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by
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Justice in Our Own Hands

Self-help: the role of private alternatives to state intervention

Author's Profile.

Geoffrey Hartwell is External Professor of Arbitration Law in the Law School of the University of Glamorgan. An engineer by profession, he was Chairman of the Chartered Institute of Arbitrators for the year 1996/1997 and President of the Society of Construction Arbitrators from 1997 to 2000. With over twenty-five years of experience as a domestic and international arbitrator, he has made a personal study of the philosophical theory and ethical aspects of all forms of dispute resolution, concentrating on the factors which make private solutions logically attractive. Some of that work is reflected in the LLM in Commercial Dispute Resolution at the University.

A member of the Swiss Arbitration Association and a Fellow of the Indian Council of Arbitration, he has conducted arbitrations in England, Scotland and Ireland, and on the continent of Europe and in the Far East, as well as teaching arbitration practice and other aspects of dispute resolution throughout the world, largely on behalf of the CIArb. He has written many articles and papers for journals such as *Arbitration*, the *Journal of International Arbitration*, and the *Boston University International Law Journal,* as well as for the journals of the Indian Associations of Chartered Secretaries and of Chartered Accountants.

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Justice in Our Own Hands

Self-help: the role of private alternatives to state intervention

Justice in our own hands. What does that mean? The whole purpose of the law is to preserve the Queen's peace and to avoid the necessity for self-help. To speak of taking the law into one's own hands is to conjure up images of vigilantes and summary lynchings of innocent victims in the lawless West of the nineteenth century.

So what is it that justifies our taking steps to avoid the intervention of the State in our private affairs? Indeed, what justifies a mere engineer, a lesser breed without the law, discussing what appears to be an especially esoteric branch of jurisprudence?

I had in mind to title this address "Justice as Fairness" in tribute to the great political philosopher, John Rawls, author of "A Theory of Justice", who died in November last year at the age of 81. "Justice as Fairness" is the title of his restatement of 2001. In "A Theory of Justice", Rawls sets forth the proposition that "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. Therefore, in a just society the rights secured by justice are not subject to political bargaining or to the calculus of social interests."

That is an important proposition, and it lies, whether we are aware of it or not, at the root of the justification of ADR in all its forms.

In practice, there is a tension between this proposition of Rawls and what we understand by the Rule of Law. The Rule of Law depends upon the calculus of social interests, the one against the many, and upon the political bargaining from which legal norms are created, whether by statute or by the development of law in the Court. And realists, like Holmes the younger, face this tension by accepting that law can be structured and predicted, made objective, in a way that is not possible with the ideal of justice, subjective and perhaps unattainable. Where there is conflict between law and justice, the realist chooses the law. The idealist may try to do justice by stretching the law, and some of the law's great developments have come about that way.

The key to the Law is that it must be fair to all men and women: predictable and consistent, whatever the circumstances. By "The Law", of course, we mean different things. Each of us uses the expression "The Law" to mean the law of our mother state. It is not an expression that has any clear and exact meaning in an international context, where one law may govern procedure, another the substance of a contract, and yet other national laws govern the capacity of the parties to enter into and perform that contract.

So, whatever proceedings are brought in the Court, they are never simply proceedings between two disputing parties. Even in the simplest dispute, there is an element of public interest, of state policy, which the Court will bring to bear. Thus, of necessity, the rights secured in the Court are influenced, to a greater or lesser degree, by laws which themselves are the product of political bargaining or of the calculus of social interests.

The balance between the objectivity of practical, positive law and the subjectivity of theories of justice is one which may become difficult when crime or social responsibility are in issue. However, there is one class of dispute for which it may be possible to achieve a result which follows more closely the subjective ideal of fairness without state intervention.

Alternative Dispute Resolution has developed over the years and has burgeoned in the latter half of the twentieth century for two, perhaps three, main reasons. I suggest that there have been two practical reasons and a moral reason. The practical reasons have to do with the business of state Courts.

Firstly, increasing Court business, both in crime and in civil actions, has meant that the state has less time to devote to inter-partes issues, matters that concern only the disputants, so that litigation has become associated with delay. Justice delayed is, of course, justice denied.

Secondly, lawyers have developed procedural skills, not to facilitate the administration of the law, but to delay it further and sometimes to frustrate it completely. There is nothing new about that, the laws delays ranked with the oppressor's wrong and the proud man's contumely in the litany of outrageous fortune that drove Hamlet so nearly to end his life with a bare bodkin.

Those are reasons to wish to avoid the Court if you seek a swift answer to a dispute. The moral justification for taking justice into our own hands, however, is of much older provenance. It lies in the notion that we have a duty to deal fairly with one another, and in the concept of accepting the judgement of one's peers. If you and I differ, we have a wide choice of ways of dealing with our differences - and they are under our control.

I'll take a moment to review the choices we have, if I may. Others will take you into the practical detail. My aim now is to show you that there is a kind of continuum of approaches and techniques open to us, whether as individuals or as commercial entities, capable of resolving all our differences at various levels.

First and perhaps safest and best, if you and I differ, we can accept our differences and walk away. Live with them. See perhaps if the passage of time will resolve them - what Beauchamp[1] called "natural death closure".

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[1] Tom Beauchamp, *"Ethical theory and the problem of closure"*, *Scientific controversies* - Englehardt & Caplan ed., Cambridge Univesity Press, 1987. ISBN 0 521 25565 1

Next, if we really need an answer to our differences, we can attempt to negotiate a solution between us. That is interesting, because we are absolutely free to agree anything that suits us both as reasonably fair in the circumstances, even to the point of making a new deal altogether. Provided we do not agree to do anything that is actually illegal, we have complete freedom and the law relating to our former contract, or our former differences, is completely irrelevant.

We can bring others into our dispute. We can engage professionals to negotiate for us, but that begins to be expensive: tens, perhaps hundreds of pounds per hour.

More usually, we may look to a third party, someone we can trust, and who understands our business, to help us find a fair solution. He may be a member of the same trade association, he or she may be someone who is known to be fair-minded and knowledgeable. There are several ways to use such a person.

- We can ask them to act as conciliator or mediator, to help us towards an agreement.
- We can ask an expert to give us an expert opinion and we may agree to be bound by what he or she says, or we may just take that opinion into account in our negotiations

- We can give this third party the task of a so-called "adjudicator[2]", a term which has come to mean someone to give a decision which is binding, but subject to a further process, such as litigation or arbitration.

- The third party can be appointed as an arbitrator. Again we may agree to be bound by the arbitrator's decision or not as we please[3].

Some of these processes are more or less close to the law. Construction adjudication in UK is a recent creation of statute, although it has long been used in construction overseas.

Arbitration is an interesting activity, a hybrid activity, because, although its origins are in the custom and practice of merchants, it has become widely recognised in law and most countries have statutes, not to regulate arbitrations per se, but to regulate those arbitrations which the Courts are to recognise. It is quite difficult to appreciate the distinction between arbitration and processes at law, so closely have the two come together over the years. However, the distinction remains - in arbitration the parties obtain their own decisions, albeit through the agency of a tribunal they themselves have created.

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[2] See, for example, the *Housing Grants, Construction and Regeneration Act 1996* at s. 108

[3] Here, consider s 58 (1) of the Arbitration Act 1996 - *"**Unless otherwise agreed by the parties**, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them."*

False distinctions are sometimes made between these ADR processes, They are convenient for academic study, but they do not stand up to meticulous analysis. For example the twin pillars of natural justice, that no one should be judge in his own cause and that both sides should be heard, are as valid in private negotiation and decision making as they are in arbitration or in the Court. They are a moral obligation of our human condition.

It is sometimes said that a mediator cannot go on to arbitrate or adjudicate[4], yet no less a lawyer than the late Sir Michael Kerr undertook precisely that task when he was asked to do so. Isn't that the merchant tradition at work? You and I cannot agree about the quality of a cargo of beans, so we go to a colleague in the market and say to him, "Please help us to see if we can find an agreement and, if that isn't possible, we'll abide by whatever you decide." Nowadays, the Americans call it "Med-Arb", but isn't it all common sense?

And that is the keynote, the one point I wish to leave with you as we move into the more detailed forum. In Dispute Resolution, we have a choice - to have recourse to the power of the State or to adopt an alternative path and to take justice into our own hands. The great step forward of the late twentieth and early twenty-first centuries is that the judiciary and the independent dispute resolution sector, if one can call it that, are at last learning to live together.

In this University, we have been developing a theory and philosophy of Independent Dispute Resolution, because the history of the subject in both common law and continental jurisdictions has been seen as a matter of jurisprudence, rather than as I believe it to be, a matter of communication and the human condition.

For myself, I believe that John Rawls was right to argue that *each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.* I see the use and recognition of methods of ADR, or IDR, as a practical example of that personal inviolability in action and I see the principle of Justice as fairness, another concept of Rawls, as lying at the root of all our IDR processes. My work on arbitration and IDR theory is directed to the development of that principle. I leave it to you to decide to what extent you can detect it in the interesting and practical materials which follow.

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[4] See *Glencot Development and Design Co Ltd - v- Ben Barrett & Son (Contractors) Ltd* (13 February 2001, TCC) http://www.adjudication.co.uk/cases/glencot.htm