LAW4225 – NON-ADVERSARIAL JUSTICE

Adversarialism and non-adversarialism not mutually exclusive

- Continuum

Non-adversarial justice:

- Approach to justice, both civil and criminal, that focuses on non-court dispute resolution
- Including role of tribunals and public and private ombudsmen
- Include processes used by courts not involve
  - Judicial determination
  - Court processes that involve judicial officers both pre- and post-determination of guilt or sentence in exercising more control over process

Includes:

- ADR – Mediation, negotiation, arbitration
- Therapeutic jurisprudence – Psychological impact
- Preventive law – Prevent future problems
- Restorative justice – Impact of crime – restore relationship
- Creative problem-solving
- Problem oriented/solution focused courts – Koori Court, neighborhood justice centre

Process rather than substantive law

Civil and criminal justice systems
Characteristics:

Elements of non-adversarial justice system

1. Public and private interests
   - Doesn’t seek to replace public court system
   - Fiss
     - Upholders of common ideals of fairness
   - Courts public role of:
     - Interpreting law
     - Scrutinizing behavior of govt and public officials
     - Determining rights and liberties of individuals
       - Between themselves
       - Between themselves and state
   - Broad principles
     - Provide direction for cases
     - Norms and procedures regulation adjudication of disputes
     - Giving force to private agreements
     - Publicly exposing and denouncing unacceptable/anti-social conduct
   - Private resolution systems
     - Reduce corporate and governmental accountability
     - Create multiplicity of standards/rules
     - Exacerbate existing power imbalanced between rich and poor
   - Criticisms of law theory
     - Overstates role of law in out-of-court negotiations
     - Assumes law is singular concept with authoritative interpretation understood by every in same way
2. **Justice system, not court system**
   - Loosely connected set of institutions and practices
   - Encompasses
     - Legislature
     - Departments of government
     - Courts
     - Tribunals
     - Legal profession
       - Judicial officers
       - Barristers and solicitors
       - Legal aid
       - Prosecution authorities
     - Community legal centres
     - Dispute resolution agencies
     - Police
     - Corrections
     - Community
   - Part of community
   - Purposes:
     - Administer justice according to law
     - Resolve disputes
     - Provide for community safety and good order
     - Protect rights of individuals
     - Promote rehabilitation of offenders
   - Involves community
     - As observers
     - As victims of crime
     - As parties to civil cases
     - As witnesses
       - Jurors
       - Volunteers
       - Bail justices
     - As participants in policy-making process
3. Problem-solving, not dispute resolution
   - Rather than simple settlement
   - Aim:
     o Avoid positions and negotiate in terms of parties’ underlying needs and interests
       § Instead of strict legal entitlements
   - Avoid narrowly adversarial forms
     o That only deals with presenting issue
     o Ignore other dimensions of problem

4. Process, not outcome
   - Procedural justice
     o Ways in which decisions made and their fairness
     o Elements: *Berman and Gold*
       § Voice
       § Neutrality
       § Respect
       § Understanding
       § Helpfulness
       § Trustworthiness
   - *Ronner*
     o 3 elements:
       § Voice
       • Providing environment where person can present case to attentive tribunal
       § Validation
       • Acknowledgement case heard and taken into account
       § Respect
       • Manner in which judicial officer interacts with person

5. Partners, not adversaries
   - Cooperation rather than conflict
   - ADR centres
   - Community education
   - Team
     o Group of legal, health, law enforcement and correctional professionals works with judicial officer on pre-sentence or post-sentence
   - Collaboration difficult
     o Due to lack of mutually defined or agreed goals
     o Lack of communication
     o Physical or legal incompatibility
6. Active, not passive judges
   - Maintain connect with and supervision of offender
   - Emotional links forged
   - Role of judicial officer
     o Personality
     o Depth of involvement
     o Continuing supervision
     o Judicial officer’s knowledge of and skills
     o Direct engagement
   - Judge not
     o Impartial arbitrator of facts
     o Dispassionate and disinterested imposer of sentence

7. Interdisciplinary and transdisciplinary development of law and legal processes
   - Multidisciplinary perspective

8. Towards comprehensiveness
   - In way they view people with legal problems
   - Legal problems themselves
   - Processes used by legal professionals
   - Or other in resolving legal problems
   - Or other forms of dispute
   - Skills needed by professionals in dispute resolution
   - Outcomes sought from dispute resolution process
   - Dialogue

9. Prevention
   - Proactive lawyering
   - Planning
   - Maintaining ongoing relationships
     o Between clients
     o Between lawyer and clients
   - Avoiding legal disputes inevitably better for client than
     o Costly
     o Time consuming
     o Stressful litigation
Mahatma Gandhi

- Founded movement: Satyagraha
  - Sanskrit
    - Satya – truth
    - Agra – insistence
  - Nonviolence is greater force
  - Capable of fighting it effectively, unarming it
  - Suffering is driving force
- Salt march
  - Dandi March
  - Major nonviolent protest action
  - First act in civil disobedience
  - Against imposition of salt tax by British
- Legal philosophy
  - Unite parties riven asunder

Criticism:

- Placing barriers in way to accessing appropriate resolution to civil disputes through courts for poorer, disadvantaged, vulnerable and unrepresented disputants
Conflict Theory

Charles Darwin

- Emergence of individual
- Abnormality foster survival
- Genetic adjustment

Stiffly change and personal growth

Dispute resolution

- Shouldn’t always dispute or see it as negative
- Should always manage it

Conflict is threatening, if inevitable in relationship

- Prevent destructiveness requires courage

Civil law context

- Process of transformation from conflict to dispute
- Some have less access to resources
- *Felstiner, Abel and Sarat*
  - Unfair process – burden is more on some groups than others
  - Naming
    - UnPIE (UNperceived injurious experience) into PIE
    - Particular experience caused one to feel wronged, hurt
    - Having a problem
    - Ex, cancer patient – realize they are sick – might not know medical procedure gone wrong
    - Higher income likely to perceive problem, complain than poor households
  - Blaming
    - PIE to grievance
    - Someone to blame
    - Attribute injury to fault of another
  - Claiming
    - Remedy sought for grievance
    - Voices grievance
    - Pursue interest
    - If rejected in whole or part – dispute
- = Dispute
- Pyramid
  - Less as the list goes down
  - Due to social conditions??
- Not every conflict end up in court
- Understanding transformation helps understanding disputes into legal cases
  - Identify societal structure of disputing
  - Who does and who doesn’t have access to justice
Aim: how can we reduce advantages of resources in a legal system

Social construct
- Cultural factors have strong influence on each stage
  - Race
  - Gender
  - Disability
  - Socioeconomic status

Dispute Resolution and Problem Solving Pyramid

All Australian Jurisdictions 2003-2007

Role of law
- Most don’t go to law with disputes
- Court – used by few
- Cultural factors and decisions made by individuals

Dispute Tree
Each branch represents different way of dealing with disputes:
  - Going to court
  - Negotiating
  - Using lawyers
  - Settlement – agreeing
- Truncated branches – Injuries named and blamed but not claimed
- Fruitless tips – grievances pursued without remedy then abandoned
- Multiplicity of options – avenues pursued and not pursued
- Reflects living and evolving nature of disputes

Why few people use legal processes to resolve disputes

- Time
- Money
- Many don’t know rights
- Intimidating
- Fear
- Lack of understanding
- Cost vs benefits
- No access
- Limits of law – can’t solve every problem

Alternatives to legal processes

- “Lumping it”
  - Not worth pursuing – accepting problem
- Exit and avoidance
  - Getting out of situation
  - Avoiding conflict
  - Withdrawal from situation or relationship
- Self-help
  - Violence
  - Getting help from someone
  - Physical retaliation
  - Seizure of property
- Direct negotiation with other party

Marc Galanter, ‘Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about Our Allegedly Contentious and Litigious Society’ (1983) 31 UCLA Law Rev 4.

- Argues many choose ‘lumping it’
  - Not naïve parties but chosen by parties gain too low, cost too high if used legal processes
- Negotiation – common way of resolving conflicts
- Questions whether there is litigation explosion
  - Most don’t go to law
Australia-wide survey – Law and Justice Foundation of New South Wales

50% experienced one or more legal problems in previous year

Most prevalent problems:

- Consumer
- Criminal
- Housing
- Governmental

Majority of problems concentrated among minority:

- Disadvantaged
- Socially excluded

Most common responses:

- Seeking advice from legal or non legal professionals (51%)
- Communicating with other side (38%)
- Consulting relatives/friends (27%)
- Using websites or self-help guides (20%)
- Court or tribunal proceedings (10%)
- Formal dispute resolution (9%)
Hazel Genn, Paths to Justice: What People Do and Think About Going to Law (1999)

- Most common justiciable (can go to court with) problems related to:
  - Faulty good and services
  - Money problems
  - Injuries and work related health problems
  - Problems with neighbours
  - Employment problems
  - Problems flowing from divorce and separation

- Most common way of responding to problems was to:
  - Try to sort problem out or
  - Take some direct personal action

- Very few did nothing at all
  - Harm may be flowed to them
  - Risk

- Most common types of problems to be ‘lumped’ were:
  - Employment
  - Injury
  - Family matters
  - Clinical negligence
  - Unfair treatment by police

- When people decide to take actions, most common course is
  - First make direct contact with the opposing side in writing or in person with the aim of getting some kind of satisfactory response.

- People only went directly to seek a solicitor’s advice or assistance in certain types of cases:
  - Divorce, separation and family violence;
  - Accidental injury or work related ill-health;
  - Ownership of residential property;
  - Occasionally where there are problems with neighbours

- 8/10
  - Justiciable problems dealt with either successfully or unsuccessfully apparently without legal proceedings being commenced
    - without ombudsman being contacted or any other ADR processes being used
Comprehensive or holistic law emerged:
  - Change from enlightenment values of
    - Certainty
    - Autonomy
    - Individualism
    - Personal rights
  To
    - Post modern values of
      - Uncertainty
      - Connectedness
      - Group values
  - And development of jurisprudential theories
    - Legal realism
    - Feminism
    - Critical legal studies
Access to justice

- How people perceive and respond to problem
- Race, gender, sexuality
- Resources have to deal with them

Access to Justice Review 2016

Victorian Government

- Focus on understanding legal needs
- Victoria legal aid as a primary source of legal info
- Triage (urgent) at courts w great referral (diversion)
- ADR expanded at courts and VCAT
- Modernise small claims at VCAT
- Improve ways courts work with self-represented litigants
The Adversarial System & its Alternatives

Defining Adversarial System

System of law, generally adopted in CL countries, in which parties, rather than the judge have primary responsibility for:

- Defining issues in dispute
- Investigating dispute
- Advancing dispute

Distillation of set of ideas, legal and ethical practices, processes, and institutions

Strengths

- Independence of the bar and bench from governments
- Autonomy of parties
- Power of examination and cross-examination to elicit facts
- Courts open to scrutiny
- Court officers disinterested parties

However – become pejorative

- Competitive battle between foes or contestans
- Associated with partisan, unfair litigation tactics

Centered on 2 major parties:

1. State
2. Offender

Inheres 2 other important parties:

1. Victim
2. Community
Culture of adversarialism

Deborah

- Aggressive in culture

Adversarial: sport, fashion, beauty pageant

- Market forces key way for us to distribute resources to people in our society
- Many come with adversarial mindset
  - Justice system is seen as more adversarial
- Family law: hone down on adversarial aspect in dispute
  - Resolved in other than judge made in court

History

- Modern is recent
- Late 18th century

Basic features

- Conduct of litigation both prior to and during trial is left substantially *in hands of parties*
- Evidence is generally elicited by *strict procedure*
  - Cross examine
    - Casting out relevance etc
- Role of judge is to *preside* and to act as form of *umpire*
  - Rather than active part as witnesses
  - Neutral role
- Judicial function designed to be concentrated into *1 continuous hearing*
  - Don’t need to keep coming back
- Compliance with rules of court is, in general, *enforced only at the request of one* of the parties
  - Case management practices
    - Judges encourage parties to settle, not waste time or resources
- Not required to say anything – right to remain silent

Social context

- Reflects cultural attitudes and norms in wider community
- ‘argument culture’
  - Taking of aggressive, argumentative approach important in addressing differences
The Inquisitorial (Civil) Law System

- More widely used than adversarial system
- System where judge plays more active judge prior to and during judgment
  - Various stages rather than 1 continuous hearing
  - Seeks truth by questioning those most familiar with events in dispute
- Role of judge
  - Inquire as to truth rather than to act as umpire
  - Presiding judges isn’t passive recipient of info
- Procedure
  - More informal
- Role of lawyer
  - Less critical, but still important
  - Supervising necessary to the case
  - Passive role
    - Suggesting routes of inquiry for presiding judge and following judge’s questioning with questioning of their own
- Rights of accused secondary to truth
  - First to testify
  - Can see government case
  - Able to give their side of story
  - Doesn’t require presumption of innocence
- Criminal defendant
  - Not presumed guilty unless prosecution representing government provided evidence that found person guilty
- Trial
  - Last for months
  - Gets evidence from many hearings
  - Collective vote from professional judges and small group of lay assessors
    - And jury – selected number of people
    - 2/3 majority required to convict criminal defendant
- Doesn’t defend as much as adversarial system

19th century – European

There may also be mixed systems:

- Nova Scotia
- Louisiana
- Scotland

Different aspects of system

- Judge both system by how they enhance justice
- Representation of lawyers crucial
  - Protect defendant – harm
- What happens to those who can’t afford lawyer or scared

Compare: something different