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Dispute Resolution: Civil Justice and its Alternatives

Introduction

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In proposing that civil procedure and alternative dispute resolution should be discussed together at the 1992 W G Hart Workshop, Terence Daintith let the participants loose on a broad field of dispute processes. But at the same time he identified some closely interwoven areas of practice whose relationships had come to be obscured by the development of separate, parallel conversations.

For civil procedure, that array of tools and markers scattered along the path to trial and judgment, the last two decades have brought major changes to the framework for the conduct of litigation across the whole range of civil courts in England. Here and there particularly notable developments stand out — the new interlocutory orders established in the High Court in support of plaintiffs in cases of commercial fraud, the introduction of the exchange of witness statements, and the small claims procedures introduced in the county courts from 1972 and consolidated following the Civil Justice Review. Overall the innovations have been such as to raise the question as to whether it is possible to make out a common core of 'civil procedure' at all. But against a shifting, irregular background of procedural innovation two general, related, trends are noticeable. First, the *trial* has receded, becoming a distant and unlikely prospect, as the focus of attention has shifted to pre-trial activity and disclosure, and 'settlement' has become more attractive. At the same time, the *court* itself has become more involved in pre-trial preparations both as a means of expediting progress towards the trial and in orchestrating settlement.

Concurrently, there has been since the 1970s a growing number of moves to institutionalise 'alternatives' to litigation. Here important examples include: the pioneering of mediation in family disputes by voluntary agencies following proposals of the Finer Committee in 1974; the importation from North America of community and neighbourhood mediation schemes; and similar adaptation of 'alternative dispute resolution' procedures ('ADR') in the field of commercial disputes. Lawyers did not generally take a leading part in these initiatives (although there were exceptions), and were at first cautious and non-committal towards them; but latterly they have shown an increasingly active interest, confirmed in the sponsorship of major reports

by the Law Society and the General Council of the Bar.[1] Judges have also begun to commend these alternatives in unofficial utterances, and the Lord Chancellor's Department has a working group looking into alternatives to adjudication. While the nature and institutional location of such alternatives remains extremely varied, and support for them has come from numerous sources and appears driven by diverse motivations, they have a common characteristic in that they claim to promote decision-making through negotiation, leading to an agreed outcome. Broadly, the mode is 'mediation' and the objective 'settlement'. So this contemporary institutionalisation of an age old means of intervention, recognisable across many cultures, needs to be distinguished from those established 'alternatives' to adjudication found in arbitration and the 'informal' decision-making of Tribunals. But these latter also fell clearly within the ambit envisaged for the Workshop.

While litigation, with its goal in judgment, and alternative dispute resolution, with its emphasis on settlement, can be presented as diametrically opposed paths towards decision making, this opposition is misleading. Whatever else litigation may be, the fact that in the great majority of cases it is discontinued short of judgment and concluded in settlement means that, like ADR processes, it ultimately revolves around negotiation. So a common approach to understanding litigation and ADR seems essential. A further direct link between civil litigation and its alternatives is provided by the growing involvement of judges, particularly in the county court, in the sponsorship of settlement. Whether intervening to suggest further bilateral negotiation, recommend outside mediation, or to attempt mediation themselves, judges are becoming embroiled in the management of negotiations in a way which breaks down the traditional boundary between the mediator and the judge. A third link between contemporary developments in civil litigation and alternative dispute resolution lies in a common attribution of 'informality of process'. The small claims procedure in the county courts, proceedings before tribunals and interventions directed towards the sponsorship of negotiations are depicted as 'informal' in contrast to traditional superior court proceedings. This generalisation needs to be carefully examined, as the nature of the claimed informality in each of these contexts is likely to be significantly different; and there is no necessary link at all between a tendency to informality and the disposition to sponsor settlement.

In evaluating the changes taking place in these rapidly evolving areas of practice, we have to bear in mind the powerful critiques of 'informalism', and of the displacement of the trial through sponsorship of settlement, which were advanced in North America during the 1980s. The first of these critiques, associated with the work of Abel and Auerbach,[2] points to the expansion of state power associated with the movement towards informality, and suggests that the position of disadvantaged litigants is seldom improved, and typically worsened, where state-sponsored informal procedures are substituted for formal adjudication. The same arguments have been advanced by Freeman in respect of the proposed introduction of a 'family court' in England.[3] These arguments need to be taken seriously,

1 *Alternative Dispute Resolution, A Report Prepared by Henry Brown for the Courts and Legal Services Committee*, Law Society, Legal Practice Directorate, July 1991; *Report of the Committee on Alternative Dispute Resolution*, General Council of the Bar, October 1991. Beside the Chairman, Sir Roy Beldam, the members were: Anthony Scrivener QC, Philip Naughton QC, Christopher Chandler (Chairman of the Law Society ADR Working Party) and Jane Hern (of the Law Society's Legal Practice Directorate). See (1992) 55 MLR 258 for a comment on the Beldam Report.

2 Richard L. Abel, *The Politics of Informal Justice* (New York: Academic Press, 1982); Jerold S. Auerbach, *Justice without Law?* (New York: Oxford University Press, 1983).

3 'Questioning the Delegalization Movement in Family Law: Do We Really Want a Family Court?' in J.M. Eekelaar and S.N. Katz (eds), *The Resolution of Family Conflict* (Toronto: Butterworths, 1984) p 7.

particularly in considering procedural changes driven by a perception of overload in agencies of formal adjudication.

Opposition to the encouragement of 'settlement' in preference to adjudication has been based upon contemplated harm to the polity as a whole, as much as upon disadvantage to particular categories of litigant. Here the classic argument is that advanced by Fiss[4] who sees in the negotiation process itself a tendency to compromise key legal and political values. For him, the role of judges in resolving disputes is secondary to their function of re-stating important public values by means of judgment. Through judgment the core repertoire of norms in society is publicised and refurbished. With the substitution of settlement, the opportunity of the courts to articulate central values is lost, and as these values fall away from public attention the stability of the polity is threatened. Fiss' argument is founded in some contestable assumptions about the nature of order and the mechanisms whereby pattern is reproduced in the social world. Clearly, also, there are differences — not least, the absence of a constitutional judiciary — between the perceived role of the judges in England and North America. But the general uneasiness with 'settlement' which Fiss expressed has echoes in, if it does not exactly reproduce, the concern about 'compromise' voiced long ago by Jeremy Bentham, of which William Twining's essay in this issue provides a timely reminder.[5] Overall, changes in the nature of courts and the judicial role, and altered patterns of resort to judgment, deserve to be carefully examined.

At the Workshop, Terry Daintith's aims in bringing together and mingling contemporary discussions of civil procedure and alternative dispute resolution were largely realised. In the papers presented, and in ensuing discussion, three broad subjects were addressed: the changing characteristics of civil procedure; third-party decision making beyond the courts; and 'settlement' processes in their various locations. But a number of common themes repeatedly ran across and connected these three conversations.

The extensive discussion of civil procedure focused on transformations in the pre-trial phase of superior court litigation, with an emphasis upon the extent to which 'the trial' has now ceased to be the centre-piece of litigation. This development was reflected in the contributions of Sir Leonard Hoffmann, Cyril Glasser, Adrian Zuckerman and Wendy Kennett. Sir Leonard Hoffmann's address provided the best recent conspectus of modern developments in English civil litigation, highlighting the importance of the increasing adoption of new discovery techniques, especially in aid of the development of powerful interlocutory remedies. These were also emphasised by Glasser and Zuckerman, the latter calling for a more coherent policy towards holding the balance between the conflicting interests of the parties. What was unfortunately missing here was any examination of corresponding changes in county court litigation, where from the 1970s the heart of the action has similarly shifted to the pre-trial phase.

In linking procedural structures to the relationships of the professionals orchestrating litigation, and noting a shift in the balance of power between barristers and solicitors, Glasser touched on the question of power relations between different professional groups which came up repeatedly in different contexts during the Workshop. This issue provided the explicit focus of John Flood and Andrew Caiger's paper on arbitration in construction disputes, which examined the implications of the tensions between lawyers and other professional groups in this area of practice.

4 O. Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073.
5 See pp. 380–392 below.

Similar tensions seem sure to proliferate as lawyers and others compete to provide alternative modes of intervention, such as mediation.

Hazel Genn returned the attention of the Workshop to the implications of 'informalism' in reflecting upon empirical studies she had made of Tribunals dealing with welfare benefits, immigration disputes, employment disputes and detention under mental health legislation. Her conclusions, particularly on the impact of representation on tribunal decision-making and outcomes, reinforce the findings of Abel and Auerbach in North America a decade ago that procedural informality seldom operates to improve the position of disadvantaged litigants.

In his introductory report at the beginning of the Workshop, Mauro Cappelletti linked together contemporary change in civil procedure and the fashion for 'alternative dispute resolution' across a number of jurisdictions. His persistent, justified concern with problems of 'access' has particular local resonance in the context of contemporary proposals to change the arrangements for the provision of legal aid. In subsequent discussion at the Workshop participants again and again came back to the pursuit of 'settlement' and a retreat from the traditional trial as the essential link between ADR and contemporary strands of procedural change. Examining the diverse forms of intervention under the common label of 'alternative dispute resolution', Simon Roberts identified three principal locations of attempts to reach settlement. These were: party negotiations, early-stage lawyer negotiations and the threshold of the court. Each of these contexts indicated a different locus of control over the process — the parties, their legal representatives, court personnel — and had their own implications for any form of third-party intervention. Court-sponsored attempts at settlement provided a common interest for participants as they tend to be seen both as procedural innovations and as instances of 'alternative dispute resolution'. The problematic nature of court-linked ADR was underlined by Richard Ingleby. Court-based mediation schemes in Australia provided the subject of a paper in which he reinforces earlier findings that mandatory mediation can seldom be advantageous to litigants.

Lawyer negotiations provided a further focus of common interest around which both major themes of the Workshop came together. Here Carrie Menkel-Meadow's paper is a forceful reminder of the close attention which negotiations have received in the professional and scholarly literature in North America, and of their neglect over here. Whatever the nature of lawyer negotiations, or their relationship to litigation processes, neither can be fully understood if looked at in isolation from the other. Overall, we know too little about lawyer negotiations. How do most lawyers see the relationship between settlement-seeking and litigation, given that even when they embark on litigation the chances are that the case will be concluded short of judgement? What will be the effect upon lawyer negotiations of a growing involvement of judges in the sponsorship of settlement?

As the Workshop proceeded, it became clear that a variety of disparate, not necessarily consistent, imperatives drive procedural change and innovative dispute processes. These include: the desire of disputants to avoid the domination of professional advisers and to maintain control over decision-making; the attempts of classes of litigants to avoid the psychological and economic costs of proceeding to trial; the efforts of competing professional groups to mark out for themselves recognised areas of work; growing pressure of business on the courts, forcing the judiciary into innovative case management practices; and the ambition of governments to maintain control of the costs incurred in the provision of civil justice.

There was also a recognition of the presence of apparently contradictory messages concerning the trend of disputing and the habits of disputants. On the one hand,

the volume of civil litigation seemed undoubtedly to be growing;[6] and the perception of this increase was being signalled in increasingly desperate calls from senior members of the judiciary for more courts and further judicial appointments. But at the same time there were signs of disenchantment with the traditional trial-oriented mode of disputing on the part of litigants, and a shift towards settlement-directed processes.

Whatever the underlying direction in the volume of litigation, there is considerable evidence of changes in the nature of judicial involvement in dispute processes. This is revealed in increasingly active judicial supervision of the preparations for trial; if the courts once provided a potent but immobile backdrop against which parties prepared for trial in their own way in their own time, that is no longer the case. Court personnel are also assuming increasingly managerial postures in seeking to sponsor settlement. There are early signs that some judges would like to act as mediators rather than decision-makers. So even if the role of the trial itself is receding as the focus of the parties' endeavours, the courts are increasingly reaching outwards as they involve themselves in settlement processes which once seemed firmly in the 'private' sphere. These changes make it imperative to invoke the broad labels of 'informality' and 'settlement' with great care. The changes now observable in civil procedure, and the existing procedural regimes before Tribunals represent very different strands of informalism; and different again is the informalism involved in the move away from third-party decision making towards bilateral negotiations and mediated processes. Processes of 'settlement' controlled by the parties themselves must also be carefully distinguished from those undertaken in lawyers offices, or under judicial surveillance on the threshold of the court.

Another part of the picture reveals signs of change in the nature of legal practice. Even before lawyers were showing an interest in alternative dispute resolution, there were indications of increasing self-consciousness abut their role in settlement-seeking activity and lawyer negotiations generally. Now, as Roberts suggests in his paper, there are early moves on the part of lawyers away from traditional partisan and representative roles towards neutral advisory and mediatory intervention.

Turning to alternative dispute resolution, the most important developments surround moves to institutionalise 'mediation' alongside bilateral negotiation and third party decision as a prominent, approved mode of handling disputes. Here the future is uncertain, both as to the institutional framework for mediation and as to what 'mediation' is going to be. Vigorous efforts are being made to establish mediation as an autonomous form of professional intervention, with the carefully circumscribed goal of facilitating negotiations. In this connection a session at the Workshop looked at the increasingly sophisticated programmes for selection, training and accreditation of mediators which voluntary agencies are developing. But the precarious funding of these agencies places these programmes and the institutional arrangements for mediation as a whole in doubt. Government funding for a national network of mediation agencies, parallel to the courts, seems a remote prospect at present, even if a consensus were to emerge that such an institutional framework were desirable. This picture is complicated by parallel attempts of existing professional groups — for example, lawyers and probation officers — to co-opt mediation and absorb it into existing practice. If these efforts are successful, mediation looks set to become more a mode of delivering existing forms of specialist help than an autonomous form of professional intervention directed towards facilitating joint decisions.

6 M. Galanter, 'Law Abounding: Legalisation Around the North Atlantic', (1992) 55 MLR 1, at p. 8–11.