



**IN LAW, IS PROCEDURE REALLY THAT IMPORTANT?**

by

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“Lloyd George knew my father”. So went the first line of one of our favourite student drinking songs. It was sung to the tune of “Onward Christian Soldiers”. There were not many words to it. Indeed there was only one other line: “My father knew Lloyd George”. The song went on repeating these lines alternatively, “Lloyd George knew my father; my father knew Lloyd George”, until we were fed up with them and turned to something else.

Jeremy Bentham did not know Lloyd George. Nor did Lloyd George know Jeremy Bentham, although he had no doubt heard of him. But these lines come to my mind when I think of Jeremy Bentham, because I believe that he knew my great, great grandfather and that my great, great grandfather knew him. It was during the first decade of the 19th Century that they must have encountered each other, at least by reputation if not in person. My great, great grandfather, Charles Hope, was at that time the Lord Justice Clerk, the second most senior judge of the Court of Session in Scotland. A few years later, in 1811, he became the Lord President. But it was as the Lord Justice Clerk that he and Jeremy Bentham, in their separate ways, were engaged in promoting the most

important procedural reform that the Court of Session had undertaken since it was inaugurated in 1532.

It must be emphasised that Jeremy Bentham and Charles Hope did not act together as colleagues in this enterprise. I have not found any evidence that they ever met to discuss these reforms, or that they ever met at all. The judges of the Court of Session had their own direct line to the authorities in Westminster, where the necessary legislation was to be enacted. Jeremy Bentham, for his part, was largely hostile to what he saw as the vested interests of the judges. But he was deeply interested in the subject of reform for his own reasons. He wrote extensively about it, in his inimitable style, with the aim of influencing the debates that were taking place in Parliament. Separate though their activities certainly were, there was nevertheless much common ground. The remarkable thing, indeed, is how close they were in the aims that they were pursuing – so close that they cannot have possibly been unaware of each other's activities.

On the one hand there were the Scottish judges led by the Lord Justice Clerk, Charles Hope, and the Lord President, Sir Islay Campbell. Alarmed at the prospect of the process being taken out of their hands entirely by politicians, they saw it as their task to persuade the other judges that the reform they were seeking to promote was desirable and workable and then to deal with the English politicians in London who had embraced the movement for reform and by whom the legislation was being designed. On the other hand there was this radical, loquacious Englishman, who had made his reputation almost entirely in

England. He has been described as “mere English”, like Elizabeth I<sup>1</sup>. Paradoxically, however, he had developed a genuine interest in how things were done in Scotland. But this was no accident. Many of his most influential friends such as David Hume were important figures in the Scottish Enlightenment, which was then in full flow in Edinburgh. James Mill, the father of John Stuart Mill, was a close friend and one of his influential admirers. And Bentham’s interest in the reform of the Court of Session was not just a passing fancy. It was a subject to which he had given a great deal of time and thought. He had studied the constitutional status of Scotland following the Union of 1707. He also believed that procedural reform in Scotland could lead to what he saw as much needed procedural reforms in England too. His study of the law of evidence had convinced him that the obscurities, delays and inordinate expense which characterised English procedure were the product of a conspiracy by the legal profession against the public interest in the administration of justice<sup>2</sup>. He regarded the way the issue of reform in Scotland was treated by Parliament as a test of its goodwill and effectiveness in promoting similar reforms of the common law courts at Westminster.

I should like, then, in this lecture to reflect for a while on this little piece of history, before I turn more generally to the question which undoubtedly would have been of very real interest to Bentham. Is procedure, in law, really as important as he evidently thought it was?

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<sup>1</sup> *Bentham and the Scots*, JH Burns, Emeritus Professor of History, UCL Bentham Project.

<sup>2</sup> *Bentham, Selected Writings of John Dinwiddy*, ed William Twining (Stanford, 2004), p 115.

For the history, let me take you back to how things were at the start of the 19<sup>th</sup> Century. In 1803 Bentham opened up a new chapter in his studies of jurisprudence by addressing himself to the law of evidence and procedure. From 1803 to 1806 he devoted most of his time to the law of evidence. But in 1806 Lord Grenville, a Whig by political persuasion, became Prime Minister. When he launched a scheme for a reform of the administration of civil justice in Scotland, it was to the issue of procedural reform that Bentham directed his energies.

The Court of Session was a unitary court. It consisted of 15 judges who sat and deliberated together – always in theory, as decisions were issued as decisions of the Whole Court, and very often in fact<sup>3</sup>. The Court was divided, as it still is today, into the Outer House and the Inner House. But judges sat in the Outer House merely as delegates or agents for the Whole Court. The Outer House was where the preparatory stages of an action took place. Final decisions were rarely pronounced there. It was to the Inner House that the cases came for decision, where they were decided in an inner room by a court of at least nine judges and often by “the hail fifteen”. This was time-consuming and wasteful in judicial manpower – there were no women judges in those days, of course. As there was, in effect, only one court there was no protection against what Bentham described as misdecision and injustice. There were other troublesome features in the way the business of the court was organised too, such as its over-reliance on lengthy written pleadings rather than on oral evidence and the lack of transparency in the way that decisions were arrived at. Transparency was something to which Bentham attached the greatest importance, although I do not think that he ever used that term. As

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<sup>3</sup> The Stair Society, *An Introduction to Scottish Legal History* (1958), p 341.

he put it, publicity is the very soul of justice, the keenest spur to exertion and the surest of all guards against improbity<sup>4</sup>. This was conspicuously lacking in a system where decisions taken collectively by the Whole Court masked individual responsibility.

There is no doubt that reform was needed. By the beginning of the 19<sup>th</sup> Century the demand for reform was becoming irresistible and by the start of the Parliamentary Session of 1805-06 it was high on the political agenda in Edinburgh. Bentham was aware of this, and so too was his Whig friend Samuel Romilly, a barrister, who was a frequent visitor to the city. Romilly had developed contacts with a group of Whigs at the Scottish Bar who had been agitating for reform but making little headway in the face of opposition from the Court of Session bench. They included Henry Erskine, John Clerk<sup>5</sup> and Francis Jeffrey<sup>6</sup>. Romilly had discussions with them as to how the Court of Session should be reformed, which he then reported to Bentham<sup>7</sup>. Bentham for his part had read all the materials that had been published on this question. In January 1806, on the death of William Pitt, a new Whig government took office under Lord Grenville. Romilly was appointed Solicitor General, and in Scotland Henry Erskine became Lord Advocate and John Clerk became Solicitor General for Scotland. At last those who believed in reform were in a position to do something about it.

In June 1806 Lord Grenville introduced a series of resolutions in the House of Lords as a preliminary to the introduction of legislation. Amongst these was one which asserted that

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<sup>4</sup> In a passage quoted by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417, 477.

<sup>5</sup> Afterwards, as a judge of the Court of Session, Lord Eldin (1823-1828).

<sup>6</sup> One of the founders of the *Edinburgh Review* and afterwards, as a judge of the Court of Session, Lord Jeffrey (1834-1850).

<sup>7</sup> A J MacLean, *Jeremy Bentham and the Scottish Legal System* [1979] JR 21.

it would greatly conduce to the better administration of justice in the Court of Session, and would be for the evident utility of Scotland, that the court, instead of sitting in one collective body of fifteen judges should sit in such number of separate chambers as might be found most convenient and that the judges sitting in such chambers should exercise the same functions and enjoy the same authority and privileges as were exercised by the whole court sitting together. The phrase “for the evident utility of Scotland” was carefully chosen. The Act of Union provides<sup>8</sup> that no alteration is to be made to laws which concern private right except for the evident utility of the subjects within Scotland, and Grenville was obviously aware of the need not to offend Scottish public opinion. This tactic cut little ice with the Scottish judges, however, who were mainly Tory by political persuasion. Charles Hope, for example, had been a Tory Lord Advocate. They took exception to the reforms that Grenville was proposing. In their view they were not, as Grenville maintained, for the evident utility of the Scottish people at all. It was also contrary to another provision in the Act of Union which, in their view, secured the existing constitution of the Court of Session in all time coming<sup>9</sup>. It was plain that there was work to be done if a reform that was acceptable to everyone was to be arrived at.

Lord Grenville invited Bentham to attend a meeting to consider the best means of reforming the judicial system in Scotland, but he declined. Some of his friends in Edinburgh wanted him nevertheless to become involved. Jeffrey wrote an article in the first issue of the *Edinburgh Review* in which he said that Bentham was the most profound and original thinker on the subject and was the only jurist capable of treating it properly.

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<sup>8</sup> Act of Union 1707, Article XVIII.

<sup>9</sup> Ibid, article XIX.

Bentham responded to the challenge. He was kept in touch with the state of Scottish opinion by Romilly who returned to Edinburgh in September 1806 and discussed the government's proposals with the Lord Advocate, Henry Erskine, and other Scottish lawyers<sup>10</sup>. Thus encouraged, Bentham wrote four letters to Lord Grenville about the proposed reforms which were published as a pamphlet in 1808<sup>11</sup>.

The theme which he pursued in these letters was based on his criticism of what he described as the "technical" existing procedural system and his contention that it should be replaced by what he described as the "natural" system of procedure. The existing system was "technical" because it was beset by technicalities devised by lawyers for their own purposes. The "natural" system was one that would put the interests of the people first. Its model, in his eyes, was the domestic family. But its main characteristic was that it was not, as Bentham would have put it, manufactured by the judges but by the legislature. Working out proposals of his own, he wanted to introduce jury trial at the stage of an appeal in civil causes. He wanted the whole of Scots law rationalised by codification. Most important of all he wanted to introduce a system of single judge first instance courts, with provision for appeals to a larger court. This he saw this system as preferable to the multi-judge first instance courts which existed in the Court of Session and in Westminster Hall. Writing to Romilly in June 1807, he expressed his surprise at finding himself largely in agreement with the substance of what the Scottish judges had proposed for the reform of the Court of Session<sup>12</sup>. He was surprised too at the fact that

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<sup>10</sup> *Jeremy Bentham and the Scottish Legal System* [1979] JR 21, 25.

<sup>11</sup> *Scotch Reform, considered with reference to the plan proposed in the late Parliament for the Regulation of the Courts and the Administration of Justice in Scotland* (London, 1808).

<sup>12</sup> J H Burns, *Bentham and the Scots* (unpublished).

the reforms that the government were proposing, although different, were not all that far away from his own views.

In his second letter to Lord Grenville Bentham set out what he saw as the benefits of the reform of the Court of Session into three separate chambers that Grenville had proposed; those of dispatch, which would increase with the number of chambers into which the court would be divided, of economy, and of competition between chambers, between which the litigant was to be at liberty to choose those best suited to his cause. But rather than the three chambers that Lord Grenville was proposing, he urged him to consider a more radical change. Why not divide the fifteen judges into a system of fifteen separate chambers, each judge sitting alone with full powers of adjudication? As he put it in his letter:

“But, my Lord, as in some companies the more the merrier, so in all competitions, the more the brisker. Setting down this benefit at whatever it may be worth, this and the first together (I mean dispatch) from three do they not bring us to fifteen?

But at number 15, or before, if any inequality of numbers be admitted, comes single-seated judicature, and with it a new, and in my view, in comparison of either, I must confess a still more important benefit; viz, individual responsibility.

A Board, my Lord, is a screen. The lustre of good desert is obscured by it; ill-desert, slinking behind, eludes the eye of censure: wrong is covered by it with a presumption of right, stronger and stronger in proportion to the number of the folds: and each member having his circle of partial friends, wrong, in proportion again to the number, multiplies its protectors.”

We can gather from this passage some flavour of the thinking that lay behind his interest in this reform. Bear in mind too that until the system was reformed by the Judicature Acts of 1873-1875 the common law courts that sat in Westminster Hall were, for the most part, multi-judge courts too. Bentham referred in this letter to the Court of



Exchequer which had four judges on it, while the Court of Chancery, previously many seated, had given way to single-seated judicature of the type that Bentham was proposing for Scotland. He contrasted the situation in the Court of Session with that in the twenty eight Sheriff Courts spread throughout Scotland, which were all single-seated courts. That experience, he suggested, might afford a sufficiently conclusive indication in favour of the proposition that no superior prospect of advantage was to be held out by many-seated, in comparison with single-seated, judicature. The misfortune of the Court of Session, as he saw it, was that by far the greatest part of its jurisdiction was one of first instance and it was to this business that the Whole Court applied their minds collectively.

In February 1807 a Bill based on the resolutions was introduced by the government. This prompted Lord President Campbell and ten other judges of the Court of Session including Lord Justice Clerk Hope to take speedy defensive action. They prepared a memorial setting out their own plans for reform. “Therein I find,” said Bentham – “imagine with what surprise”, he added – “that which coincides as far as it goes, with my own on most material points.” He let it be known that in his view this was the pattern of reform that should be adopted. The Whig government fell in March 1807, but this did not divert either the Scottish judges or Bentham from the need to press ahead. The Lord Chancellor in the new Tory government led by the Duke of Portland was Lord Eldon. He was known as a man who preferred to listen to judges rather than politicians. He decided to consult the Court of Session judges, and the Lord President and the Lord Justice Clerk travelled to London to make the case for their proposals.

In the event the system that the Scottish judges proposed won the day. The Bill which Lord Eldon introduced was based on their proposals, although to begin with it fell short of Bentham's scheme. Achieving which he wanted to see was a gradual process<sup>13</sup>. First, in 1808 the Court of Session was divided into two Divisions, a First Division presided over by the Lord President with seven other judges and a Second Division presided over by the Lord Justice Clerk. A famous cartoon by John Kay shows the last sitting of the old court on 11 July 1808, with fifteen bewigged judges crowded together in a semi-circle round a horse-shoe shaped bench. In 1810 three judges from the First Division and two from the Second were appointed to sit permanently as single judges in separate courts in the Outer House. In 1825 one more judge was taken from each of the Divisions to sit permanently in the Outer House, raising the number of judges there to seven. This reduced the number of judges in each Division of the Inner House to four. In 1830 the number of judges in the Outer House was reduced from seven to five. Thus there was introduced in Scotland one of Bentham's fundamental concepts, the single-seated judge. There have been fluctuations in the number of judges in the Divisions and in the Outer House during the past two centuries, but the Court of Session has retained the same basic structure ever since.

Bentham was disappointed by the lack of interest in his pamphlet at official level. He regarded the reform of the Court of Session as a relative minor step towards his ideal of purifying and rationalising the whole of the law of Scotland – a complex subject for which, as soon became clear, Parliament had no enthusiasm. This, for him, was a demonstration of its habit of deferring to the lawyers within it on any legal question, and

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<sup>13</sup> It was achieved by the Court of Session Acts 1808, 1810 and 1825.

he lost any hope that it would embark on the task of codification<sup>14</sup>. He regarded what had been achieved as a paltry outcome for all his efforts, which he attributed to the hostility of the legal profession and the indifference of Parliament.

I think that a more realistic assessment is that the reform of the Court of Session from an exclusively multi-judge court to one that conducted its business before single judges at first instance was a significant step forward. It provided an example which England was to follow a few decades later when the modern English system of judicial organisation was established<sup>15</sup>, and has been followed universally ever since throughout the common law world. Indirect Bentham's part in this may have been. But there is good reason to think that his ideas, with which many people of influence in Edinburgh and at Westminster were familiar, made a significant contribution to the moulding the reforms which created the modern system for the administration of justice<sup>16</sup>.

Codification was always going to be too big a step. It was alien to the traditions of the common law world. Even in Scotland, despite its civil tradition, the creation of a workable code would have been a massive task which could not have reasonably been entrusted to one man. That was what Bentham appears to have envisaged when he asked his friend Romilly to lay a proposal before the House of Commons that the enterprise should be entrusted to himself, to be undertaken gratuitously. But he did not have the specialist knowledge of Scots law, the capacity for sustained effort or the eye for detail

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<sup>14</sup> *Bentham, Selected Writings of John Dinwiddy*, p 117.

<sup>15</sup> By the Judicature Acts 1873-1875.

<sup>16</sup> Nicholas Phillipson, *The Scottish Whigs and the Reform of the Court of Session 1785-1830*, p 117; *Jeremy Bentham and the Scottish Legal System* [1979] JR 22

which the task would have required<sup>17</sup>. He was, after all, at heart a crusader. His thesis was that the law was too important to leave to the judges, so the whole enterprise – both substantive law and procedure – should be redesigned for them by Parliament. Disillusionment set in when he realised that there was no prospect of this ever happening, at least during his own lifetime. So we do not have even an outline of what his code would have looked like.

But he has left us with something that is of lasting significance. This is his appreciation, when he was promoting these reforms, of the importance, in any legal system that serves the needs of the people, of procedure. Both in England and in Scotland the 19<sup>th</sup> Century was an era of legal reform, much of it directed to the structure of the courts and the way business before the courts was organised. There was a clear and irreversible shift from systems of procedure that were controlled exclusively by the judges to one sanctioned by Parliament which ensured that the views of court users were taken into account.

Bentham's complaint was that the laws of procedure were the creation of the judges, not the legislature – that they favoured the interests of the judges as a class, not the interests of the people generally<sup>18</sup>. His vision was of a system that gave effect to the requirements of the substantive law – its servant, on other words, not its master; of a system that prevented delay, vexation, expense and a failure of justice. There is no doubt that in his time there really was something to complain about. Judges did receive salaries. But they were generally regarded as inadequate, and both in England and in Scotland judges

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<sup>17</sup> Ibid, 26.

<sup>18</sup> Ibid, 29.

supplemented their income in other ways. Part of the fees that were charged for each step in the progress of a case through the courts went towards their remuneration. There was an obvious incentive to make the process as complex and lengthy as possible. And just as profit was achieved by complicating and obscuring procedure, so too was the ease of the judges as people gave up litigating to save expense or could not afford to litigate at all. This problem was addressed by an increase in the judges' remuneration, so that they no longer had a financial interest in the way the business of the court was conducted. Gradually the system of procedure which the judges had devised for themselves was replaced by one as to which, under delegated powers, the court users are consulted and over whose content they have had an increasing influence. Parliament has been content to abstain from engaging in the detail.

When Parliament was legislating for the creation of the Supreme Court of the United Kingdom, for example, it provided in section 45 of the Constitutional Reform Act 2005 that the President of the Supreme Court was to make rules governing the practice and procedure to be followed in the Court. It told him that he must exercise the power to make the Supreme Court Rules with a view to securing that the court was accessible, fair and efficient and that the rules were both simple and simply expressed. He was also told that before making the rules he was to consult with, among others, the General Council of the Bars of England and Wales and Northern Ireland, the Faculty of Advocates and the three Law Societies<sup>19</sup>. There was to be both ministerial and Parliamentary scrutiny. The rules, when made, were to be submitted to the Lord Chancellor and to be contained in a statutory instrument which was subject to annulment in pursuance of a resolution of

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<sup>19</sup> Constitutional Reform Act 2005, section 45(3)-(5).

either House of Parliament<sup>20</sup>. Various safeguards were built into the system. But the detail was left to the President. The system that was thus laid down was, it has to be said, rather unwieldy. Any amendments to the rules, however trivial, will require the same rather elaborate process of consultation and of laying before Parliament. So, in the interests of economy and flexibility, detailed regulation of the court's procedure within the framework that the rules provide has been set out in a series of Practice Directions made under the authority of the President which can be changed readily as the need arises in the light of experience.

Over-regulation is a very real problem. Often it is due to the best of motives. Under the heading of procedure, at least in Bentham's terms, must be included the way that the judges are chosen. Until recently judicial appointments were in the hands of the Law Officers – members of the executive. The process was completely unregulated by statute. In practice no appointments were made without consultation, and the appointments that were made were very seldom the subject of criticism. But the process lacked independence, so it has been replaced by a process that ensures that all decisions are completely independent of any influence by the executive. Judicial appointments boards now exist in each of the three jurisdictions of the United Kingdom, and the Constitutional Reform Act 2005 provides for the setting up of an ad hoc selection commission whenever a vacancy occurs in the Supreme Court<sup>21</sup>. A process of advertising, consultation and scrutiny of applications by panel including a substantial number of lay persons ensures that each application receives careful and independent consideration with a view to

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<sup>20</sup> Ibid, section 46

<sup>21</sup> Ibid, section 26(5) and schedule 8.

making appointments based on merit<sup>22</sup>. But it is very slow in comparison with what was there before. In the case of a recent vacancy on the Supreme Court, for example, the process took more than four months whereas under the old system it would have been completed within four weeks.

The benefits – despatch, economy, individual responsibility. Also giving effect to the substantive law. The substantive law is no use if it cannot be invoked and applied with reasonable speed and economy. In Bentham’s analysis, the direct and collateral ends of justice, towards which any system of judicial procedure and organisation should aim are: giving effect to the substantive law, preventing misdecision and injustice (direct aims) and prevention of delay, vexation and expense (collateral aims)<sup>23</sup>.

The 2005 Act’s criteria – accessible, fair, efficient procedure supported by rules that are simple and simply expressed. The Woolf reforms – the Rules of the Court of Session. Detail is inevitable. But layout helps and there must be a dispensing power. The preparation of these things takes time in consultation and drafting, as does keeping them up to date. But the time and effort that this takes is really essential to the smooth running of the system.

We are now well past the problems that Bentham was troubled by. Judges no longer derive profit from complex procedures. The aim nowadays is to ensure accessibility, to keep things simple and to create as few obstacles as are compatible with fairness to both

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<sup>22</sup> Ibid, section 27(5).

<sup>23</sup> *Jeremy Bentham and the Scottish Legal System* [1979] JR 22, 27.

sides. Of course, it would be too much to expect Bentham to be satisfied with what we have achieved. He would be bound to find something to criticise. He would, I am sure, object to the use of closed evidence and the appointment of special advocates. He would have objected to the increasing practice to accord litigants anonymity had this not been corrected recently by the Supreme Court.

How would he see things if he were here now with us? Codification is not longer the priority. Over-regulation there made well be, but this is by Parliament not by the judges. He ought to derive satisfaction from the fact that the single judge sitting alone is now the norm. The European Court of Justice might well trouble him – as indeed might the whole edifice of regulation from Europe. But that is another story.