CHAPTER ONE

Introduction

'. . . impressed with command, we see little else.'

C Geertz *Negara* (1982: 121)

'. . . there probably exists no social unit in which convergent and divergent currents among its members are not inseparably interwoven.'

G Simmel *Der Streit* (1908: trs 1955: 15)

Prologue

Across the world, there are disagreements between neighbours, family members, affines, colleagues and others. The manner in which quarrel situations are characterised, and the ways in which the particular modes of response are regarded, varies from society to society – indeed, also from group to group within any given society. The nature of disputes, the appropriate responses to disputing situations, and the remedies considered proper are inevitably informed by fundamental social values and even cultural identity. This is the starting point for the examination of dispute processes provided in this book below, which also locates current enthusiasms for 'alternative' modes of resolving disputes – especially those found in the United Sates and other parts of the Anglo-American common law world – in a wider comparative framework.

A: Shifting Ground in the Common Law World

Thirty years ago we could have said with reasonable confidence, in the common law world, what the principal institutions of public disputing 'were'. Over a long period, judges and lawyers had progressively become central, well-defined agents of public dispute management. The former held out the beautiful promise of an authoritative third-party decision; the latter, as both advisers and champions, presented themselves as essential companions along the arduous route of litigation.[1] With

1 Max Weber was perhaps not the first to recognise an extraordinary degree of reliance upon the legal profession for everyday matters in the common law world, when he noted the English layman's propensity to make his peace with the law 'by retaining once and for all a solicitor as his legal father confessor for all contingencies of life'. (Weber [1917] 1978: 891).

the increasing dominance of courts in an evolving public sphere as the nation state solidified, and the parallel emergence of lawyers as a specialised service profession, other institutionalised forms of disputing had receded in importance. For example, ordeals and duelling had ceased to be a recognised part of disputing cultures in the West. Mediation too had been elbowed aside and hidden in the background,[2] even if it was always 'there' as an irreducible element of any context in which more than two agents are involved.[3]

We should none the less be cautious as to how we present this picture of 'formal justice'. First, it is easy to exaggerate the extent to which a discrete 'public' sphere, characterised by a distinctive rationality and actively shaping a subordinate 'private' sphere, had ever historically evolved.[4] In this respect, we need to recall that the relationship of the courts to government in common law jurisdictions has always been a distinctive and ambivalent one. In England, for example, there is not now, and never has been, a career judiciary. In recent times, the higher ranks of the judges have been recruited exclusively from the legal profession, with appointment representing the ultimate career stage of the successful lawyer. While elaborate ritual, including the conferment of knighthood in the case of the higher judiciary, marks the transition from barrister to judge, and some formal distance is subsequently maintained between judges and former colleagues, judges remain socially very much part of the professional group from which they emerge. They will be 'Benchers' of their Inns and remain part of long-established networks of information exchange and support, including those centred on the chambers in which they formerly practised as advocates. These networks cross generations, beginning in the great 'public' schools, continuing in the older universities and subsequently in the London clubs (of which the Inns of Court are today in some senses a variant).[5] So the courts are perhaps just as accurately seen as the apex of the legal profession as a specialised branch of government.

A second caution must concern the manner in which civil courts have historically been employed, notably the use made of their procedural arena by lawyers. Until the 1970s the courts on the whole conceived their role quite narrowly, as one of providing trial and judgment. Pre-trial interventions were largely devoted to making sure the landscape did not change too much before trial, otherwise leaving the parties to proceed at their own pace. But while this narrow approach that common law judges traditionally took to their role may appear to draw a clear line between solutions achieved through negotiated agreement and authoritative third-party

2 For the way this transformation progressed in early modern France, see Castan (1983).
3 See the seminal discussion of the 'triad' in Simmel ([1908] 1950), especially p 138 et seq.
4 This point can perhaps be made particularly strongly in relation to Habermas' 'system'/'lifeworld' opposition (Habermas, 1981).
5 The pattern of 'network' recruitment also gives rise to problems of gender and ethnic underrepresentation in both the judiciary and the bar. The most sustained efforts to broaden access are to be found in the decision to allow solicitors to represent clients as advocates in the High Court, and perhaps to serve as judges. See Griffith (1997) for an exploration of the social provenance of the judiciary.

determination, this concealed something that had for generations gone on beneath the surface. Lawyers, conceptualising virtually their entire role in dispute management as 'litigation', had long used the framework provided by civil procedure as the primary arena for their attempts to 'settle'.[6] It is a common place that in English and other common law civil jurisdictions only a tiny proportion of proceedings commenced ever reach trial, let alone judgment. So, through this clandestine use of civil process as an arena for negotiations, two apparently different modes of decision-making had long shared a single procedural route (one historically devised for the safe achievement of judgment).

Some elements of this picture were closely attended to in legal scholarship. The principal form of research in the growing number of university law schools consisted of commentary upon the decisions of superior courts.[7] Other areas, including the greater part of lawyers' contentious work – the out-of-court management of dispute processes, were virtually uncharted.[8]

At the beginning of the second half of the twentieth century this distinctive culture of public disputing, under which courts treated their role as the delivery of judgment while a dominant legal profession used litigation as a vehicle for strategies of late settlement, appeared securely entrenched. Indeed, the growing state provision of welfare and a steady increase in rights consciousness further encouraged reliance on litigation and the courts. But during the last three decades, the certainties represented in this apparently well-established universe were swept away right across the common law world. Over that relatively brief period, the known identities of the 'court' and the 'lawyer' were placed in question and the 'mediator' re-emerged as a major if ill-defined figure. Central strands of this transformation to an overt 'culture of settlement' have been advanced under the fugitive leitmotiv of Alternative Dispute Resolution (with its universal acronym, 'ADR').[9]

Characterising this new world and identifying the forces that have shaped it is not altogether straightforward even if at the heart of it lies a burgeoning culture and ideology of 'settlement' across the whole spectrum of dispute institutions.[10] It could almost be said that, in ideological terms, there has been a reversal of priorities as between two foundational processes, 'judgment' and 'agreement'. Of these two, the first – linked to the potent symbol of the Blind Goddess – long represented the *beau idéal* of public justice. The second, although represented in the powerful and

6 See Galanter (1984). 7 See Murphy and Roberts (1987).
8 Note some important exceptions: Johnstone (1967); Abel-Smith and Stevens (1967).
9 The phrase 'alternative dispute resolution' creeps into general use in the North American literature in the years around 1980, having perhaps been used first by Sander (1976).
10 'Settlement' is used here in the general sense of the search for negotiated, consensual agreement as opposed to resort to a third-party decision. The approach to settlement seeking found in practice may bear little relation to the foundational idea of consensual decision-making through a bilateral exchange. While the rhetoric of voluntary agreement is retained, settlement in the lawyer's sense can well be, perhaps is typically, the culmination of a bruising process, characterised by secrecy and suspicion, in which one party's representatives have successfully wasted the other to the point at which the latter decides reluctantly, perhaps facing the inevitable, that she or he has got to give up.

beautiful image of the handshake, never enjoyed ideological parity and was seldom even articulated as an objective of public justice.

In England, official recognition that the sponsorship of settlement was an explicit, official objective of the public justice system came only in the 1990s. Statements of this aspiration appear in the Heilbron/Hodge Report of 1993[11] and then in the Interim version of the 'Woolf' Report.[12] In the latter, judicial 'case management' is prescribed and its overall purpose identified as 'to encourage settlement of disputes at the earliest appropriate stage; and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited duration'.[13] Here 'settlement' is presented as the primary objective of the courts, with adjudication relegated to an auxiliary, fallback position. So 'settlement' itself becomes the preferred route to justice – an astonishing reversal.

This shifting balance between the ideologies of 'command' and 'joint decision-making' has been reflected in institutional terms through three closely linked developments. The first of these can be loosely described as the arrival of the 'new professionals' in dispute resolution. In most common law jurisdictions, specialist groups have emerged over the last two decades, in both the not-for-profit and the private sectors, offering facilitatory help with joint decision-making. The members of these groups, who generally identify themselves as 'mediators', thus provide services that compete only indirectly with lawyers.

A second strand of these developments has been represented in parallel, more or less contemporaneous initiatives within the courts to move beyond adjudicative roles to sponsorship of settlement. These initiatives, visible earliest in North America, have been driven by contradictory imperatives: both the attribution of a primary value to party decision-making and a more general ambition towards 'case management'.

Yet a third strand has subsequently become visible in responsive, defensive movements of recovery on the part of the lawyers. The arrival of the new professionals in dispute resolution, and the growing readiness of the courts to become involved in settlement processes, combined to encourage lawyers to re-examine their own practices. This process of re-examination has led lawyers both to move beyond advisory and representative roles towards non-aligned interventions, and to develop new specialist techniques in aid of their settlement strategies.

While the new professionals initially promoted mediation as promising a 'third way' between external, hierarchically imposed decision and representation by legal specialists, clear boundaries between these three strands of development did not last long. The boundaries were blurred, first, through the new professionals being drawn into association with public justice through court-sponsored mediation schemes

11 *Civil Justice on Trial: The Case for Change* (London: Justice, 1993).
12 *Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Lord Chancellor's Department, 1995).
13 Ibid.

and, second, through the incorporation of 'mediation' in the evolving practice of lawyers.

The heterogeneous nature of these practice developments has not prevented each of these strands laying claim to, and coming to be associated with, the shared label of 'Alternative Dispute Resolution' (ADR). As noted above, this term seems to have been used first by Professor Frank Sander in a paper to the Pound Conference in 1976 (Sander, 1976), a meeting largely attended by lawyers and judges, explicitly concerned with renovating court processes. So ADR cannot be seen as a label only associated with the movement of escape and resistance from lawyers and the courts. ADR in a narrow sense originated very much as something lawyers decided to do and judges to participate in and encourage.

The complex, interwoven nature of these developments is clearly reflected in contemporary scholarship around dispute processes. The considerable body of writing now found under the label of 'alternative dispute resolution' has been largely produced by lawyers. So this writing must by no means be read as a literature 'just' about alternatives to lawyers and courts. Indeed, it would not be an exaggeration to say that the literature of ADR has come to reside to a substantial extent within the discourse of law.[14] This literature conveys sharply the bitter struggle of different professionals to associate themselves with an emergent image supposedly attractive to client groups.

B: The Comparative Scene

These transformations in the practice of public dispute management coincided with a moment when legal scholarship was becoming much more sensitive to the social sciences and taking on a broader comparative view. This growing sensitivity was signalled in the language through which some academic lawyers, and a few legal practitioners, began to talk about conflict. In the course of self-conscious attempts by lawyers to theorise disputes, the terms of conversation shift from 'cases', 'litigation' and 'judges', to 'disputes', 'dispute processes' and 'interveners' (see Abel, 1973). This shift at the same time involved a growing familiarity with the ethnography of dispute processes to which leading Anglo-American social anthropologists contributed in the years following the Second World War (Gluckman, 1955; Bohannan, 1957; Turner, 1957; Gibbs, 1963; Gulliver, 1963, 1971). This exposure of lawyers to other cultures led sometimes to explicit 'borrowing' in the formulation of projects of domestic reform (Danzig, 1973), but more generally growing comparative awareness prompted expansive reflection on 'complementary' and 'alternative'

14 See, for example, these texts from both sides of the Atlantic: Goldberg, Green and Sander (1985) – now in its fourth edition as Goldberg, Sander, Rogers and Cole (2003); Murray, Rau and Sherman (1989; 1996; 2002); Riskin and Westbrook (1987; 1997); Mackie (1991; 2002); Bevan (1992); Brown and Marriott (1992; 1999); and Smith (1996).

arrangements at home (see Sander, 1976). Central to this growing concern was a return of attention to the primary processes of negotiation and mediation.

C: Civilian Parallels

When we turn to civilian jurisdictions, the major themes of processual transformation that we have noted here are all present: the re-emergence of institutionalised mediation, procedural reform of public justice systems and consequent accommodations within the legal professions. But the emergent picture is very different, for two linked reasons. First, in continental jurisdictions the common law culture of using civil process as an arena for strategies of late settlement was never replicated. Second, the late twentieth-century shift in the common law courts towards a managerial approach did not need to take place.

The continental judicial apparatus, inherently more bureaucratic and hierarchical than that found in common law systems, has traditionally given judges a much more active role to play in litigation so that, for example, 'delegation of any procedural step to outsiders is inappropriate or even repugnant. Private procedural enterprise is . . . almost an oxymoron in the lexicon of hierarchical authority' (Damaska, 1986: 56). In preparatory proceedings, judges of lower standing are charged with collecting factual material and preparing it as written evidence for their superiors. The evidence thus gathered and presented forms the basis for the written case file that is developed through a series of stages that culminates in the final public proceeding, the trial. The central position of the judge – or, better, the hierarchy of judges – dealing with a civil case gives civil litigation a different processual shape (Markesinis, 1990), one which has not generated the same pressure for reform experienced in common law jurisdictions.

Nevertheless, the judiciary in civilian systems has not necessarily been expected to give priority to adjudication in its handling of a civil case. For example, the courts in Germany have for some time been bound by the Code of Civil Procedure to 'promote at every stage of the legal procedure a consensual settlement', are encouraged by practice-related writings to adopt a 'peace-making function' and are pressured by heavy case loads to engage in settlement activities (Röhl, 1983: 2–3). Moreover, since the early 1960s there have been developments in Germany to promote informalism in some of the areas of social life that in common law jurisdictions have also been considered appropriate for ADR mechanisms. In particular, there have been operating for some forty years extra-judicial 'conciliation boards', designed to process disputes between consumers and producers, professionals and their clients, and so on (Eidemann and Plett, 1991). In France, too, efforts have been made to adopt ADR mechanisms to enhance the machinery of civil justice. Indeed, as long ago as the French Revolution the use of a *juge de paix* as a mediator was made obligatory for many kinds of civil disputes, and although this was not felt to be a particularly helpful device, it was not abandoned until 1975. For the resolution of certain kinds of administrative disputes, the French introduced

in 1973 the *Mediateur de la Republique*, an ombudsperson system designed to deal with complaints raised by citizens against public bodies. In addition, in some areas of France, the mayor appoints a 'district mediator' in order better to deal with complaints against local administration. Moreover, Articles 21, 768 and 840 of the New Code of Civil Procedure encourage judicial mediation of civil disputes. Labour and family disputes appear to be the most commonly mediated types of disagreement, with the resolution of the latter type of conflict by mediation being encouraged in particular by the *Comité National de Service de Mediation Familiale*.

D: Legal Reform Initiatives and the Role of ADR

These developments in the civilian world have largely taken place in part as a result of inspiration from the ADR movement in the Anglo-American common law world. Elsewhere, too, ADR is slowly being incorporated into international legal reform projects – especially for developing countries. But the extent of this incorporation has been limited by conventional approaches to legal development. International legal assistance programmes continue to focus primarily on improving courts and introducing legal codes in the recipient countries – an enthusiasm for building up formal legal institutions that rests uncomfortably with the benefits that ADR is perceived to bring in the donor states themselves. So, while in the legal systems of North America and Europe complaints and reforms have focused on the problems generated by a perceived flood of litigation, the social divisiveness of litigation and court proceedings, and the rapacious activities of self-interested lawyers – the predators and parasites of modern society, as Galanter (1994) has suggested the public view them – the foundations of these elements are concurrently promoted in legal development programmes. At the same time, there is a certain irony – indeed an incongruity – in teaching contemporary forms of ADR to the very societies whose own traditions of community-based, extra-judicial dispute resolution have served as a key inspiration for the development of alternatives to conventional civil process in the Anglo-American common law world.

E: The Scope of this Book

These various developments within and surrounding civil justice reveal a range of contradictory, but entangled, agendas and projects. So where to go, when 'ADR' itself turns out to be a fugitive label, attached to a disparate group of evolving practices? It seems to us that the place to begin is with a fresh look at three primary processes – negotiation, mediation and umpiring. A sociologically informed understanding of these processes appears indispensable to forming a clearer view of the complex, culturally specific developments in different jurisdictions. Chapters Five, Six and Seven, built around these foundational processes, form the core of this book. The approach here thus takes us away from an exclusive concern with what lawyers and

judges do in and around the trial, and from the analysis of legal doctrine – subjects which have traditionally preoccupied law schools in the common law world.

To prepare for this considerable shift in focus, Chapter Two sketches in the cultural and historical background to contemporary institutional change. Chapter Three then introduces the debates around 'informal justice' and the critiques of 'settlement' that have accompanied the ADR movement. Here a notable feature of the landscape we are examining has been the quality and intensity of the critiques that some seemingly common-sense prescriptions and practice initiatives have evoked. Chapter Four looks at the nature of disputes and draws in the typology of dispute processes that informs the subsequent shape of the book.

In Chapters Five and Six we turn to the primary processes of negotiation and mediation. Bringing these to the centre of the stage, we are deliberately concerned to redress some of the imbalances in the way we think about disputes inherent in the law school's historic preoccupation with what judges and lawyers do at and around the trial. That focus has inevitably marginalised the activities of the parties themselves – most notably, those predominantly bilateral processes through which decisions are typically reached at stages before resort to legal specialists. Beginning with negotiation underlines the fact that this mode of decision-making is common to everyday life and to the instance of dispute, providing the site of transition between them. At the same time, concentration on roles involving authoritative determination, on the one hand, and partisan advisory and representative activity, on the other, has left little room for a serious examination of the impartial, facilitatory interventions of the mediator.[15]

With Chapter Seven, on umpiring processes, we are inevitably brought back to the familiar terrain of superior court litigation and its formal goal of judicial determination. But we are concerned to locate these in a wider context of third-party decision-making as a whole. Chapter Eight, the last substantive chapter, is concerned with the very extensive hybridisation of processes that has accompanied contemporary procedural change. We conclude, in Chapter Nine, with a tentative look at the possible trajectory of alternative dispute resolution and speculate on its implications for our established conception of 'public justice'.

15 For English law students – and for many of those elsewhere in the common law and civilian worlds – this approach involves a radical break from the universe of understanding within which dispute processes have been traditionally located. Our own students have repeatedly drawn our attention to the need for a different approach. The case for a change in emphasis in North American legal education was forcefully expressed by Derek Bok in his seminal essay, 'A Flawed System of Law and Practice Training' (1983). See also Menkel-Meadow's examination of the main arguments in favour of changing understandings in her recent robust and insightful analysis of the development of ADR (2003).

CHAPTER TWO

Cultures of Decision-making: Precursors to the Emergence of ADR

A: Introduction

In this chapter we begin by marking out, in broad schematic terms, the larger background to the emergence of ADR in the latter part of the twentieth century. This apparently abrupt shift towards what we have loosely identified as a 'culture of settlement' came at the end of a long period during which the lawyer and the judge had emerged as central figures in disputing. The entrenchment of institutions of formal justice, closely associated with the maturity of the nation state, resulted in other foundational institutional forms being marginalised and lost sight of. But these institutional forms, and the values associated with them, were always somewhere in the picture; and as Auerbach (1983), Abel (1982a, 1982b) and Nader (1986) have suggested, a panoramic view would show something of an episodic alternation between values of 'formalism' and 'informalism'. Some sense of this larger picture, inevitably casting doubt upon contemporary claims to radical innovation, provides a necessary context for understanding the contemporary transformation of disputing under the *leitmotiv* of Alternative Dispute Resolution.

While, as we shall see in Chapter Three, self-conscious efforts to 'find a better way' (Burger, 1982) of dealing with civil disputes have in part shaped the ADR movement, co-option by government, large business interests and expansive professional agendas are also important in the movement's emergence and growth. The largely unchallenged critiques of 'informal justice' appearing at the beginning of the 1980s deserve careful examination today.

Two other related themes, articulated across a range of societies, inform the ADR movement. The first holds that there is a necessary tension between formal law and justice. The second claims that disputing institutions are there to secure outcomes that go beyond providing remedies for the parties themselves. So, these institutions are there: to maintain social order; to avoid conflict; to restore harmony; to achieve equality; and to express communal identity. As Auerbach has emphasised, the rejection of legal processes as an appropriate mode of decision-making in the context of disputes is often part of an attempt to develop or retain a sense of community: 'how to resolve conflict, inversely stated, is how (or whether) to preserve community' (1983: 4). We argue here that this impulse may manifest itself in a variety

of specific contexts – religious, political, territorial, ethnic and occupational seem to be the most important of these. These values often constitute a counter-tradition to legalism or what Santos has labelled the 'neoclassical model' of law (1982: 256).

B: Ideals of Informal Justice

A 'model' of informal justice invariably contains a number of identifiable core elements that are seen as superior to orthodox, formal justice. These include the development of processes and associated institutions that are:

- non-bureaucratic in structure and relatively undifferentiated from society, relying on small, local fora which – unlike large legal bureaucracies – can get to grips with the social relationships of the parties;
- local in nature and, for example, rely on local rather than professional or official language;
- accessible to ordinary people, and not dependent on the services of ('expensive') professionals;
- reliant on lay people as third-party interveners, perhaps with some – but not a great deal – of training, and who are preferably unpaid;
- outside the immediate scope of official law, and reliant instead on local standards of conduct and common-sense thinking;
- based on substantive and procedural 'rules' that are vague, unwritten, flexible and good common sense – so that 'the law' does not stand in the way of achieving substantive justice in the 'instant' case; and
- intent on promoting harmony between the parties and within local communities, in part because they get to the 'real' underlying cause of the problem(s), in part because they search outcomes mutually acceptable to the parties rather than the strict application of legal rules and in part because they carry an ethic of treatment.

We would argue that there is in *every* legal system some line of thinking which manifests these principles of informalism to a certain extent. Even within our current legal practice, professional jokes may reflect such values, albeit in a negative manner – for example, 'any lawyer can achieve justice; it really takes a good litigator to achieve an injustice'.

In contrast, in centralised legal systems a dominant ideological strand typically stresses perceived values of formal justice, for dispute resolution through law and legal institutions. The values or elements that are, to a greater or lesser degree, given emphasis include:

- Specialised bureaucratic mechanisms that are differentiated from society so that such mechanisms are able to make good, independent and technically correct decisions.
- Professionals with relevant expert knowledge and the capacity to articulate and to enforce the law.