

Alternative dispute resolution and non-adversarial regulation: why are they still not mainstream and can they ever become mainstream?

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Introduction

Law is a discipline that is highly resistant to change. While modern practitioners of medicine, physics, sociology and philosophy hold understandings vastly different from those held by their ancient counterparts, it is not difficult to imagine that jurists from ancient Rome, for example, would probably be able to function quite efficiently in a modern legal chambers, provided, merely, that they were able to bring themselves up to date on current legislation, cases and procedure (Cohn 1967:64). While this is not necessarily remarkable in itself - the functions of family life, for example, would have few dissimilarities either - nevertheless what can be seen as the common link is the tenacity with which both the ancient and modern legal systems hold on to certain tenets, practices and procedures.

One such tenet in the common law system is that justice is more likely to be done (indeed, to be seen to be done) when one is able to have one's day in court. Increasingly, this view has been questioned and challenged. Alternatives to adversarial formality have emerged, for example, systems and practices pursuing, amongst other things, alternative dispute resolution or 'ADR', family group conferencing, interest-based mediation, court-ordered conciliation conferences, industrial arbitration, transformative justice, restorative justice, diversionary courts and therapeutic jurisprudence. Each of these alternatives came about as more and more people began to recognise the limitations of any approach that brought parties into a highly formalised legal battle, one against the other, where there could be but one winner (eg. French 1991, Ingleby 1991). Legal and non-legal observers alike have been enormously productive in seeking out and spelling out ways and means to address and manage legal conflicts and to solve legal problems in ways that are enduring and acceptable to the parties concerned.

The reasons for this search for alternatives are easy to glean. In adversarial systems, criminal and civil alike, an adjudicator (a judge or jury) considers the arguments from both sides, following examination and cross-examination and re-examination (and legal argument on the admissibility of evidence) and imposes a judgment. The dispute is thereby declared 'resolved'. This resolution, however, comes at great cost, not only in terms of the legal expenses imposed upon the litigants (and the community, too, as measured in court time, judicial costs etc), but in the harm done to the combatants as well, financially and psychologically. The conflict never really goes away. In many ways, commentators allege, it is merely exacerbated (e.g. McDonald and Moore 2001). In contrast, non-adversarial procedures and informal practices are said to be more easily accessible and less daunting to those who wish to participate in the legal process but whose skills, confidence or resources are lacking.

Yet despite all of the evidence of the spiralling costs and enduring bitterness launched and fomented by the litigious process, there is little evidence that its appeal, generally, is shrinking. That is not to say that alternatives are being frustrated by this resilience. Certainly there are officially mandated ('court-annexed') conciliation conferences readily ordered in commercial cases, family law disputes and in the industrial and employment law realms. It is also the fact, of course, that most legal matters, certainly commercial cases, are settled 'out of court'. Yet there is an unyielding view that alternatives to litigation are still very much the 'alternative'. The instituting of legal proceedings, and, indeed, the making of threats of litigation, are fundamental to the processes associated with civil justice.

The resilience of adversarial approaches

There are a number of possible reasons why litigation endures as the cornerstone of the civil legal

system notwithstanding the great strides made by law reform commissioners, community legal services and governments alike in seeking alternatives. These reasons are explored briefly in the discussion that follows.

For the sake of the simplification of the arguments, three somewhat artificial notions need to be constructed. Firstly, litigation and its alternatives are set out as dichotomous and mutually exclusive entities. This is a little misleading, for there are a number of permutations in relation to legal outcomes that cannot be classified as one or the other, and, in many cases, the bringing of proceedings is a necessary forerunner to court-annexed mediation or conciliation process. Nevertheless, for the purpose of exploring the question posed (above), there is an assumption that a clear dichotomy does exist. Secondly, formal adjudications and the adversarial system are linked irretrievably. This is not always the case, but for the purposes of this explanation, there is an assumption that the process of examination and cross-examination is a precondition to a formal, legal adjudication. Thirdly, while there is court-annexed ADR, and options outside of the formal system, no distinction between them is made for the purposes of this paper.

The reasons for the survival and pre-eminence of litigious and adversarial practices are many and varied.

The certainty of a judicial pronouncement has deep appeal

There is great power in the symbolic function of a judicial pronouncement at the end of a formal hearing rather than an outcome that has been drawn from a mediated exercise, where parties have been led to reach a compromise that may be seen to be unsatisfactory to both. Many people prefer to live in a world of certainty even when it is said or suspected that such certainty is contrived, in much the same way as some people, in times of trouble, often adopt theological precepts they may have previously abandoned. John Locke stated it thus:

“Freedom of Men under Government, is to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man” (sic). (quoted in Kennedy 1973:370)

There is a strongly held view that legal arguments and formal pronouncements are required in order to develop the law, and in order to give certainty to legal relationships. This is the basis of the doctrine of precedent. Consider the reasoning of the English Court of Appeal in *Rickards v Rickards* [1990] FCR 409:

“The importance of the rule of *stare decisis* in relation to the Court of Appeal’s own decisions can hardly be overstated. We now sometimes sit in eight divisions and, in the absence of such a rule, the law would quickly become wholly uncertain. ...[Certainty in relation to substantive law is usually to be preferred to correctness, since this at least enables the public to order their affairs with confidence” (per Lord Donaldson of Lynton, MR, at 416-7).

In other words, if the law is simply what the parties care to say it is, or what a compromise says it may be, what is a legal advocate to argue? What is a judge to justify in any later decision? The pre-eminence of formal pronouncements in legal proceedings will not lightly be set adrift. This may explain the attitude of some litigants who will press on through litigation despite the advice of their counsel and regardless of the costs involved.

The visibility of, and consistency attached to, an open court hearing is attractive

Moves away from open court litigation take parties into private deliberations and outcomes that are usually shielded from public scrutiny. Mediated outcomes, for example, those emanating from family group conferences for juvenile offences, and, to a lesser extent, civil settlements where confidentiality

is imposed upon the disclosure of the terms of the settlement, suffer from an opaqueness that concerns some commentators (for example, Hossain and Malbon 1998). In other words, alternative dispute resolution outcomes and decisions that are unlikely to be publicly viewed, and even less likely to be debated, may be treated with suspicion. The fairness or otherwise of the final outcome for the parties concerned or the public in general is not open for public scrutiny.

Moreover, there is an expectation in a democratic society that the law will be applied consistently. The New Zealand Court of Appeal recently overruled a restorative justice family group conference outcome determining that it was too lenient in the punishment it awarded, and arguing that the state had an abiding interest in equalising punishment across offences (Mason 2000, quoted in Bayley 2001:220). There is a perception that alternatives to the litigious process may allow parties to license an *ad hoc* intervener to determine a dispute between them according to an "arbitrary and inherently indeterminate view of the outcome" (Kennedy 1973:376). Commentators have noticed that unsatisfactory inconsistencies in the application of administrative law penalty options are becoming more common (Tomaino 2000:188ff; Grabosky and Braithwaite 1986:163ff).

Litigation serves the purposes of the legal profession

Legal commentator Maureen Cain points to the 'claustrophobic structure' of the legal profession as one of the reasons why the ideology upon which the profession operates remains largely unexamined.

"Maintenance of the unity of legal thought is contingent upon [judges and lawyers] being impervious to the various day to day rationalities of other sections of the population."
(Cain 1976:246)

That is, says Cain, there is power in the mystery and esoterism of the litigious process, and in its language, the dress of counsel and the formal courtroom practices (Sarre 1994:16-20). Judges, generally, are not averse to perpetuating that power and esoterism. They are unlikely to renounce the deference the public accords to their judgments (Elson 1989:363). Lawyers may act likewise.

"The good lawyer, then, is the one who can demonstrate to himself and to others that he does, in fact, know more than other lawyers and, especially, more than the ordinary, well-educated layman about things legal. Such a view inevitably breeds a kind of exclusivity and separatism in relationships between lawyers and the public. It is no accident that prestige and authority within the legal profession increase with one's distance from the general community." (sic) (Fraser 1977:70)

It may be seen to be a threat to the legal mystique that private, non litigious alternatives give power back to the parties, an idea explored in a now famous essay by Danish criminologist Nils Christie and expanded in the concept of restorative justice (e.g. Bayley 2001). Although Christie was referring to victims' rights and returning criminal conflicts to their 'rightful' owners, he foreshadowed the possibilities of an evolution of lay-people's sense of power over the legal process:

"[The current system is] a loss of opportunities for a continuous discussion of what represents the law of the land...Lawyers are... trained into agreement on what is relevant in a case. But that means a trained *incapacity* in letting the parties decide what they think is relevant (emphasis in the original) (Christie 1977:8).

To this extent, it is argued that alternatives to the adversary system threaten to remove power from those with whom it has resided for centuries.

"[The law's] guardians are a priesthood, who to greater or lesser degrees cling together in mutual self-discipline encouraging or compelling each other to understand, apply and preserve the orthodoxy. Of course, the whole is really a writhing mass of movement, change and conflict even though, from a distance, it may appear to some to hang

together in a sort of seamless web. (Mason 1990:80)

The adversarial system is entrenched in the current style of legal education

There is little doubt that the way in which law is taught and the curricula that are assembled entrench the view that legal judgments (as opposed to customized outcomes arrived out through parties' discussions) are a preferred method for reaching 'correct' results.

"Wherever [a] traditional style of legal training is offered, social problems tend to be reduced to a series of disconnected disputes between anonymous and interchangeable individuals. Hypothetical cases are manufactured for students who are expected to isolate the 'facts' and then apply the relevant law. The student's task is to arrive at the legally 'correct' solution by reasoning in an intelligent and objective manner. ... For much of the time, the required task is skilfully to piece together small sections of the [jigsaw] puzzle, without ever having to appreciate the entire composite legal picture and its implications for society. Thus is maintained the impression of a fair, dispassionate and objective treatment of all parties who come before the law." (Naffine 1990:33)

This is not to suggest that no alternatives find their way into the classrooms or that legal educators are not aware of the difficulties attached to a litigious approach to legal problem-solving. Indeed, there is now a concerted effort for mediation training in law schools and continuing legal education curricula. There is a tendency, nevertheless, for these subjects to be peripheral to 'real' law. That is, practitioners come away from their education with the belief that the law consists of set principles and that the profession is the guardian and preferred interpreter of those principles.

"The most obvious failing of the traditional law school curriculum is that its ... concentration on legal doctrine as an objectively rational subject of discourse results in the neglect of a multitude of competencies that mark the excellent practitioner." (Elson 1989:345-6)

A wholesale change in the style and content of legal education cannot occur overnight, of course. It would be, however, needed if there were to be a greater exploration of the possibilities offered by alternative approaches.

Law reformers accept the centrality of the adversarial/litigious approach

It is the often case that reformers review alternatives to litigation by referring to them as 'exceptional' and thus the perceived immutability of the prevailing assumption remains intact. For example, Ericson and Baranek use the term 'tinkering' to describe the manner in which reformers toy with existing structures rather than challenge the more enduring underpinning assumptions, a process which "serves not as change but as an excuse for not changing" (1982:225). Their work examines the process by which reforms may become used as matters of administrative convenience, and point to the manner in which policy-makers and legislative draftspersons often collaborate in mystifying what the reform is really intended to do.

The adversarial system may assist those who challenge authority and power

There is, furthermore, an argument that the adversarial approach can *return* power to the hands of the otherwise powerless (Handler 1978:232-3). It is possible that an open court judgment, with fixed procedural rules, may act against the threat of arbitrary action by the more powerful elements of society. Do not clear and authoritative legal rules and judgments, pronounced by an authority above reproach and removed from political interference, provide protection against injustice, for example, the availability of the writ of *habeas corpus*? Where matters can be dispensed with in a manner that may not require formal rules, for example, those dealt with by administrative action or on a private settlement, there may be the suspicion that powerful elements were at work in reaching a settlement based more upon convenience than justice (Kennedy 1973:393; Sarre 2001). In other words, a mediated response may be perceived as favouring the interests of the powerful. There is an argument

that only through the litigious process can power imbalances be overcome, assuming equal access to resources. Only in a litigious setting will rules of evidence and procedure be in place to ensure fairness and the perception of fairness.

One of the guiding principles of mediated legal processes is that formal rules are not usually followed. The closing off of the possibility of formal legal rules, however, may lead to a perception that there is no impartial 'umpire'. Even the participants in the most simple of neighbourhood meetings may need to refer to Roberts Rules of Order to ensure that a meeting is conducted fairly. In other words, despite a society's best endeavours towards adopting more localised and less formalised processes and outcomes, legal 'centralism' is hard to break when people are aspiring to fairness (Galanter 1979, cited in Bayley 2001:220).

The adversarial system is culturally determining and determined

There is, finally, an argument, albeit from one particular paper, that the rate at which people choose adversarial, litigious approaches can serve as an indicator of legal culture. Blankenburg (1997) compared civil litigation rates in Austria, Belgium and West Germany (the more litigious) with Italy, Denmark, the Netherlands and Japan (less litigious). He then conducted a comparison of the otherwise seemingly culturally similar nations, the Netherlands and West Germany that allowed him to conclude that 'legal culture' is as much the product of the system as it is its generator and does not exist outside of legal institutions. David Nelken, the editor of the volume in which this view appears wrote critically of this argument, which appears to confuse culture and structure.

Conclusion

Despite the criticisms of the litigious process, and its not insubstantial role in exacerbating conflicts rather than managing them, it remains as one of the cornerstones of the civil justice system, if not the criminal justice system in Australia as well. The faith that we place in lawyers as suitable combatants for our battles and judges as paragons of objectivity remains largely unshaken. For the reasons outlined above, alternatives that one might have thought should have or could have become mainstream have remained *alternative*. Whether that is because of the perceived value of certainty, the need for objectivity and openness and so forth, or whether it is simply because there is, as yet, less faith in the process of dispute resolution by those who find themselves in conflict remains a moot point. At the very least, there will need to be some attention given to the above issues if there is to be a greater reliance upon, and confidence in, alternative procedures and practices, alternatives that have promised much for some time but which have failed to make the sort of impact that their proponents may have hoped for or predicted in the past.

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