

Enforcement of process requirements: a search for solid grounds.

Dr Carla Crifo^{*}

1. Introduction

In England and Wales, the Civil Procedure Rules regulate all aspects of court adjudication, including what happens when a litigant does not comply with the rules of process. This may trigger in an array of responses, from ignoring the breach altogether, through requiring the opposing party to complain about it, to levying costs sanctions against the non-complying litigant or even precluding him from relying on an individual point – or indeed, on his entire defence, effectively leaving the opponent to ‘win’ the case. Process requirements are essential to the administration of justice, and the extent to which they are enforced constitutes a measure of the efficiency of the process, that is, its ability to fulfil its purpose. There are however diverging opinions, broadly associated respectively with Aristotelian ideas of general and individual justice, as to what its purpose is. This leads to inconsistent applications of the rules and, eventually, uncertainty as to success or failure of individual cases in arguably similar circumstances of rule non-compliance, or an increase in appellate litigation by litigants in the hope of a more favourable application of the rules.

The administration of justice is a human endeavour and therefore no single perfect interpretation of an ideal rule is to be expected. However, the normal human wavering in this field is compounded by the fact that, while judges are required to apply substantive rules of law, and have very little leeway to diverge from or actively undermine them, they are given – or take – an open and apparently unfettered amount of discretion in determining when to apply those rules of procedure which entail such drastic consequences as the potential exclusion of a litigant from the forum for a mere ‘technicality’. This article will argue firstly that there is no good reason for considering that rules of civil procedure are not capable of binding judges in the same manner as any other type of state regulation, and secondly that any discretion granted

^{*} School of Law, University of Leicester, carla.crifo@le.ac.uk. The research for this article was carried out during a semester’s Visiting Fellowship at Northeastern University School of Law, Boston, with support and funding from the Italy/US Fulbright Commission, the Leverhulme Trust and the University of Leicester. Grateful thanks are owed to Professor Stephen Subrin for his insights, to colleagues at Leicester and Warwick Universities for astute comments, and to the anonymous peer reviewers. All errors remain my own.

to judges faced with non-complying litigants ought not to be extended to a subjective assessment by the judge of the very purposes of his function, such that the rules are reduced merely to guidelines for 'doing justice'. Instead, a formalist approach to civil procedure should be taken, whereby the rules bind the judges and expressly acknowledge the basic philosophy of justice underlying that particular legal system, rather than leaving these matters to the judges alone.

The article will develop the argument in the following manner: in section 1 the background will be set, with the history of the current understanding of civil procedure in England and Wales as secondary to the substantive rights whose enforcement they facilitate and, as such, something that can safely be left to the experience of individual judges than to general law. Section 3 provides a preliminary justification for the article's emphasis on the judicial discretion to enforce process requirements, rather than the litigant's duty to obey them. The article then moves to consider judicial attitudes to the ultimate process rule: the rule that requires compliance with the other rules as a condition to reach the stage where a substantive judgment can be delivered. The rule is considered in two jurisdictions, the federal United States (section 4) and England (section 5), where it appears in a slightly different form but with arguably similar import. The necessity of a comparative approach arises from the attempt to identify the normative preferences that influence the application of the rule in question, and the extent to which those preferences are unique to the English system. The analysis suggests the same two conflicting philosophies guide the exercise of discretion: 'justice on the merits' and 'complex justice'. These are detailed and examined in section 6, but the article is not dedicated to the normative question of which of these philosophies, which both seek to determine the function of state adjudication, is preferable. Instead, I argue that, while a choice must clearly be made, this is something that must be formally incorporated into the rule system, rather than left to the discretion of judges in individual cases. With this in mind, section 7 demonstrates that, despite the criticisms levelled at formalism, it is certainly possible for a legal system to embrace formalism and achieve the desired result of judicial constraint. Lastly, section 8 addresses some particularities of the common law which may undermine a general call to formalism: that its procedural rules are written primarily by, or with significant input from, the judiciary itself; the presence of an almost 'pre-constitutional' inherent power of the individual court to regulate its own process, with no higher authority to which to be

beholden; and the necessity for formalistic rules to be ‘transsubstantive’, that is, of general application and with no underlying substantive content.

2. Background

For some, civil procedure has become almost a byword for mindless technicality and formality. Any critic of a mechanic application of rules can easily find support in decided cases or, indeed, in an established legal philosophical tradition berating judges and lawyers for believing themselves to be so in thrall to mere process rules as to render the determination of rights and obligations unnecessarily complicated and often unfair. From the 19th century onwards,¹ that judges could consider themselves and the litigants in front of them bound by the rules of procedure was criticised with such force that a formal approach to procedure appears unthinkable still today. Bentham, to whom we owe many insights into the English system of litigation, was particularly scathing with regards to procedural technicality, which he characterised as the ‘multiplication of the occasions of extracting fee; the cause of factitious complication, intricacy, obscurity, unintelligibility, uncognoscibility in the system of procedure’.² Bentham’s contempt for procedural formalism meant that in his new system judges would be granted a vast amount of unappealable discretion with regard to procedure,³ precisely because no important substantive consequence would be allowed to flow from procedural constraints.

The critique of formalism in civil procedure begun in the 19th century is inextricably linked with the consideration of its rules as secondary, ancillary, and devoid of any interest beyond the merely instrumental. This assessment continued throughout the next century: for Hart, the rules which define the procedure to be followed are ‘secondary’, rather than primary, rules;⁴ moreover they are not as important as the other secondary rules, those which confer the power to make determinations of the

¹ WB Odgers, ‘Changes in procedure and in the law of evidence’, in *The Council of Legal Education, A Century of Law Reform: Twelve Lectures* (MacMillan 1901).

² J Bentham, ‘Scotch Reform’ in J Bowring (ed), *The Works Of Jeremy Bentham*, vol 5 (Edinburgh 1843) 5: for a comment, see AJ Draper, ‘“Corruptions In the Administration of Justice”: Bentham’s Critique of Civil Procedure, 1806-1811’ (2004) 7 *Journal of Bentham Studies* <http://www.ucl.ac.uk/Bentham-Project/journals/journal_of_bentham_studies> accessed 18 July 2013; GJ Postema, ‘The Principle of Utility and the Law of Procedure: Bentham’s Theory of Adjudication’ (1977) 11 *Ga L Rev* 1393.

³ Draper (n 2) 14-15.

⁴ HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 97.

question whether a primary rule has been broken, or 'rules of adjudication'.⁵ Additionally, the former, while having features of rules of recognition, have it in a 'form [that]... will be very imperfect.'⁶ If civil procedure has no higher function than merely to facilitate the application of all the other, more important rules, then it can be easily considered comparatively unimportant. It is to be treated as pure mechanism.

If the above is true, there is no political or ideological choice to be made in, and no weight need be given to, individual, specific rules of procedure; if the administration of justice is mere machinery, it can be left to its operators, the judiciary, to devise, enact and apply the best procedures for its delivery. It is then merely an issue of internal organisation whether, if at all, a judge or a court can derogate, interpret purposively, or integrate the rules thus created. Where a rule is missing or an eventuality has not been foreseen, the inherent jurisdiction of the court to regulate its own business can easily fill the gap. However, the identification of civil procedure as merely a subsidiary (at best) part of the regulation and rights-attribution powers of the state, delegated to the court as 'organisation of their own process', is unsatisfactory in the present day.

On the one hand, Bentham's critique is itself part of an extremely critical approach to judge-made law. Thus, although he was clear that in procedural matters the court should have almost unfettered discretion, that was within a proposed system of subjection to the will of Parliament in all other matters. If formalism consists in thinking of the rules as binding in their ability to constrain the creativity of their interpreter, Bentham's dismissal of technicalities in procedure was subject to the recognition of another type of constraint at a higher legal level.

On the other hand, in the real world one is faced with the undoubted fact that, despite any attempts to minimise the theoretical importance of procedure and give priority to the substantive law to be applied, rules of procedure carry an inordinate amount of weight, both practical and legal. The violation of mere procedural rules can effectively put substantive rights out of the reach of one or the other litigant. So can their strict application. Procedure manifestly influences results, as it cannot help but assist in making winners and losers, and thus has an unavoidable 'political' and power dimension, at least with respect to the rules that make a difference to the path that litigation takes. To 'formalise' procedure therefore is not a worthless enterprise:

⁵ *ibid.*

⁶ *ibid.*

to formalise in this sense means to put such rules on a par with substantive rules of law. It means that procedure, in combination with other rules, determines the extent and the enforcement of rights and obligations, as opposed to accepting that these rules are merely guidelines for the (good) organisation of a particular public activity, and as such, mere bureaucracy. This reveals two things: firstly, that the rules themselves may well contain their own 'process values'⁷ (implicit or explicit) that may belie their neutrality and political unimportance. Therefore, if there are values buried in the rules, there is no reason to believe that the expression of such values should not derive from the usual democratic processes, and as such bind an individual judge to the same extent as all legislatively expressed public values. This means that it is legitimate to re-introduce a formalistic approach to civil procedure.

This article centres on the rule of civil procedure that requires compliance with the other rules as a condition to reach the stage where a substantive judgment can be delivered. Problems mostly arise⁸ when preventing, rather than facilitating the production of the judgment on the substantive law, is the eventual outcome of the application of the rules. This is the case where the court strikes out part or all of a litigant's statements of claim for procedural failings, with the effect⁹ that what is to all intents and purposes a judgment is entered in favour of the opposing party without consideration of the non-complying litigant's substantive case.

The application of the rule has led to starkly conflicting results. Such variation appears in decided cases not because the rule is claimed to be ambiguous, and thus needing explanation, but because courts explicitly refer to one of two broader philosophies of procedure, 'justice on the merits' or 'complex justice' which are generally nowhere to be found in the rules of court nor in any superior source of law. These philosophies will be further analysed in section 6. The choice of which philosophy to apply appears to be entirely free, and dependent on no more than an

⁷ Eg, participatory governance, process legitimacy, process peacefulness, respect for human dignity, personal privacy, consensualism, procedural fairness, the procedural rule of law, procedural rationality, and timeliness and finality: RS Summers, 'Evaluating and Improving Legal Processes – a Plea for "Process Values"' (1974-75) 60 Cornell L Rev 1.

⁸ As evidenced recently in the transnational *Gambazzi* saga: *Canada Trust Co v Stolzenberg (No 2)* (Mareva Injunction), The Times, 10 November 1997 (ChD); *CIBC Mellon Trust Co v Stolzenberg* (Sanctions: Non-compliance) [2004] EWCA Civ 827, and in the European Court of Justice, Case C-394/07 *Gambazzi v DaimlerChrysler Canada Inc.*, *CIBC Mellon Trust* [2009] ECR I-02563.

⁹ In the English system – CPR r 3.5, CPR 12 – and in the US Federal Rules of Civil Procedure – Rule 41(b), Rule 55.

individual judge's 'normative preferences',¹⁰ in a manner than may appear in conflict with basic principles of predictability and certainty of prescription which underpin the rule of law. Civil procedure in the Common Law tradition is today so entirely within the discretion of the judge, that it seems normal that she should be allowed to identify for herself the boundaries of her own function and jurisdiction. This is a direct consequence of the historical and philosophical minimising of the role of the rules of civil procedure. The further consequence of such an approach is that the outcome of rules is not to be found in the rules themselves, as created through an established process,¹¹ but in the personality and tendency of the judges, whose appointment, history and humanity becomes attractive to criticism, while much less amenable to critical analysis and change.

In order to identify the external or subjective rationales that affect the application of the rule in question, and the extent to which those rationales recur or are unique to the English landscape, a comparative approach can provide useful insights. Within the common law judicial tradition, England still influences many jurisdictions and their court systems and organisations. In looking for the common law jurisdiction that is today most independent of English practice and ideas, one can not help but alight on the earliest system to assert its own identity in a manner both derived from, and in conscious opposition to, that of England, to be found in the United States, and within it, the federal system. This has the additional advantage of allowing access to a rich body of academic literature in the field. In the United States, the study of civil procedure has not been excessively concerned with Benthamian aspersions, although the reforms of the federal court system and its regulation¹² have followed a similar path as in England, and conflated the Common Law and Equity practices to the evident advantage of the latter, with its broad definitions and extensive discretionary powers. In both jurisdictions, the Anglo-American conflagration of common law and equity traditions¹³ leads to a comparable combination of 'reactivist'¹⁴ regulation, with attendant expectations of a 'soft touch' for parties' failings, and all the characteristics

¹⁰ SB Burbank, 'The Transformation of American Civil Procedure: the Example of Rule 11' (1989) 137 U Pa L Rev 1925, 1932.

¹¹ Of Hartian 'rules of recognition'; see below section 8.

¹² SN Subrin, 'How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective' (1987) 135 U Pa L Rev 909.

¹³ *ibid.*

¹⁴ To use Mirjan Damaška's categories: MR Damaška, *The Faces of Justice and State Authority* (Yale University Press 1986), in particular 64.

of state regulation, such as coercion, finality and inflexibility to individual circumstances (general rules for everyone, rather than an individualised approach for each). The tensions between these two aspects are often found in the ‘hard cases’ where the compliance rule must be applied. Clearly, there are systemic distinctions to be made, such as (most obviously) the explicit constitutional framework within which the federal court system operates. However, the compliance rule is present in both systems and in the first and most important case decided in the USA, *Link v Wabash*, it is explicitly referred to as a direct descendant of the original English version, although in a slightly different form, with no allowance made for a revolutionary blank slate. Whereas constitutional matters of due process arise frequently in the discourse on the Federal Rules of Civil Procedure, even with regards to other process enforcement rules,¹⁵ few are adverted to in relation to the rule under consideration. In the judgments dealing with the rule, the same or similar two conflicting extra-regulatory concerns (philosophies) appear as justifications and limitations on its application, making it suitable for direct comparative analysis.

Before detailing the rules and their application, however, it is necessary to justify the present article’s emphasis on the judge, rather than the litigant, as the object of the rules of civil procedure, who ought to be bound by them.

3. Rules of civil procedure: who are they for?

Rules of court are addressed to two distinct audiences. On the one hand, they impose behaviours and sanctions (where those sanctions are automatic) upon the litigants themselves. In so doing they may require more or less specifically defined behaviours,¹⁶ and they provide a practical structure within which to comply. Of the various functions¹⁷ that the rules of court as formalities addressed to litigants and litigants’ behaviour could have, the most important in this context is the standardising function, or ‘channeling’ function in Fuller’s words.¹⁸ The rules provide a channel that facilitates the identification, investigation and resolution of a dispute or of law-given right. For a litigant, stepping outside of the channel must mean withdrawing, or

¹⁵ Such as those concerning disclosure and attorney behaviour, see below section 4.

¹⁶ Eg, how to object to a claim may require a special document or ‘anything that is fit for purpose’; the content of a claim may be directed to be as detailed or as open-ended as possible.

¹⁷ LL Fuller, ‘Consideration and Form’ (1941) 41 Colum L Rev 799; D Kennedy, ‘Form and Substance in Private Law Adjudication’ (1975-1976) 89 Harv L Rev 1685.

¹⁸ Fuller (n 17) 801.

at least deviating, from achieving the goal of adjudication. A well-established tradition¹⁹ with regards to civil procedural law in England and Wales considers that, since participation in the process is voluntary (one may choose not to sue or not to defend when sued on a private law matter), it is legitimate for the system to require of its users that they should enter the process alertly and responsibly, in particular by accepting that there are consequences to their procedural choices. In so doing, sanctions – where they arise automatically – are not sanctions (punishments) at all, but merely foreseen, avoidable and yet unavoids consequences of a choice. According to Zuckerman, '[t]he exclusion from the adjudicative process of a party who has failed to comply with the rules is not a punishment but a mere consequence of failing to meet the conditions of participation.'²⁰ As Jolowicz puts it,²¹

If the party to whom such a rule applies chooses to disregard it, the normal outcome is that a choice accrues to the other party. He may do nothing or he may seek an appropriate order from the court. If he chooses to do nothing, nothing will happen; if he chooses to bring the matter before the court, a choice accrues to the [court]: in contrast to substantive law, procedural law rarely purports to dictate what the court's order must be, even after the facts have been established.

The English litigant (inclusive of litigant's counsel, but irrespective of his or her actual abilities or knowledge) is expected to be a rational economic actor. The principle of party autonomy in procedure leads to the conclusion that 'it is strictly inaccurate to describe the great majority of procedural requirements as obligations or duties, [and therefore] it is also inaccurate to describe the consequences of procedural defaults as sanctions.'²² This understanding of the role of litigants in procedure turns the apparently compulsory nature of the rules, with respect to litigants, into a natural consequence rather than, as Kennedy²³ would have it, an active contradiction-compulsion of the litigant's will. Rules of procedure become no different than rules of physics, in describing causation rather than causing themselves the effect. This allows us to concentrate on the role of judges, to whom the rules are also addressed, and their relationship with the rules themselves. In particular, where there is – in the rule – a

¹⁹ A Zuckerman, *Zuckerman on Civil Procedure* (2nd edn, Sweet & Maxwell 2006) 397-401. This vision of civil litigation is arguable. It is however beyond the scope of the present paper to dispute it.

²⁰ A Zuckerman, 'Must a fraudulent litigant be allowed to think: if the fraud is successful, I will gain much; if it is not, I will still recover my legitimate claim?' (2011) 30 CJQ 1, 10.

²¹ JA Jolowicz, 'On the Nature and Purposes of Civil Procedural Law' in JA Jolowicz, *On Civil Procedure* (CUP 2000) 68.

²² Zuckerman (n 19) 401.

²³ '[F]ormalities ... operate through the contradiction of private intentions': Kennedy (n 17), 1692.

discretion to change those natural consequences that would ensue from the litigant's behaviour, it becomes essential to understand whether the judge in her exercise of discretion is part of the physical realm, a cog in the machine, or above it all, in the form of a *dea ex machina*.

4. Involuntary dismissal in the US Federal Rules of Civil Procedure

The position in the United States with regards to the compliance rule is deceptively simple, much more so than in England. It is therefore a good starting point to draw out the main issues that arise with the rule.

Rule 41(b) provides:

Involuntary Dismissal: Effect Thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Although the rule is couched in general terms, amongst the provisions in the Fed. R. Civ. P. it is rarely used to justify or apply sanctions for disobeying the rules themselves. Several other, more specific Rules allow for the explicit possibility of sanctions for non-compliance, the most notable being Rule 11, which imposes on the attorney a duty of honest belief in the legal grounding of the claim;²⁴ and Rule 37(b) which imposes a series of specific sanctions which the court may order for failure to obey a discovery order. These include striking pleadings, dismissing the action or part of it, and giving a default judgment against the disobedient party, as well as preventing the disobedient party from relying on some claims or defences and staying

²⁴ The Supreme Court did not consider this rule to be exhaustive; in *Chambers v NASCO* 501 US 32 (1991) it considered that it had inherent power to sanction bad-faith conduct which was an abuse of process. In England, the kind of behaviour it referred to would be dealt with under the procedures for vexatious litigants: CPR 2.3, CPR 3.11, Practice Direction 3C.

proceedings.²⁵ While the latter rules have been the object of intense debate, especially when subject to amendment, in part because of specific constitutional requirements, such as due process, such issues have not excessively troubled the Court and the commentators with regards to Rule 41. Indeed, sometimes sanctions take the form of costs orders against the opposing party,²⁶ or even against the lawyer of the party rather than the party herself, in which case the discussion becomes coloured by considerations concerning such essential features of American civil procedure as the attorney fee regime or the encouragement of private enforcement of general utility statutes.²⁷

As long as one bears in mind the fundamental constitutional importance of due process in the USA, which is not mirrored, structurally, in the UK's compliance with the ECHR or even in traditional notions of fair trial, it is not necessary to go into such details in order to deal with the general problem, that is, the availability to a court of the discretion (or the obligation) to remove from the litigant the only possibility of achieving a substantive determination of his legal position. Questions of litigant or attorney fault and questions of degree of sanctioning merely follow on from the more essential issue: on what basis it can ever be appropriate to consider, in the application of the very rules for the determination of a claim, that such claim may be discontinued for a violation of those rules. In American textbook treatments, the rule is either ignored or it is considered self-evident in order to avoid an 'inefficient system, if not an unfair one'.²⁸ On the specific rule, there has been little judicial and academic discussion, which centres on the case of *Link v Wabash*.²⁹ In that case,³⁰ a 1962

²⁵ See, on Rule 37(b): M Rosenberg, 'Sanctions to Effectuate Pretrial Discovery' (1958) 58 Colum L Rev 480; SB Burbank, 'Sanctions In The Proposed Amendments To The Federal Rules Of Civil Procedure: Some Questions About Power' (1983) 11 Hofstra L Rev 997, 1009.

²⁶ Eg in *Roadway Express Inc. v Piper* 447 US 752 (1980), an application of Rule 37(b): the 'district court could not use its inherent power to impose attorneys fees without complying with due process': 767. See JJ Janatka, 'The Inherent Power: An Obscure Doctrine Confronts Due Process' (1987) 65 Wash ULQ 429.

²⁷ *Alyeska Pipeline Service Co. v Wilderness Society* 421 US 240, 259 (1975); see also HM Kritzer, 'Fee regimes and the cost of civil justice' (2009) 28 CJQ 344. American regulatory practice depends on private enforcement (M Gilles and GB Friedman, 'Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers' (2006) 155 U Pa L Rev 105, 102), which relies on risk-taking and inventive lawyers; thus policing and sanctioning their behaviour, beyond the statutory power in 28 USC §1927, can have (un)intended consequences on the system of private enforcement and deterrence of corporate/state malpractice.

²⁸ SN Subrin et al, *Civil Procedure: Doctrine, Practice and Context* (WoltersKluwer 2008) 503; J Friedenthal et al, *Friedenthal, Kane and Miller's Civil Procedure* (4th edn, West 2005) 486, for an example of the first approach.

²⁹ The case has warranted very few direct commentaries: Note, 'Dismissal for Failure to Attend a Pretrial Conference and the Use of Sanctions at Preparatory Stages of Litigation' (1962-1963) 72 Yale

Supreme Court decision, in an action arising out of a traffic accident, a majority of the Supreme Court, with an opinion written by Justice Harlan, held that the court's power to dismiss for want of prosecution, in the application of Rule 41(b), was an inherent power of the court, which could be exercised *sua sponte*, without notice or an adversarial hearing. There could therefore not be a finding of abuse of discretion where the District Court had dismissed the case, six years after it had been commenced, when the plaintiff's counsel failed to appear at the duly scheduled pre-trial conference in view of the excuse offered and the prior history of the case. Harlan J. wrote:³¹

The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of nonsuit and non prosequitur entered at common law, e.g., 3 Blackstone, Commentaries (1768), 295-296, and dismissals for want of prosecution of bills in equity, e.g., *id.*, at 451. It has been expressly recognized in Federal Rule of Civil Procedure 41(b). ... Neither the permissive language of the Rule-which merely authorizes a motion by the defendant-nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Thus the rule recognised, rather than created, the power to dismiss, and therefore the court was not bound by the literal import of the rule.³² The danger of course is that by maintaining the existence of an inherent power even where there is an explicit rule, the court can extend or limit the scope of this or other rules based on policies that are not explicit, as was the case in *Chambers v NASCO*.³³ There, the extent of the

LJ 819; Note, 'Involuntary Dismissal for Disobedience or Delay: The Plaintiff's Plight' (1966-1967) 34 U Chi L Rev 922; and some on the attorney-client relationship: WR Mureiko, 'The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys' Procedural Errors' 1988 Duke LJ 733; RG Vineyard, 'Dismissal with Prejudice for Failure to Prosecute: Visiting the Sins of the Attorney upon the Client' (1987-1988) 22 Ga L Rev 195.

³⁰ *Link v Wabash Rly Co.* 370 US 626 (1962).

³¹ *ibid* 629-31.

³² Criticised on this point by RJ Pushaw, Jr, 'The Inherent Powers of Federal Courts and the Structural Constitution' (2000-2001) 86 Iowa L Rev 735, 847.

³³ (n 24).

inherent power was held to be due to the fact that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'³⁴

Harlan J.'s speech in *Link v Wabash* is interesting for several reasons. Firstly, it states (by circular reference to the rule) that there is a 'self-evident' and inherent power. Secondly, it refuses the idea that enshrining the power – or some effect of it – into a Rule would have exhausted it. Thirdly, it calls upon the argument of historical authority to bolster its claims. Finally, and most importantly for the present discussion, it gives as a rationale the power of the courts to regulate their own business, if necessary to the extent of streamlining their dockets, in order to achieve orderly and expeditious disposition of cases.

There was a strong dissenting opinion from Justice Black, with whom Chief Justice Warren concurred (Justice Douglas merely dissented). Justice Black began by agreeing with the single dissenting judge in the Court of Appeals, who had said

Plaintiff's cause of action was his property. It has been destroyed. The district court, to punish a lawyer, has confiscated another's property without process of law, which offends the constitution. A district court does not lack disciplinary authority over an attorney and there is no justification, moral or legal, for its punishment of an innocent litigant for the personal conduct of his counsel.³⁵

He then went on to criticise the majority's argument by pitting desirable against indispensable features of a court system:³⁶

It is of course desirable that the congestion on court dockets be reduced in every way possible consistent with the fair administration of justice. But that laudable objective should not be sought in a way which undercuts the very purposes for which courts were created—that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties. ... When we allow the desire to reduce court congestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is desirable, at the expense of justice, which is indispensable to any court system worthy of its name.

Moreover, it seems plain to me that any attempt to cut down on court congestion by dismissing meritorious lawsuits is doomed to fail even in its misguided purpose of promoting speed in judicial administration. Litigants

³⁴ *Chambers* (n 24) 43.

³⁵ *Link v Wabash Ry. Co.* 291 F2d 542, 548 (7th Cir 1961).

³⁶ *Link* (n 30) 648-49.

with meritorious lawsuits are not likely to accept unfair rulings of that kind without exhausting all available appellate remedies. Consequently, any reduction of trial court dockets accomplished by such dismissals will be more than offset by the increased burden on appellate courts. This case seems to me an excellent example of the sort of wholly unnecessary waste of judicial resources which can result from such overzealous protection of trial court dockets. The case has twice been before the Court of Appeals and has twice been brought to this Court as a result of ‘time-saving’ ruling handed down by the trial judge.

Justice Black’s argument is in two parts: firstly, there is a clear hierarchy between ‘justice’ and ‘administration’ considerations, with the latter incapable of trumping the former. Secondly, the additional satellite litigation that would ensue to challenge exercises of discretion would equal, if not outweigh, the strain on the court system caused by allowing existing and already lengthy cases to remain on the dockets. Elsewhere in the opinion he also expresses his discomfort at the ensuing arrogation of determinative power over the case by the judge, whereas, constitutionally, a jury ought to decide if a case is devoid of merits.³⁷

Rule 41(b) was not amended substantively, except in relation to evidence burdens in jury trials, since its adoption in 1937. *Link v Wabash* is authority for the continued existence of the court’s inherent power to control its own proceedings³⁸ of which Rule 41(b) is one expression, and the focus of discussion of the court’s power to sanction litigants or their counsel for non-compliance with the rules has moved to more specific rules, such as Rule 11 or Rule 37.³⁹

The general statement of the availability of dismissal as sanction for non-compliance with rules or court orders is now qualified⁴⁰ by the accretion of jurisprudential dicta – mostly at Appeals Court level. Dismissal now is to be considered the most extreme sanction among the many available to the trial court.⁴¹ In addition, it would appear that there is no consensus in the case-law as to which factors ought to be considered before the court determines whether a case may be involuntarily dismissed. Some cases emphasise the importance of clearing the docket

³⁷ The point is again to be considered with the historical and constitutional backdrop of American Federal litigation: Janatka (n 26).

³⁸ Although Burbank ‘Rule 11’ (n 10), states that *Roadway Express* (n 26) attenuated the ‘austere landscape’ of *Link v Wabash*.

³⁹ Burbank ‘Sanctions’ (n 25) 1004, finds the first use of the expression ‘inherent powers’ in an 1865 case, *Heckers v Fowler* 69 US (2 Wall) 123, 128 (1865).

⁴⁰ 15 ALR Fed 407.

⁴¹ *Vazquez-Rijos v Anhang* 654 F3d 122 (1st Cir 2011).

and a generic interest in the expeditious resolution of litigation,⁴² while others take an atomistic approach and consider the plaintiff's and the defendant's respective positions and behaviour. Thus we have a list of the factors to be considered:

- (1) the duration of the plaintiff's failure to comply with the court order;
- (2) whether the plaintiff was on notice that failure to comply would result in dismissal;
- (3) whether the defendants are likely to be prejudiced by further delay in the proceedings;
- (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard;
- and (5) whether the judge has adequately considered a sanction less drastic than dismissal.⁴³

In other cases, the emphasis is on whether the behaviour is so 'deliberate and contumacious' as to justify the sanction.⁴⁴

5. Non-compliance with rules or court orders in the Civil Procedure Rules for England and Wales

Before the enactment of the CPR, if faced with a delay or failure by the plaintiff in serving a statement of claim, or in complying with Rules of Court or an order of the Court, the courts were loath to deny the plaintiff an adjudication on the merits due solely to procedural default, unless the default had caused prejudice to his opponent which an award of costs could not compensate.⁴⁵ The defendant could apply to the court for an order to dismiss the action for want of prosecution, in terms very similar to those of Rule 41(b), but the rules⁴⁶ invested the court with the broadest possible discretion.

⁴² In order for a court to dismiss a case as a sanction for failing to comply with court order, the district court must consider five factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favouring disposition of cases on their merits; and (5) the availability of less drastic alternatives: *Yourish v California Amplifier* 191 F 3d 983 (9th Cir 1999) summarised in 15 ALR Fed 407.

⁴³ *Rzayeva v US* 492 F Supp 2d 60 (D Conn 2007).

⁴⁴ *Doe v Cassel* 403 F3d 986 (8th Cir 2005), a case of a litigant in person. 'Deliberation' in failing to comply was also given as a justification of sua sponte dismissal in *Holly v Anderson* 467 F3d 1120 (8th Cir 2006).

⁴⁵ A reaction to the 'inflexible procedural formalism prior to 1875': AAS Zuckerman, 'From Formalism to Court Control of Litigation', in L Cadiet and G Canivet (eds), *1806 – 1976 – 2006 De la Commémoration d'un Code à l'Autre: 200 Ans de Procédure Civile en France* (Litec LexisNexis 2006), 339.

⁴⁶ Originally Rules of the Supreme Court, Order 59 rule 1 (1875); the version in force before the enactment of the CPR was RSC Ord. 2 r. 1, amended in 1964: 'non-compliance with the rules of court shall not render any proceedings void. Instead, the court had the discretion to make such order as it saw fit': AAS Zuckerman, 'Dismissal for delay – the emergence of a new philosophy of procedure' (1998) 17 CJQ 223, 225.

An order of dismissal for want of prosecution was rather difficult to obtain. As it was put in the modern statement of the rule,⁴⁷

the power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and a third party.

Striking out upon non-compliance required that it was impossible to conduct a fair trial, and that the defendant had suffered some prejudice. This in turn would be balanced against any advantage he would have derived from the delay. In more recent cases,⁴⁸ other factors were added to the list to be taken into account for the balancing act, such as the possibility of abuse of process. In *Grovit v Doctor*⁴⁹ Lord Woolf held that ‘the prevention of abuse of process has by itself long been a ground of the courts striking out or staying actions by virtue of their inherent jurisdiction irrespective of the question of delay’.⁵⁰

In 1998 the position was reversed.⁵¹ The English Civil Procedure Rules provide that where a litigant has failed to comply with the rules or an order of the court,⁵² sanctions take effect immediately and the court may be petitioned to remove the consequences of those sanctions. As Lord Woolf explained in *Biguzzi v Rank Leisure*,⁵³ the situation was not as stark as a literal reading of the new rule implied. The new requirement of proportionality⁵⁴ in case management decisions would ensure that both the rules themselves and the court, when giving orders inclusive of sanctions for non-compliance, imposed sanctions that were appropriate and proportionate responses, rather than ‘all or nothing’. The reconstruction of the nature of procedural

⁴⁷ *Birkett v James* [1978] AC 297 (HL).

⁴⁸ Listed in *Trill v Sacher* [1993] 1 All ER 961; Zuckerman ‘Dismissal for Delay’ (n 46) 227.

⁴⁹ [1997] 1 WLR 640 (HL).

⁵⁰ *ibid* 642.

⁵¹ J Sorabji, ‘Late amendment and Jackson’s commitment to Woolf: another attempt to implement a new approach to civil justice’ (2012) 31 CJQ 393. See also Zuckerman ‘From Formalism to Court Control’ (n 45), for the caution that the CPR were never supposed to entail a mere return to pre-1875 formalism, but rather the implementation of court control.

⁵² CPR 3.4(2)(c).

⁵³ [1999] 1 WLR 1926 (CA), 1932-33.

⁵⁴ CPR 1.1(2)(e), as explained by Lord Woolf in *Jones v University of Warwick* [2003] EWCA Civ 151. See Zuckerman ‘Must a fraudulent litigant’ (n 20) 8-10.

sanctions in *Biguzzi* should also have constrained the exercise of discretion of the court upon applications to dispense with such sanctions. It is only because the court exercises a control of proportionality over the possible consequences of failure to comply (especially when they derive from a court order themselves, as in an order given in the form of an ‘unless’ order⁵⁵) that there is (or ought to be) little shrift given at the later stage of potential reconsideration.

The overriding objective (CPR 1.1) also provided for the first time a regulatory template of the court’s function, introducing some principles to guide the court in applying the Civil Procedure Rules, in particular notions of proportionality and equality of arms.⁵⁶ Additionally, case management was introduced as a means of wrestling from the parties, and giving to the court, overall control of the proceedings. The rules governing non-compliance are within Part 3, dealing with the court’s case management powers. Here we find the traditional version of the (active) power of the court to strike out a statement of case, if ‘it is an abuse of the process of the court or is otherwise likely to obstruct the just disposal of the proceedings, or there has been a failure to comply with a rule, practice direction or court order.’ (CPR 3.4(2)(b) and (c)). Part 3 also contains the avowedly revolutionary⁵⁷ change with regards to the effect of sanctioning rules. The effects of rule non-compliance were now to be automatic,⁵⁸ and the rules only gave the court discretion to grant relief subsequently, having regard to a long, non-exhaustive list of factors:

- (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
 - (a) the interests of the administration of justice;
 - (b) whether the application for relief has been made promptly;
 - (c) whether the failure to comply was intentional;
 - (d) whether there is a good explanation for the failure;
 - (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
 - (f) whether the failure to comply was caused by the party or his legal representative;
 - (g) whether the trial date or the likely trial date can still be met if relief is granted;

⁵⁵ See for a definition and practice notes, AAS Zuckerman, ‘A colossal wreck - the BCCI - Three Rivers litigation’ (2006) 25 CJQ 287.

⁵⁶ Lord Woolf, *Access to Justice: Interim Report* (HMSO 1995) ch 26, para 30.

⁵⁷ Lord Woolf, *Access to Justice: Final Report* (HMSO 1996) ch 6, ‘Sanctions’.

⁵⁸ CPR 3.8 ‘(1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.’

- (h) the effect which the failure to comply had on each party; and
- (i) the effect which the granting of relief would have on each party.
- (2) An application for relief must be supported by evidence.⁵⁹

The original intention⁶⁰ in introducing such a potentially draconian rule structure – that applications for relief would not be entertained as a matter of course, but remain exceptional and subject to all the stated aims of the Overriding Objective, including case management ones such as preventing the clogging up of courts’ dockets,⁶¹ – was in part thwarted by the continued importance given by the courts to the right of a litigant to an adjudication on the merits. As Sorabji has shown, it takes a long time for the culture to follow where the rule-makers lead, be they the Rule Committee or the Court of Appeal, who is charged with providing leadership and authoritative interpretation of procedural questions. While the new approach is applied in most cases,⁶² there are still situations where first instance courts (or perhaps even just some more traditionalist judges) rely on general dicta to satisfy what they see as a fundamental need of litigants to be heard on the merits.⁶³

Not everyone accepted Lord Woolf’s diagnosis and recipe for a new procedural landscape. The ideological lines were drawn up quite clearly in a number of cases immediately preceding or following the introduction of the CPR. In support of the post-1875 ‘justice on the merits’ approach, the most authoritative reference seems to be Bowen L.J.’s dictum in *Smith v Cropper*,⁶⁴

... the object of the Courts is to decide the rights of parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach,

⁵⁹ CPR 3.9 (in force until 1 April 2013).

⁶⁰ Post-Woolf, ‘the policy behind the civil process in future was no longer to singularly focus on the achievement of substantive justice in the case immediately before the court. It was to consider the right of all citizens to a fair process that could lead to a decision on the merits’; Sorabji (n 51) 401.

⁶¹ *Arrows Nominees Inc v Blackledge* [2000] CP Rep 59. See also *Adoko v Jemal* (CA, 22 June 1999) [7] (Laws LJ): ‘the proper and proportionate use of court resources is now to be considered part of substantive justice itself’: cited by Sorabji (n 51).

⁶² Eg, Ward LJ in *Gohar Maqsood v Mr Mufazar Mahmood* [2012] EWCA Civ 251.

⁶³ Two recent examples are from the same judge, Peter Smith J., at first instance in *Swain-Mason v Mills & Reeve* [2010] EWHC 3198 (Ch), revd [2011] EWCA Civ 14, and in *JSC BTA Bank v Solodchenko* (Ch, 2 May 2012), where he held that the Court of Appeal in *Swain-Mason v Mills & Reeve* had been wrong because ‘Procedural rules were the servant and not the master of the rule of law’. These were all decisions on late amendments, Sorabji (n 51).

⁶⁴ 26 Ch D 700 (1884), 710. Most criticisms of automatic effects of procedure can be traced to this dictum: it was referred to by Sir Jack Jacob, and the latter was then quoted by Professor Zander, in a submission mentioned by Sir Rupert Jackson in Lord Justice Jackson, *Review Of Civil Litigation Costs: Final Report* (December 2009, TSO 2010) 391.

the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.

More than a hundred years later, Millett LJ criticised the then imminent Woolf reforms in *Gale v Superdrug Stores Plc*:⁶⁵

Litigation is slow, cumbersome, beset by technicalities, and expensive. From time to time laudable attempts are made to simplify it, speed it up and make it less expensive. Such endeavours are once again in fashion. But the process is a difficult one which is often frustrated by the overriding need to ensure that justice is not sacrificed. It is easy to dispense injustice quickly and cheaply, but it is better to do justice even if it takes a little longer and costs a little more.

The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party.

... I do not believe that these principles can be brushed aside on the ground that they were laid down a century ago or that they fail to recognise the exigencies of the modern civil justice system. On the contrary, I believe that they represent a fundamental assessment of the functions of a court of justice which has a universal and timeless validity.

On the academic side, Sir Jack Jacob concluded his influential Hamlyn Lectures⁶⁶ with a quotation from a speech of Quintin Hogg MP, later Lord Hailsham: '[i]t is not only important to realize that litigation is an evil; it is also important to realize that neither speed, nor cheapness nor universality are the ultimate ends of litigation. The ultimate end is justice...' He also reiterated his opposition to automatic sanctions for non-compliance in 1968 in his submission to the Winn Committee on Personal Injuries Litigation.

Although, in contrast with what seems to be the prevailing position in the US, in reported cases in England only a minority view still clings to a pure 'justice on the merits' ideal, the position is still canvassed at regular intervals and occasionally reappears with each application of the rule.⁶⁷ The debate extends to what the rule itself ought or ought not to say on its face. In the most recent report on the civil procedure system⁶⁸ Sir Rupert Jackson, having been given a mandate to review the entirety of the rules of procedure, as well as those pertaining more specifically to

⁶⁵ [1996] 1 WLR 1089 (CA) 1098-99.

⁶⁶ JH Jacob, *The Fabric of English Civil Justice* (Stevens & Sons, 1987) 285.

⁶⁷ See cases above n 63.

⁶⁸ Jackson (n 64).

costs, and to suggest improvements to reduce costs, noted that the vast amount of satellite litigation created by the inconsistent application of CPR 3.9 contributed considerably to increased costs.⁶⁹ He suggested that the rule be simplified, indicating two alternative versions.⁷⁰ Eventually, neither of his specific proposals was taken up, but the general idea of reforming and simplifying the rule, by removing the ‘laundry list’ of factors to be considered, was accepted. As of 1 April 2013, CPR 3.9 states:

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—

- (a) for litigation to be conducted efficiently and at proportionate cost; and
- (b) to enforce compliance with rules, practice directions and orders.

It is as yet unclear how far the new version of the rule satisfies either Lord Justice Jackson’s concerns or those of the academics who suggested changes to the rule.⁷¹ Past history of procedural reform in England however suggests that drafting changes may not be sufficient to eradicate unwanted cultural hang-ups. Such cultural imperatives, however, are not to be limited to the ‘philosophies of procedure’. Instead they go much further back, to the belief that the choice of which philosophy to adopt when applying the rule is subjectively that of the judge. The following sections will attempt to address, and dispel, this misconception.

6. Two philosophies: Justice for one, justice for many.

The American Federal court system and the English system of civil courts, while both part of the Common Law family,⁷² share very little today in terms of structure, constitutional framework, and even the character of judicial personnel. The American Federal system was designed to apply to a vast territory and provide a relatively uniform⁷³ adjudicative process throughout the United States. It is established by the

⁶⁹ Not only inconsistent application by individual judges, but also an insistence on going over all the factors listed in the rule, leading to hearings of considerable length and complexity: A Higgins, ‘The costs of case management: what should be done post-Jackson?’ (2010) 29 CJQ 317.

⁷⁰ One in the Final Report itself, at 397, and one in a subsequent note to the implementation committee.

⁷¹ Eg, Higgins (n 69). For history of Sir Rupert Jackson’s proposed changes, and critical comment on the final version, see A Zuckerman, ‘The revised CPR 3.9: a coded message demanding articulation’ (2013) 32 CJQ 123, and I Levy, ‘Lightening the overload of CPR Rule 3.9’ (2013) 32 CJQ 139.

⁷² Subrin ‘How Equity Conquered’ (n 12).

⁷³ Although this might be a mere superficial uniformity: SN Subrin, ‘Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns’ (1989) 137 U Pa L Rev 1999,

United States Constitution in terms both general and rigid.⁷⁴ With regards to the procedure of the court, the Rules Enabling Act 1934 gives the Supreme Court and all courts established by Act of Congress the power to prescribe rules for the conduct of their business, which must not be inconsistent with Acts of Congress or the rules of practice and procedure prescribed by the Supreme Court, and must also not ‘abridge, enlarge or modify any substantive right’.⁷⁵ The rulemaking procedure is complex⁷⁶ and involves federal judges, representatives from the practising bar, academia, the federal Department of Justice, and the state courts (Advisory Committee members), the Judicial Conference of the United States, the formal organisation of the federal judiciary, the United States Supreme Court and Congress.⁷⁷

On the other hand, English civil courts and their role and powers within the state are not enshrined in a constitutional document, but are still steeped in age-old constitutional conventions. The structural framework, ie the constitution, is notoriously hard to define, and at the very least unwritten.⁷⁸ The requirement of judicial independence, for example, was absent⁷⁹ in the domestic statute books until 2005, with the Constitutional Reform Act,⁸⁰ yet no-one would have seriously considered before then, or before the introduction of the Human Rights Act 1998,⁸¹ that the English courts did not heed Western liberal due process traditions, including all aspects of public and private fair trial, such as the independence⁸² and impartiality of the judiciary and time-honored rights of access to court and to be heard.⁸³ The structure, jurisdiction and day-to-day administration of the civil court system were eventually crystallised and put on a statutory footing beginning with the 19th century

2018-21; SN Subrin, ‘Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits’ (1997-1998) 49 Ala L Rev 79; TO Main, ‘Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure’ (2001) 46 Vill L Rev 311.

⁷⁴ Article III US Constitution.

⁷⁵ Rules Enabling Act, 28 USC § 2071 and § 2072 (1982). SB Burbank, ‘The Rules Enabling Act of 1934’ (1982) 130 U Pa L Rev 1015, 1042-54.

⁷⁶ PG McCabe, ‘Renewal of the Federal Rulemaking Process’ (1994-1995) 44 Am U L Rev 1655.

⁷⁷ TD Rowe, Jr., ‘Civil-Justice Reform Processes in the United States’, in J Walker (ed) *A Community Of Procedure Scholars: Teaching Procedure And The Legal Academy* Osgoode Hall LJ (Special Issue), Fall 2013 forthcoming.

⁷⁸ V Bogdanor, *The New British Constitution* (Hart 2009); JH Baker, ‘The unwritten constitution of the United Kingdom (2011) 167 Proceedings of the British Academy, also published in [2011] Ecc LJ 4.

⁷⁹ Except for some political Acts, such as the Act of Settlement 1701, which contains a guarantee of tenure for judges in its Article 3.

⁸⁰ CRA 2005, s 1.

⁸¹ JM Jacob, *Civil Justice in the Age of Human Rights* (Ashgate 2007).

⁸² T Bingham, ‘The old order changeth’ (2006) 122 LQR 211.

⁸³ The latter first appear as ‘rights’ in *Dr Bentley’s Case*, 8 Mod 148, 88 ER 111 (1669- 1732); and *Board of Education v Rice* [1911] AC 718 (HL).

Judicature Acts. The rules of procedure, first originated in custom, then enshrined in statute law,⁸⁴ are today made and published in statutory instruments by a Rules Committee, composed of mostly judges and a few representatives of the professions, whose authority is now conferred by the Civil Procedure Act 1997 sections 1 and 2.

Despite the differences in constitutional context, the procedural rules follow remarkably similar paths, especially with regards to the enforcement of process requirements. Both the English and the US Federal codes contain the compliance rule discussed above, and in both systems the application of the rule to cases of non-compliance is subject to two countervailing philosophies of procedure. The first, which has been called the ‘justice on the merits’ approach in England, originally by Professor Zuckerman,⁸⁵ is characterised historically in England by the rejection of the overly formalistic pre-1875 approach, the dicta of Bowen and Millett LLJ and the *Birkett v James* tradition.⁸⁶ In the USA, it is apparent in Justice Black’s dissent in *Link v Wabash* and in more sophisticated form in the subsequent easing of the ‘austere landscape’ of that case and the application of fetters to the discretion granted in Rule 41(b) such as continuously contumacious conduct and potential harm to the defendant. This approach to the function of the courts and its rules is atomistic, in that it considers ‘justice’ to be the resolution of the particular case and resolutely refuses to countenance any utilitarian limitation to be placed upon the court’s (state’s) provision of that good. It is also idealistic – through it the judge sees herself as fulfilling a duty to the parties, unconstrained by practical administrative considerations or even the parties’ own sabotaging behaviour.

It may appear that the opposite viewpoint (which I term ‘complex justice’) seeks to arrogate to the judge or the court a position of superiority whereby it demands respect for itself and its rules rather than for any other reason. While some judicial statements⁸⁷ do give fuel to these criticisms, it is quite clear that even a broad principle of authority is not the essential rationale of rigorous applications of the

⁸⁴ A Zuckerman, ‘Rule making and precedent under the Civil Procedure Rules: still an unsettled field’ (2010) 29 CQJ 1, citing S Rosenbaum, *The Rule-Making Authority in the English Supreme Court* (Boston Book Co. 1917, repr Fred B Rotham & co. 1993).

⁸⁵ Zuckerman, ‘Dismissal for Delay’ (n 46).

⁸⁶ *Birkett v James* (n 47). In addition, the philosophy is apparent in decisions where the court looks not to the non-compliance of one party, but beyond it to ‘whether a trial is still possible’: this factor haunts the pre-2013 version of CPR 3.9, at letter (g), although in that rule it is limited to a regard for the trial *date*, rather than the trial itself.

⁸⁷ Zuckerman, ‘Dismissal for Delay’ (n 46) 223, points out that, in *Birkett v James* itself, ‘the prevention of delay is not an objective of Lord Diplock’s test. Rather, it is designed, first, to protect the authority of the court and, second, to prevent prejudice to defendants.’

rule.⁸⁸ The ‘complex justice’ philosophy suggests just as strong an awareness,⁸⁹ both by theorists and judges, of their role as implementers of a higher policy to which they are beholden. This philosophy is relativist, in that it redefines ‘justice’ as not an unlimited, private right that a litigant has vis-à-vis the court, but rather as a right of the community that each member should be given an opportunity to litigate fairly, considering that public resources are not unlimited and must be managed appropriately. This utilitarian approach sees ‘justice’ redefined to include time and cost to the parties themselves, on the one hand, and contextualised to include consideration of external factors, such as the need to treat equally other potential users of limited judicial resources.

Both sides of the debate allow that an uncompromising application of their interpretation of ‘justice’ will entail some collateral damage, or an acknowledged failure to satisfy some of the demands put upon the court: the ‘justice on the merits’ camp accepts that there will be delays and costs to the opposing party (these are considered to be for the most part compensable in damages), to the court and to any other external litigants, who however are merely potential, and abstract. The ‘complex justice’ camp coalesces both actual and potential litigants into a community, thus leveling their interests, and allows for situations where the present litigants may well be court barred and their options reduced, in view of the rights of access of other potential litigants. The danger of satellite litigation is mentioned by supporters of both philosophies.

The positions are strongly and honestly held by their adherents. It is not the purpose of this paper to argue normatively for one or the other, as others have done.⁹⁰ Instead, what I propose to do is address (and change) an even more pervasive ‘cultural belief’, that is, that the choice of philosophy is a matter for the individual conscience of the judge rather than the system itself. This argument requires consideration of several theoretical obstacles: firstly, whether it is at all possible to pre-determine in the abstract the factors underpinning any choice of the decision-maker; secondly, whether the outcome of such constrained choice would be as good as, if not better than, allowing unconstrained choice. These are crucial issues of legal formalism, and

⁸⁸ Although reference is often made, in the case-law on striking out, to the parallel, and distinguishable, powers of the court to punish contempt of its process: see C Crifò, ‘The limits of civil contempt as a measure of compulsion: *JSC BTA Bank v Mukhtar Ablyazov*’ (2013) 32 CJQ 14.

⁸⁹ A Zuckerman, ‘Civil litigation: a public service for the enforcement of civil rights’ (2007) 26 CJQ 1.

⁹⁰ *ibid*; also Higgins (n 69).

will be addressed in the following section. The actual claim for formalism with regards to civil procedure propounded here is limited to the choice of general philosophy of procedure, rather than the removal of judicial discretion in all cases.

If the above can be demonstrated, formalism, the limitation of judicial options in the interpretation of rules, may be rehabilitated in the discourse on civil procedure, in England and Wales at least, where there is no question of constitutional entrenchment. This would allow the rule-maker to elect one philosophy, state it in the rules, and be reasonably certain of it binding its addressees, including the judiciary. The debate over the precise wording of CPR 3.9 shows that commentators and rule-makers alike are aware of the importance of express regulatory statements. The new version of CPR 3.9 may even be seen as implementing a choice of philosophies, in favour of rule compliance and efficiency. However, as long as there exists a subconscious, cultural opposition in the judiciary to considering the rules as binding on all litigation protagonists, any re-drafting, no matter how admirable, is subject to wilful misinterpretation.

7. Should the rules be taken as meaning what they say?

Formalism is only applicable to the relationship between judges and rules. This is because I adopt – for the English position – the liberal reconstruction of the litigant as free to choose to engage in civil litigation.⁹¹ In addition, a formalist claim, even limited to some rules or even some general principles, when applied to the field of civil procedural rules must take into account two special features of those rules: the fact that the decision-makers are also the rule-makers and the value-neutrality claimed for those rules. The first of these is merely of superficial appeal, and relatively easily dismissed. The second feature however is essential to a formalist claim. Both will be discussed in depth in section 8.

In relation to the compliance rule, it is the individual judge, who in England is also⁹² the trier of facts, who has the power to either exercise discretion in dismissing a case where the litigant has breached the rules or an order of the court (US version) or exercise discretion to allow that same litigant to avoid the automatic consequences of that breach (English version). As has been seen, there is already a formal difference in

⁹¹ Section 3 above.

⁹² For the majority of civil claims, with few exceptions: County Courts Act 1984.

the two systems, and a superficial formalist approach could merely point to the difference in drafting to suggest that a hypothetical judge would have to consider that what is couched as a positive, as opposed to a negative, exercise of discretion is ‘different’ and therefore constraining. Clearly, there is scope for accepting an argument *a contrario* or an argument about the rule-maker not legislating in vain: she would not have bothered to change or write the rule as it is if she could have done it in a simpler fashion. At the very least the post-1998 English version ought to be interpreted as disapproving of the practice following from the previous version, which is similar to the version to be found in the US Fed. R. Civ. P. On the face of it – even when discounting context and history as irrelevant – there must be a difference, perhaps a difference in the policy objectives to be pursued. If there is a difference, and it is accepted that drafters wished to make one, this is a formalist approach itself, albeit superficial insofar as it still requires interpretation by reference to external principles of interpretation.

However, what is attempted here is a reconstruction of the whole system of procedural rules as formal, where even the external factors that may be taken into account when exercising the court’s function are prescribed and the choice of the decision-maker is constrained. While the claim may be grandiloquent, in the present instance it would merely apply to a binary choice, ie to ban one philosophy of procedure and proclaim the other. This requires the removal of the historically negative connotations of formalism, but also honesty about the claims that can be made about formalism in general.

The first issue is the utility itself of the formalist label: Schlag has suggested that both pure formalism and pure realism are impossible,⁹³ but even he acknowledges that, tired as the debate is, ‘none of the moves [efforts to resolve disputes between formalist and realist argumentation] is a killer argument.’⁹⁴ Accepting that ‘pure’ formalism is impossible, however, is no bar from seeking to use some form of ‘practical’ formalism. As Schauer demonstrated, not only is it possible to use language that has a more or less universally accepted meaning,⁹⁵ but it is also possible for some rules to constrain the decision-maker’s choice to some extent. As he puts it,

⁹³ P Schlag, ‘Formalism and Realism in Ruins (Mapping the Logics of Collapse)’ (2009-2010) 95 Iowa L Rev 195.

⁹⁴ *ibid* 236.

⁹⁵ To the extent that ‘meaning can be “contextual” in the sense that that meaning draws on no other context besides those understandings shared among virtually all speakers of English’: FF Schauer,

as a descriptive and conceptual matter, rules can generate determinate outcomes; ... those outcomes may diverge from what some decisionmakers think ought to be done; and ... some decisionmakers will follow the external mandates rather than their own best particularistic judgment.⁹⁶

What is important in his work is that the issue of formalism is defined as a denial of choice: 'rules... exclude from consideration factors that a decisionmaker unconstrained by those rules would take into account.'⁹⁷ Despite the very different theoretical bases, this is not dissimilar to considering one of the functions of formalities as having a behaviour-modification function,⁹⁸ if one is considering the behaviour in question to be that of the decision-maker herself. The main consequence of adopting a formalist approach therefore is that it provides a means for preventing a decision-maker from taking into account any additional factor that is not permitted in the rule itself. This must be easier when the choice is binary – as between the 'philosophies of justice' identified above.

Schauer proceeds to admit that a constraint of choice may not necessarily be A Good Thing. It carries heavy consequences: in exchange for predictability or certainty, rules

get in the way. ... Rules doom decisionmaking to mediocrity by mandating the inaccessibility of excellence ... that could possibly emerge from allowing the decisionmaker free access to all potential features: ... a rule-bound decisionmaker, precluded from taking into account [other features], can never do better but can do worse than a decisionmaker seeking the optimal result for a case through a rule free decision; ... to stabilize... is to give up some of the possibility of improvement in exchange for guarding against the possibility of disaster... we must therefore decide the extent to which we are willing to disable good decisionmakers in order simultaneously to disable bad ones.⁹⁹

On a general level, this appears to be a 'worst case scenario' approach. In an ideal world, there would be no need to constrain decision-making because the decision makers themselves would be able to reach the best decision possible, and in that ideal world, the best answer is within reach of human endeavour. In Schauer's view, formalism works because it prevents bad decisions, but does not foster the 'best' decision-making. In this sense, it allows a certain amount of mediocrity in order to achieve consistency, certainty and orthodoxy. However, there are more recent

'Formalism' (1988) 97 Yale LJ 509, 528.

⁹⁶ *ibid* 531.

⁹⁷ *ibid* 536.

⁹⁸ Kennedy (n 17).

⁹⁹ Schauer (n 95) 539-43.

suggestions that in reality the limitation of factors that may be taken into account when taking a decision may improve the quality of the outcome, rather than, at best, preventing it from degenerating. Too much choice may not necessarily be good, either. Levy,¹⁰⁰ in critiquing the old and the new versions of CPR 3.9, applies some recent developments of experimental psychology and points to the ‘factor overload’ inherent in the old version of the rule.¹⁰¹ She concludes that an increase in complexity and the provision of additional factors add little to the quality of the decision, and render the process inefficient. On the other hand, merely reducing the number of factors (as in the current version of the rule) does not aid decision-making if the new factors are ‘not simpler, lack clear guidance and are non-exhaustive’.¹⁰² Thus, if formalism consists in restricting the decision-maker’s choices, as long as it is clear and exhaustive (as a binary choice between philosophies must necessarily be), it may even lead to better, rather than just not-worse, outcomes.

On the other hand, formalism is not to be confused with a strict adherence to a rigid literalist interpretation. There may be overlaps between the two, and the latter may be used in order to pursue the former, but they are not indistinguishable. For example, the use of the word ‘may’ or ‘discretion’ in a rule – specifically the rules here taken into consideration – does not necessarily imply that the decision, as to whether to exercise the discretion, is entirely free and unconstrained, as a purely grammatical reading would indicate.¹⁰³ With regards to the exercise of discretion in case management decisions, for example, the Australian High Court in a recent, important case¹⁰⁴ influential beyond its shores, has highlighted the importance of the context, primarily the regulatory and ‘systemic’ context in which the discretion is to be exercised. As a commentator wrote,

[a] discretion, as the High Court explained in *Aon Risk Services Australia Ltd v Australian National University*, is a decision-making process where no single rule or principle mandates a particular decision or result. Subject to the

¹⁰⁰ Levy (n 71).

¹⁰¹ Levy (n 71) 148.

¹⁰² Levy (n 71) 152.

¹⁰³ It would appear to be a case of the rule ‘meaning what it says’ but not necessarily ‘saying what it means’. For the proposition that judicial discretion, even when apparently unfettered, is never absolute, A Barak, *Judicial Discretion* (Yale University Press 1989) 19-21, citing in particular Lord Scarman in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529 (HL), 551: ‘Legal systems differ in the width of the discretionary power granted to judges; but in developed societies limits are invariably set, beyond which the judges may not go.’

¹⁰⁴ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 [89]-[90] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), applying *Jago v District Court of New South Wales* (1989) 168 CLR 23, 75-77.

general purposes for which a discretion is created, the decision-maker is free to choose the decision from a range of possibilities. ... a discretionary power confers on the decision-maker a latitude of individual choices, but not such that the discretion is left at large. It is confined by matters that the court may or must take into account in reaching its decision. A discretion must be exercised in the context of the purpose for which it was created. The authority that creates a discretion defines the purpose of the discretion.¹⁰⁵

If the purpose for which the discretion was created is made clear, it is therefore arguable that the constraint of judicial choice, feature of formalism, can act at the level of the purpose, or philosophy of procedure, rather than at the level of the rule. The extensive satellite litigation concerning the pre-2013 version of CPR 3.9, for example, and in particular the much criticised ‘tick-box’ approach to the factors to take into consideration,¹⁰⁶ demonstrates that apparently constraining language, without a clear commitment to being constrained, does not suffice for the chosen philosophy to apply. In the binary landscape between philosophies of procedure, a formalist approach would infuse the rule with binding force sufficient to prevent the use of explicitly disapplied general principles, without by necessity requiring a slavish attention to literary standard and grammatical minima.

8. Rulemaking : are judges the masters or the servants of the rules?

Of the many possible obstacles to the recognition of a (limited) formalist approach in civil procedure, two are of particular interest in the context of the exclusionary procedural compliance rules. The first is due to the difficulty in identifying the very source of the ‘rule’ at hand: not only are the judiciaries, in England and in the USA, intimately connected with, some might say entirely responsible for, the creation of the rules themselves, but in some dicta, the power to strike out for non-compliance appears to predate the rule itself, in the guise of ‘inherent power’ of the court to ‘regulate its own process’. The second concerns the scope of rules of procedure.

The history of the Rules Enabling Act 1934¹⁰⁷ in American federal procedure is well documented, but the details and limits, not to mention the very nature, of the

¹⁰⁵ B Cairns, ‘Discretionary litigation processes and rules of court’ (2011) 30 CJQ 444, 448.

¹⁰⁶ A Zuckerman, ‘How seriously should unless orders be taken?’ (2008) 27 CJQ 1.

¹⁰⁷ See for all, T Williams, ‘The Source of Authority for Rules of Court Affecting Procedure’ (1937) 22 Wash ULQ 459; Burbank ‘The Rules Enabling Act’ (n 75); Pushaw, (n 32); PD Carrington, ‘Substance

rulemaking power itself are quite controversial. There appears to be a certain degree of agreement that the 1934 Act constitutes a delegation, by Congress to federal courts, of its legislative power over procedure.¹⁰⁸ It would further appear that, while the rule-making power under the Rules Enabling Act 1934 is concerned with prospective rules of general application, the courts maintain an ‘inherent power to manage their own business.’¹⁰⁹ The description of the extent of the inherent powers is, variably, a power that is ‘necessary to the exercise of all others’ or to ‘provide themselves with appropriate instruments required for the performance of their duties’.¹¹⁰ As we have seen, one of the arguments underscoring the current application of Rule 41(b) is that the power to dismiss the claim is not exhausted by the rule itself, but is a function of the (underlying, parallel) inherent power.¹¹¹

In England and Wales, the rules of court are made pursuant to powers conferred by Act of Parliament ‘for the purposes of regulating and prescribing the practice and procedure to be followed in the respective courts’.¹¹² Sir Jack Jacob clearly defines them as subordinate legislation, which may be held to be *ultra vires* if the rulemaking authority exceeds its own statutory powers,¹¹³ and as judge-made since the Rules Committee, from 1833 when the power was first conferred¹¹⁴ to today,¹¹⁵ is composed mostly of judicial office-holders. English courts also retain a certain amount of inherent power, or ‘inherent jurisdiction’, which derives from

the very nature of the court as a court of law... the essential character of the a court of law necessarily involves that it should be invested with the power to maintain its authority, to control and regulate its process and to prevent its process from being abused or obstructed.¹¹⁶

and Procedure in the Rules Enabling Act’ 1989 Duke LJ 281.

¹⁰⁸ Burbank ‘The Rules Enabling Act’ (n 75) 1116.

¹⁰⁹ Pushaw (n 32) 847.

¹¹⁰ Burbank ‘The Rules Enabling Act’ (n 75) 1686 citing *US v Hudson & Goodwin* 11 US (7 Cranch) 32, 34 (1812) for the first definition and *Ex parte Peterson* 253 US 300, 312 (1920), and *Link v Wabash* (n 30) for the second.

¹¹¹ Text at n 32.

¹¹² Jacob, *Fabric* (n 66) 53; Zuckerman ‘Rule-making’ (n 84).

¹¹³ Derived from the Superior Court Act 1981, ss 84 and 87.

¹¹⁴ Civil Procedure Act 1833 s 3, see JIH Jacob, ‘Civil Procedure since 1800’, in JIH Jacob, *The Reform of Civil Procedural Law* (Sweet & Maxwell 1982) 213.

¹¹⁵ The composition is now set in the Civil Procedure Act 1997 s 2.

¹¹⁶ Jacob, *Fabric* (n 66) 60, referring to JIH Jacob, ‘The Inherent Jurisdiction of the Court’, in Jacob, *Reform* (n 114) 221, and noting that the definition was approved in several Commonwealth courts (Canada, New Zealand) and the House of Lords.

The most common instance of use of the court's inherent jurisdiction is the exercise of punitive and coercive powers for contempt.¹¹⁷

Clearly, the extent to which rules of court in general, and specifically the exclusionary rule/sanction for non-compliance, can be made to exert a constraining force on the judge's choice (or whether the constraint must be imposed from a superior source of law) depends on whether the norm itself is within or without her power *qua* court. Where the power to sanction non-compliance (or dispense with the sanction) issues directly from the very nature of the court, rather than from a rule, there is no sense in trying to guide that power through potentially binding rule, and the formalist claim for these rules must fail. The position is unclear in the US in general,¹¹⁸ although there seems little support for the idea that rulemaking displaced inherent power in the specific context of involuntary dismissal.¹¹⁹ However, in England, at the very least where abuse of process is not engaged, in Jacob's canonical definition, inherent jurisdiction of the court 'is not to be confused with the exercise of discretionary judicial powers,'¹²⁰ of which surely the power to dispense with automatic sanctions is one.

Having disposed of the question of inherent power, there remains, though much attenuated, the question whether judicial rule-making equals judicial mastership of rules so that a formalist claim for those rules would necessarily fail. The point can be dismissed summarily. Indeed, to the extent that the rules of court are laid down prospectively, and through a predetermined process by a group whose composition is determined statutorily, rather than on a case-by-case basis, it is legitimate to expect them to be binding on the individual judge, even though she could – in the right conditions – be a member of the rulemaking authority. Even if the content of the rules of court is determined by the individual members of the rule-making Committee, the authority to make those rules, coming as it does in an acknowledged source of law to which the rule-maker is subject (Act of Congress/Parliament) must also include a duty to abide by those rules for the future, until and unless they are changed through the

¹¹⁷ *ibid.*

¹¹⁸ Burbank, polemically, discounts the existence of even a 'weak', gap-filling inherent power in the case of federal local court rulemaking: SB Burbank, 'Procedure, Politics and Power: the Role of Congress' (2004) 79 *Notre Dame L Rev* 101, 105.

¹¹⁹ The conclusion that process enforcement rules in the US system stem from inherent power, rather than rule-making, is also bolstered by the positive antipathy of judges and reformers for mandatory, rather than permissive, sanctioning rules: Burbank, 'Rule 11' (n 10).

¹²⁰ Jacob, *Fabric* (n 66) 60.

same process. The process through which the rules are created detaches them from the individuals who were part of the authority, by analogy with parliamentary procedure, and thus enables those rules to be ‘superior’ and ‘binding’ on the individual judge.

Another potential problem – better adverted to in the American literature – for the rehabilitation of formalism in civil procedure concerns the scope of the rules themselves. It is usual to make a correlation between the recognition/attribution of procedural rule-making power to the judiciary and procedure that is value-neutral, trans-substantive, non-infringing on substantive law.¹²¹ In no way as explicitly as in the US, the correlation can also be made in England: extensive judicial rulemaking power, through the failed experiment of the 1833 Hilary Rules,¹²² comes at the same time as the definitive separation between substance and ‘pure’ procedure with the abandonment of the forms of action in 1875.¹²³ While there is little academic work in England on the matter,¹²⁴ in America there has been a broad debate on the continued validity of the trans-substantive claim for civil procedure rules. One does not need to be a hard-line realist to identify the actual or potential risk of ‘hiding behind’ apparently trans-substantive rules to apply whichever fundamental agenda a judge has.¹²⁵ A formalist approach to procedure – even if only to the strictures and sanctions, rather than to the content rules such as pleading or discovery – may increase the risk of ignoring those very concerns and indeed, entrench their unappetising consequences. Clearly, this objection has a broader application to any formalist analysis, and its usefulness lies in providing a salutary dose of humility for any such claim.

9. Conclusion

¹²¹ For an overview, PD Carrington, ‘Continuing Work on the Civil Rules: The Summons’ (1988) 63 Notre Dame L Rev 733, 741; GC Hazard, Jr., ‘Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure’ (1988-1989) 137 U Pa L Rev 2237; SN Subrin, ‘The Limitations Of Transsubstantive Procedure: An Essay On Adjusting The “One Size Fits All” Assumption’ (2010) 87 Denv U L Rev 377; Burbank, ‘Rule 11’ (n 10) 1934-35.

¹²² WS Holdsworth, ‘The New Rules of Pleading of the Hilary Term, 1834’ (1923) CLJ 1, 261.

¹²³ Jolowicz (n 21) 359-61.

¹²⁴ The defence of the idea that rules of civil procedure are value-neutral and general only appears where there is a danger of ‘Balkanising’ the rules: for example, A Zuckerman, ‘The Jackson Final Report on Costs: plastering the cracks to shore up a dysfunctional system’ (2010) 29 CJQ 263, 276.

¹²⁵ JB Weinstein, ‘After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?’ (1989) 137 U Pa L Rev 1901, 1903.

Formality is essentially associated with the rules of procedure. As a reaction to the specificity of the old forms of action, in England modern rules of civil procedure were designed to be applicable to any civil substantive dispute, irrespective of field, policies and parties. They are operative, not teleological, in that their objective, to reach a final substantive decision about who is right and who is wrong, is generic but empty of content, apart from the equality and right to be heard minima ingrained in fair trial requirements. The court's rules merely ensure that the ultimate product of legislative, adjudicative or coercive power (an authoritative determination of the law applicable to specific facts) is legitimate, but they do not necessarily provide a directed content to that product. They are today considered 'handmaidens' to substantive law and as such should be noticed as little as possible, and certainly not applied to obstruct or prevent the product from being produced. At best, these rules can be critiqued insofar as they lead to a 'better' or 'worse' outcome.

A principled approach to the legitimacy and rationales of sanctions for non-compliance with rules of civil procedure, starting from a comparative study of the exclusionary compliance rule (dismissal of the action for non-compliance with rules or orders of the court) in the US Federal Rules of Civil Procedure and in the English CPR elicits some interesting observations. In these two cognate but constitutionally very different systems, we find a similar expression of the need to ensure compliance with rules and court orders, but in differing forms. In the US system the court has an active discretion to sanction non-compliance, while in England, post-1998, the court may only be approached after automatic effects of non-compliance have taken place or will necessarily arise, and it has a discretion merely to remove its effects. The American rule has undergone very few legislative modifications and has not been the object of much specific debate (while similar rules, but specific to particular fields such as discovery or the attorney's duty of care, have proved much more controversial); the English practice has been the object of intense jurisprudential and legislative activity in the past 140 years, has undergone constant refinement and review, and has caused intense academic debate. Yet, the arguments, factors to be considered when exercising discretion, even terminology, which appear in the two systems' literature are surprisingly similar and point towards the judiciary's tortured relationship with the rule. What has become apparent is that in applying the rule, judges in reality apply one of two contrasting guiding philosophies, which have no basis in statutory prescription but merely in the judges' own subjective, ethical and

intellectual perception of their role and functions. This leads to tensions within each system, with a tendency for procedural litigation to balloon in the search for a ‘sympathetic’ judge and, in England at least, for costs to increase.

While there are suggestive hints in the recent reforms in England of which of the two philosophies attracts the rulemaker’s preferences,¹²⁶ factors such as the secondary status of procedural law and its judicial origin, as well as a historical suspicion of ‘formalism’, have contributed to a culture where judges see themselves as free to adopt whichever philosophy they prefer. I have suggested that this is inopportune for practical reasons, such as uncertainty and its attendant risk of satellite litigation; and that it does not necessarily flow from judicial rule-making or, in England, the ‘inherent jurisdiction’ of the court. I have sought to demonstrate that procedural rules can and ought to be considered binding upon the judiciary themselves, and in particular that a clear constraint as to which philosophy is adequate ought to be stated in such rules. A formalist approach to the rules of court would not require a rigidly textualist reading of the rule itself, as demonstrated by the conventional mechanisms of fettering discretion.

¹²⁶ From Lord Woolf’s incipit ‘These rules are a new procedural code’ (CPR 1.1) to Jackson’s acceptance that the previous version of CPR 3.9 was too ‘open’ and the current version, with its emphasis on rule compliance and efficiency.