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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* ([1923] trans. 1955: 15)

'the charismatic message inevitably becomes dogma, doctrine, theory, regulement, law or petrified tradition.'

M. Weber *Economy and Society* ([1917] 1978: 1122)

Preliminaries

This book, *Dispute Processes: ADR and the Primary Forms of Decision-making*, principally concerns disputes and the processes relied on to deal with disputes in many societies around the world. It is more than ten years since the publication of the second edition of our efforts to understand and explain these two central concerns, and during this past decade or so awareness of the advantages of providing a variety of processes for seeking and securing civil justice has greatly increased. A steadily expanding number of jurisdictions have introduced reforms intended to put in place multiple processes for managing and resolving disputes, thereby giving disputants a greater degree of choice of process for pursuing their grievance. Negotiation, mediation, umpiring (including in modified forms), innovative hybrid methods and so on have become better understood and more widely relied on, not only within jurisdictions but also across geographical borders so that, for example, the European Union now actively encourages the use and recognition of 'alternative' modes of dispute resolution. Indeed, the meaning of the 'A' in the acronym for 'Alternative Dispute Resolution' namely, 'ADR', is now perhaps better understood to mean 'Appropriate', so that many commentators now also speak of 'Appropriate Dispute Resolution', or simply 'processual pluralism'. Moreover, ideas significantly encouraged by ADR and civil justice reform have seeped into neighbouring legal fields perhaps most noticeably in areas of restorative criminal justice and 'Truth and Reconciliation'.

It is therefore even more important than ever for students of law to engage with the developing theoretical and practical field of dispute processing, including in particular ADR. Moreover, we take the view that enhancing the understanding of, and sharpening the skills used in, such processes as negotiation and mediation is also invaluable in enhancing our personal capacity to relate to each other and to solve problems better, so that it is also important for students of other disciplines to appreciate the value of ADR. We have learned from our students that role plays in class help all sorts of student to grasp these benefits more effectively, and some role plays we use in our teaching are therefore included in an Appendix to this book for the first time. Students have also told us that they enjoy reading the extracted materials which we provided in quite considerable number in earlier editions, allowing the commentators to 'speak for themselves'. However, the ever-growing availability of material online has encouraged us to reduce such materials so as to create space to broaden the scope of the book and thereby cover important new developments in the rapidly evolving field of dispute resolution.

These developments are taking place not only because both the practice of dispute resolution and the theorising about disputes and their management are continuing to evolve and to be diffused but also because the context in which the field has emerged is changing and encourages new responses. The international economy (coincidentally) suffered a significant downturn several years after the publication of the last edition, generating among many other things demands for better ways to handle financial disputes involving aggrieved small investors, as well as leaving many people more impoverished. The world of legal services is shifting, becoming more globalised on the one hand, and suffering from reductions in legal aid, governmental intolerance of lawyers' dissenting voices in many parts of the globe and other difficulties on the other. The use of violence in its many forms, including terrorism, as a way of resolving differences at various levels, appears to be strengthening rather than abating. Environmental degradation, ethnic tensions, gender inequalities and injustices, the difficulties of containing infectious disease, the growth of transnational organised crime, and the abuse of human rights seem to be more serious than they were a decade ago. The search for solutions to such problems should include a willingness to learn from dispute resolution discourse and practice as explicated in, for example, this book.

Transformations in the Common Law World

Everywhere, 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, vary 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, which also locates current enthusiasms for 'alternative' modes of resolving disputes – especially those found in the United States and other parts of the Anglo-American common law world – in a wider comparative framework.

Forty 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 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 nonetheless 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

[1] Max Weber recognised 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 relate to the law 'by retaining once and for all a solicitor as his legal father confessor for all contingencies of life' (Weber, [1917] 1978: 891).

[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] trans. 1950) 138–44 and 145–69. See also Simmel 'The Quantitative Conditioning of the Group' ([1908] trans. 2009a: 53–128).

[4] This point can perhaps be made particularly strongly in relation to Habermas' 'system'/'lifeworld' opposition (Habermas, 1981).

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 they are 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 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', so that the process of dispute resolution in effect became one of 'litigotiation'.[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.

[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.
[6] See Galanter (1984).
[7] See Murphy and Roberts (1987).
[8] Note some important exceptions: Johnstone (1967); Abel-Smith and Stevens (1967).

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

In England and Wales, recognition by the legal professions 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 and Final versions of the 'Woolf' Report, followed by the introduction in 1999 of new 'CPR' or Civil Procedure Rules.[12] In the handling of civil cases, judicial 'case management' has become prescribed and its overall purpose identified as encouraging settlement of disputes at the earliest appropriate stage, and, where trial is unavoidable, to ensure that cases proceed promptly to a final hearing (of limited duration). Thus, 'settlement' is presented as the primary objective of the courts, with adjudication relegated to an auxiliary, fall-back position. So 'settlement' itself becomes the preferred route to civil justice – an astonishing reversal.[13] Continuing evolution of the civil justice system now includes

[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.

[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), and *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (1996) HMSO, London. The Civil Procedure Rules are available at www.legislation.gov.uk/uksi/1998/3132/contents/made, accessed 3 December 2019.

[13] Lord Woolf has also encouraged the use of settlement in resolving administrative disputes that come before the courts in England and Wales, although this possibility was not taken up in his

a projected move to extensive reliance on online dispute resolution (ODR) (Briggs, LJ, 2016).

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 three 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'.

reports on the state of civil justice (1995; 1996). In several leading judgments, Lord Woolf declared in robust language that the emphasis on ADR and other reforms introduced by the 1998 Civil Procedure Rules should also govern administrative cases. Indeed, in the Cowl case (*Cowl v Plymouth City Council* [2001] EWCA Civ 1935), which concerned an effort by local residents of a residential care home to secure a judicial review of a decision by the local government to close down their care home, he stated: 'the importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.' And: 'The appeal also demonstrates that courts should scrutinise extremely carefully applications for judicial review in the case of applications of the class with which this appeal is concerned. The courts should then make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts. The legal aid authorities should cooperate in support of this approach.' However, this policy is not one that has found widespread support among senior members of the judiciary. The then Lord Chancellor declared in 1999 that there are natural limits to the role of mediation in public law cases: 'Some unstinting admirers of ADR assert that all disputes are suitable for ADR, and can benefit from it. I doubt that such unlimited enthusiasm does much to help promote wider use of ADR in the long run. Courts have a vital – indispensable – part to play in the resolution of many categories of dispute. It is, at best, naïve to claim that mediation and its alternatives can adequately equate to this role . . . consider the issues of cases which set the rights of the individual against those of the State . . . this is an extremely sensitive area, which must be approached with extreme care. I think the use of ADR in administrative cases is of necessity limited' (Irvine, 1999). It might be added here that the development in the late twentieth century of the 'regulatory state' – involving a process of privatisation, contracting out and supervision by a regulator of important areas of the economy – in the hope of smaller government but enhanced protection for consumers and others, has also had an impact on administrative dispute resolution, perhaps most notably through the development of a policy emphasis on greater use of tribunals and a reduced reliance on the administrative courts: see Scott (2010: 26); Rawlings (2010: 302).

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 decisions 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 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. Indeed, the identification of courts as sites and sponsors of ADR processes was powerfully expressed in the notion of a 'multi-door' courthouse – a key symbol of the new approach to civil justice that is 'ADR', and one that also emerged from Frank Sander's contributions to the Pound Conference – reflecting the former dominance of courts in the common law world as *the* institutions of dispute resolution.[14]

The complex, interwoven nature of these developments – the routinisation or institutionalisation of the 'charismatic' messages of ADR – is clearly reflected in contemporary scholarship around dispute processes. The considerable body of writing now found under the label of 'alternative dispute resolution' – and the university courses which are important consumers of this discourse – 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. Alongside this literature is a struggle between different professionals to associate themselves with an emergent image supposedly attractive to client groups,

[14] And see Palmer (2014a) on the impact of the 'multi-door courthouse' ideal in encouraging processes of institutionalisation of ADR, an issue further discussed in Chapter 13.

with lawyers seeking both to resist but also to incorporate ADR into their practice. ADR remains significantly relocated close to legal norms, institutions and actors.

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' (Damaška, 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 which 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 caseloads 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 *Médiateur de la République*, 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, reformed civil procedure law has encouraged judicial mediation of civil disputes. Labour and family disputes appear to be the most commonly mediated types of disagreement.[15]

Arguably, the developments towards ADR in the civilian world have largely taken place in part as a result of a diffused inspiration from the ADR movement in the Anglo-American common law world. In civilian jurisdictions in Europe, academic writings on the nature of new ADR approaches to civil justice being introduced in the common law world appear to have been an important catalyst for a growing recognition that ADR is a viable and valuable alternative to litigation and adjudication. As a result, in Germany for example, in the late 1990s legal practitioners began to develop enthusiasms, 'although current litigation reforms are heavily focused on reducing court waiting lists through court related mediation schemes' (Alexander, 2002: 110). In addition, in 2008, the European Directive on Mediation (2008/52/EC)[16] put in place a common framework for cross-border mediation within the European Union, and in so doing stimulated the wider acceptance of mediation in member states, especially as they were required to implement the Directive by May 2011. As a result, many member states with civilian legal traditions which had hitherto not seen a significant expansion of ADR processes took the opportunity to encourage appreciation of the value of providing a greater range of dispute resolution possibilities, especially more use of mediation. Other states, such as Germany and France, have gone further and introduced new laws and regulations on mediation, going well beyond the basic requirements of the Directive itself.[17]

[15] The existence and potential for informalism in the civil justice systems of jurisdictions within the civilian tradition was stressed in the essay by Mauro Cappelletti identifying the rise of ADR as a third wave – after legal aid reforms and court focused reform ranging from small claims courts to class actions – in the 'Access to Justice' movement: 'whereas – in the last two centuries or so – Western civilisations have glorified the ideal of fighting for one's rights (Jehring's famous Kampf um's Recht), we should recognise that in certain areas a different approach – one that I used to call "co-existential justice" – might be preferable and better able to assure access to justice' (1993: 287).

[16] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Available at: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32008L0052, accessed 3 December 2019.

[17] See, generally, Hopt and Steffek (2013). For Germany, see Tochtermann (2013), and for France, see Deckert (2013).

Elsewhere in the world, local legal cultures which have 'modernised' their legal systems at least in part by a process of diffusion and adaptation of 'western law' have not necessarily cast aside traditional legal culture's emphasis on mediation and other forms of extra-judicial dispute resolution in their efforts at refurbishing civil justice. Thus, for example, in the case of China, many of the efforts at legal system reform have since the late nineteenth century been focused on transplanting into China laws and institutions from, initially the civil law tradition and then the socialist branch of the civil law tradition (Palmer, 2009). But this has not in itself significantly reduced a long-standing emphasis on the use of negotiation and mediation as preferred forms of dispute resolution and transitional exchanges. Indeed, in the case of China the last decade or so has seen an extraordinary re-emphasis on mediation not only in community dispute resolution processes and other extra-judicial systems but also in the manner in which courts handle cases and official agencies deal with complaints (Fu and Palmer, 2017). The general policy has been to encourage reliance on mediation in dispute decision-making in order to assist in the promotion of a more harmonious society, and to ensure greater social and political stability in a period of rapid economic change.

The Comparative Scene

These transformations in the practice of public dispute management – in particular in the common law world as noted above – coincided with a moment when legal scholarship was both 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 shifted 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' arrangements at home (see Sander, 1976). Central to this growing concern was a return of attention to the primary processes of negotiation and mediation. One of the most robust explorations of disputing in this field is Philip Gulliver's study *Disputes and Negotiations*, a processual analysis of negotiations fashioned from a wide variety of cross-cultural case studies. It highlights the sequences inherent in negotiation and mediation, the importance of the parties' views of the dispute resolution process, and shows that 'patterns of