JUSTICE OUTSIDE THE COURTS: ALTERNATIVE DISPUTE RESOLUTION AND LEGAL PLURALISM *By: Prof Dr. Shad Saleem Faruqi* : *Universiti Teknologi MARA*

To many people the luster of the legal process radiates the promise of justice. Many of us have been brought up to believe that an independent judiciary and a fearless Bar can protect our rights, preserve our liberty, secure our property and render to everyone his or her due - both by way of punishment and by way of benefit.

It can hardly be doubted that judges and lawyers play an important role in actualising the ideals of justice under the law. A modern society without courts and a legal profession is unthinkable.

Having said that, it must also be observed that the problems and challenges of justice are so immense that no single institution or cluster of institutions and no single process can by itself banish the darkness of injustice, produce a just ordering of society, ensure a fair distribution of material and legal resources, safeguard the rule of law, promote equality, ensure proportionality in punishment, and protect entitlements and legitimate expectations. The demands of substantive and procedural justice are so monumental and multi-dimensional that no law, no institution and no method is adequate to the task.

It is also being increasingly recognised that in attempts to resolve disputes, litigation is only one choice amongst many viable alternatives. In every society a large number of legal and non-legal, formal and informal, contemporary and customary principles, methods and institutions exist to rectify wrongs and promote remedies.

In all social systems, the formal, enacted, written law of the state co-exists with a large corpus of non-state law. Sociology and historicism recognise that the centre of gravity of the law-making process lies not in Parliament but in society itself.

The tendency in modern legal systems, especially those wedded to the common law tradition, is to aggrandize the judiciary, to place it at the centre of the legal cosmos and to exaggerate its role in, and its capabilities for, actualising the goals of justice and the rule of law. It needs to be stated, at the risk of sounding heretic, that the judicial technique plays only a marginal role in the resolution of disputes in society. When invoked, the judicial process merely supplies band-aid solutions to problems of vast magnitude.

A mature theory of dispute-resolution must encompass all institutions and processes - whether legal or non-legal, formal or informal, contemporary or customary - to further the end of settling disputes by smoothing away discords.

This essay will touch on some such institutions and processes. It will point out that in Malaysian society, in addition to arbitration, mediation and conciliation, there is a wide range of other legal and non-legal alternatives for coping with the conflict stirred by public and private law disputes.

It will also plead for a revival or strengthening of many historical, social, customary and religious means for ordering human relations, resolving disputes, maintaining social harmony and preserving an idea of communitarian justice.

THE DARKER SIDE OF LAW AND LITIGATION

The judicial process was meant to provide an effective and impartial mechanism for redressal of grievances. It was meant to solve some of society's problems. Sadly it has become part of the problem !

From a long litany of complaints against the judicial process the following need to be highlighted.

Procedural justice, substantive injustice.

It is claimed that justice is secreted in the interstices of procedure. It is true that between procedure and substance there is a cycle of interaction. But it is equally evident that in many cases the courts go through the motions of justice to reach results which are legal but hardly equitable. The process, not the result, seems to be the dominant consideration. Technicalities of procedure often thwart substantive issues from being raised. The success of a pleading does not depend on its intrinsic merit but on the brilliance (or otherwise) of the advocacy.

The law of evidence is not about truth but about proof. Exclusion of hearsay evidence ensures that false evidence is not admitted. But it also results in rejection of eminently truthful testimony. The parole evidence rule, the rules of limitation, the mind boggling technicalities of procedure, have very little to do with justice. They also diminish respect for the legal system in the minds of litigants whose substantive case was clearly just but who got knocked out on. mere technicalities.

Structural Issues

Judges are servants of the law, not its masters. They face serious dilemmas when the law at hand is iniquitous or reflects structural injustice. For example, indigenous communities occupying native land without formal titles are often displaced because the formal law does not recognize their rights over the land. Often, children of poverty-stricken families have difficulties proving their citizenship status because their illiterate parents did not register them with the National Registration Department in accordance with legal requirements.

The English philosophy of legal positivism poses problems when a human rights conscious judge is confronted with` unjust laws and institutions. He cannot, like the natural lawyer, lean on the principle *"lex injusta non est lex"* (unjust law is not law) and give preference to transcendental values over posited and enacted rules. At best he can interpret existing materials creatively and read into them some implicit safeguards. But such kind of reformative activity is bound to be sporadic and piecemeal and cannot solve deep-seated structural problems of injustice.

Adversarial System

The polarizing blunt instrument of adversarial litigation supports competitive aggression to the exclusion of reciprocity and empathy. It "expresses a chilling Hobbesian vision of human nature. It accentuates hostility and not trust. Selfishness supplants generosity. Truth is shaded by dissembling." [1]

The adversarial system resolves conflicts in a way that destroys rather than preserves erstwhile relationships. This system is inappropriate for disputes between family members and business associates. Recourse to the highly publicized judicial process for domestic violence cases often results in fracture of family ties. If one party loses his/her means of support as a result, there is very little that society does in the post trial period to help the helpless.

The adversarial framework requires judges to choose one victor and one vanquished in a fair contest between two equal parties. But where the parties are not equipped equally, and the judge does not interfere to ascertain the truth, a miscarriage of justice is most likely. In countries with high rates of unrepresented accused, the adversarial system leads to horrible results. In another area, that of citizen-state disputes, the citizen is hardly on a level playing field with the government and the adversarial system often works to his detriment.

I am tempted to suggest that trials by adversarial contest are a relic of our not so civilized past and must in time go the way of the ancient trial by battle and blood.

I also wonder whether the French system of droit administratif, with its peculiar system of separate and independent administrative tribunals to try disputes between the citizen and the state, provides a better forum and better range of remedies in public law disputes.

High Cost

The high cost of hiring a lawyer dissuades many a citizen from seeking judicial enforcement of his rights. It does not speak well of a legal system if I wish to recover my stolen cow from someone and have to sell my house to recover it! The government's and Malaysian Bar's gallant efforts at providing legal aid help access to the legal system. But legal aid does not solve problems which are structural in nature.

Delays

Besides high costs, the delays inherent in judicial proceedings encourage many citizens to seek non-judicial remedies for enforcement of their rights.

Separation Of Powers

Two sacred doctrines of contemporary legal systems - the doctrine of separation of powers and the rule of stare decisis - have a bearing on the ability of judges to do what justice requires. The doctrine of strict separation by Montesquieu is often used by judges to justify self-restraint. For example, in a recent case,

[1] J. Auerbach, Justice *Without Law,* Oxford University Press, 1983, p. viii.

Mohd Yusof Mohamad v Kercjaan Malaysia [1999] 5 MLJ 286, the learned judge said: "Any judicial interference, in matters where the executive had exclusive information and upon which it had acted, could be readily construed as judicial encroachment upon the independence of the executive."

There are some well recognised categories of decisions which are so mixed up with executive policy, or politics or non-legal factors that the courts are unwilling to review these decisions by reference to judicial standards. This is the concept of nonjusticiability. Whenever it is invoked successfully, the ideals of the rule of law are set aside.

Stare Decisis

The doctrine of stare decisis bids judges to respect the principles of the past in the interest of certainty and predictability. But with all due respect, certainty and predictability in the law are good but justice is better. As Lord Atkin said: "when these ghosts of the past stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred." **United Australia Ltd. v Barclays Bank Ltd**. [1941] AC 1 at 29.

Lack Of Initiative

The judicial work, unlike the work of the legislature and the executive, is characterized by lack of initiative. Courts of law do not have a roving mission to discover and correct errors of law or abuse of power by administrative authorities unless a citizen knocks on the door of justice and asks for judicial intervention.

Executive Policy

Judicial control of the administration operates on the circumference of the administration rather than becoming an integral checking force therein because the underlying policy assumptions of executive decisions are generally not the subject of judicial intervention.

Locus Standi

The rule of locus standi provides a procedural hurdle against those seeking judicial intervention for alleged wrongs. Though this rule has been liberalized in many countries like India and the USA, its obstructive potential is considerable. It tends to treat civic minded citizens as busybodies and not as public benefactors.

In sum the legal process can be threatening, inaccessible and exorbitant for the weaker sections of society. Litigation encourages the assertion of legal rights but only for those who have the ability to pay. To some extent the judicial process, despite its pretensions for impartiality, is more likely to sustain domination than to equalise power.

Exclusive reliance on the judicial process for achieving justice in society in neither desirable nor possible.

Other techniques for dispute resolution must be explored.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR refers to the wide range of alternatives for coping with the conflict stirred by disputes between citizen and citizen, citizen and the state and between international parties. According to Auerbach, "litigation is only one choice among many possibilities ranging from avoidance to violence".[2] ADR refers to the many alternative methods of resolving disputes other than through litigation/adjudication in the ordinary courts.

In Malaysia the following techniques of ADR seem to exist:

1. Arbitration under the Arbitration Act 1952; the International Court of Arbitration and the Kuala Lumpur Regional Centre for Arbitration.
2. Negotiation, Mediation and Conciliation.
3. Statutory Tribunals or adjudicatory bodies like the Industrial Court, Public Services Commission, Professional Disciplinary Bodies, Rent Tribunal, Public Services Tribunal, Special Commissioners of Income Tax, Social Security Appellate Board, Commission for Workmen's Compensation, Commodities Trading Tribunal, Appeal Board for Planning Matters, Registrar of Trademarks, Collector under the Land Acquisition Act, Registrar of Societies, Licensing Authorities and Adjudication by Ministers.
4. Commissions of Enquiry.

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[2] Jerold S. Auerbach, *Justice Without* Law, Oxford University Press, Oxford, 1983, p. 3.

5. Special bodies have recently been created to handle small claims, consumer complaints and complaints on insurance matters.

6. The proposal for an Accident Compensation Commission and an Independent Police Complaints Authority has been mooted but not yet accepted.

7. In addition to the normal courts, there also exist the following courts with specific jurisdiction:
   - Syariah Courts with civil and criminal jurisdiction.
   - The Penghulu's court (court of the village head-man)
   - Native Courts in Sabah and Sarawak.
   - Juvenile Courts
   - Court-Martial

8. Under the rules of court several procedures exist to enable parties to force their opponents to compromise or settle the dispute and avoid the trial: [3]
   - Payment into Court if defendant admits liability and wishes to avoid costs (0.59 r 5 (b)) Rules of the High Court 1980.
   - Offer of Compromise
   - Notice by Admission
   - Defence of Tender
   - "Without prejudice save as to costs offer."

9. Parliamentary devices
   - Question time in Parliament.
   - Debates and Motions.
   - Parliamentary Committees.
   - Constituency work by MPs.

   Parliamentary opportunities to discuss issues of public concern and to highlight the grievances of citizens against the state serve to expose official mismanagement, unfair treatment of citizens and administrative bungling. Parliamentary scrutiny of the government may help to provide remedies against maladministration and reduce the citizen's need to resort to the judicial process.

   Members of Parliament are not only legislators; they are also problem solvers, social workers and spokespersons for their areas. Many MPs use their parliamentary allowance to set up Service Centres to attend to constituents' needs. These Service Centres are highly popular and process hundreds of cases between citizen and citizen and citizen and state.

   One commentator attributes the importance of such non-legal remedies to "legal under-development." This is an ethnocentric view and rests on the presumption that legally conscious people must necessarily be litigation-hungry.

10. The print media especially the Letters to the Editor Column, and the Actionline and Hotline service that some newspapers provide to their readers allows an informal, expeditious and effective grievance-remedial technique to the citizens. In the area of human rights, the international media plays a significant role to highlight abuses.

11. The Public Complaints Bureau which is Malaysia's version of the Scandinavian ombudsman and the British Parliamentary Commissioner of Administration supplies an internal corrective mechanism within the administration.

12. The recently established Human Rights Commission is charged with the responsibility of investigating complaints.

13. Intervention on behalf of a complainant by a non-governmental organization (NGO). Many such consumer, environmental and human rights NGOs exist with varying degrees of effectiveness.

14. The departmental complaint box.

15. The Anti Corruption Agency.

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[3] Choong Yeow Chow, (1999) 26 JCML 85-117

16. The Auditor General.
17. Internal or Departmental inquiries.
18. International pressures.

In a third world setting where legal literacy is low; legal aid is in its infancy; and people are not litigation conscious, extra-legal and informal remedies are much more effective than legal ones in securing redress against maladministration and unconstitutional conduct. One can point to Service Centres run by political parties; exposes of gross injustices by the media; intervention by MPs on behalf of their constituents; parliamentary committees; the Biro Pengaduan Awam; the Human Rights Commission; and actions by determined NGOs that seem to be much more effective in solving citizens' grievances than the processes of the courts. We should get away from the idea that a court is the only place in which to settle disputes. People with claims are like people with pains. They want relief and results and do not care whether it is in a court-room with lawyers and judges or somewhere else.

LEGAL PLURALISM

Legal pluralism can help to supply alternative dispute resolution techniques. In the *Journal of Legal Pluralism and Unofficial Law, No.* 39 of 1997 at page 155, legal pluralism is referred to as `legal polycentricity'. Elsewhere, a state with legal pluralism is described as a multi-law state. According to Gordon R. Woodman,[4] the concept of legal pluralism refers to the following legal arrangements:

(i) "the existence within a particular society of different legal mechanisms applying to identical situations" (Vanderlinden)

(ii) "the situation in which two or more laws interact" (Hooker)

(iii) "that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs" (Griffith)

(iv) "the situation, for an individual, in which legal mechanisms arising from different orderings are potentially applicable to that situation" (Vanderlinden)

(v) "a situation in which two or more legal systems coexist in the same social field" (Merry)

(vi) "the condition in which a population observes more than one body of law" (Woodman)

(vii) "different authorities in the different fields of regulation use different sources of law and in different orders" (Weis Bentzon)

(viii) "polycentrism means that law is engendered in many centres - not only within a hierarchical structure - and consequently also as having many forms".

Legal pluralism refers to the situation where a legal system allows a variety or multiplicity of substantive rules, from many sources, on the same point; or where a field of social relations like marriage is governed by more than one set of laws.

So defined, legal pluralism probably exists in every legal system! As Woodman, quoting Griffith, says: "law everywhere is fundamentally pluralist in character".[5] The *Journal of Legal Pluralism and Unofficial Law*s records many instances of legal pluralism in Latin America, Europe, Africa and Asia. For example in the African state of Benin, "inheritance of land is governed in part by customary indigenous law in a form recognised and enforced by the institutions of the state, and in part by the French Civil Code introduced in the period when Benin was the French Colony of Dahomey".[6]

In almost all legal systems, the formal, written law of the state competes with informal, unwritten, non-state laws. Such non-state laws may be known by many names: folk laws, indigenous traditions, *lex--non scripta*, ethnic groups' laws, and traditional laws. In Malaysia, for example, codified Islamic law, uncodified Malay *adat* (custom) and native laws of Sabah and Sarawak coexist with the ordinary legal system. Legal pluralism

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4 Gordon R Woodman, Book Review of Hanne Peterson and henrik Zahle (eds.) *Legal Polycentricity: Consequences* of *Pluralism in Law, 1995* in *Journal* of *Legal Pluralism and Unofficial Law,* Number *39, 1997, pp. 155-161.*

5 Ibid, *157*

6 ibid, no. *40, 1998, p. 183*

can also be said to exist because statutes are supplemented by, and often compete and clash with, common law; the common law is supplemented by equity; public law exists side by side with private, contractual law; secular law is supplemented by divine law; and national laws exist alongside international rules dictated by the increasing spread of globalisation. In addition, the ordinary laws of the land are supplemented and superseded by emergency laws enacted under Article 150 of the Constitution. For example, on the issue of corruption, two parallel laws exist - the ordinary Prevention of Corruption Act 1961 and an Emergency Ordinance on the point. The Attorney General has the discretion to pick and choose which law to apply.

Comparison Between Legal Pluralism & ADR

1. ADR is primarily procedural. It is about how a claim must be processed and about how a dispute must be resolved. Legal pluralism, on the other hand, encompasses both substantive and procedural aspects. The existence of legal pluralism means that on a particular point, more than one system of substantive law exists. There are no universal rules about whether the pluralistic laws must be administered by different or the same courts.
2. ADR is primarily about the forum in which a dispute is to be resolved. ADR does not dictate the substantive content of the law to be applied. Thus a contractual matter may be litigated in the ordinary courts or be subjected to arbitration etc. under ADR. In both cases the ordinary law of contract will apply. Legal pluralism, on the other hand, supplies an alternative law to be applied to the situation at hand.
3. In the application of ADR, there is generally no competition between conflicting systems of laws as there invariably is when legal pluralism exists.

Does ADR Create Legal Pluralism?

The issue is exceedingly complex. From a superficial point of view, it appears that ADR is about forums, about where the dispute should be processed. Legal pluralism is about what law is applicable. It follows, therefore that the implementation of ADR is not meant to create legal pluralism but only to supplement the court system of Malaysia.

However there may well be situations in other jurisdictions where the existence of an alternative dispute resolution mechanism indicates the existence of a parallel legal system. For instance if "trial by battle" is allowed as an alternative method of resolving the issue, this will clearly point to the recognition of an alternative system of laws. Perhaps one can conclude that the existence of ADR does not prove the existence of legal pluralism. But the existence of legal pluralism may well permit the operation of ADR.

ADR and Legal Pluralism in Malaysia

Many legal systems including those in India, New Zealand, the United States, and many African and Latin American states have had to grapple with the demand of the minorities for legal pluralism in the matter of personal laws.

In many African states, legal pluralism is allowed because of nationalistic fervor which brought about the end of colonialism and which demanded that African traditions be revived to restore African pride and dignity.

In Malaysia, Muslims are allowed to maintain their religious laws for certain purposes (Articles 74 & 77 and List 11, Item 1 of the Ninth Schedule of the Federal Constitution). Likewise the natives of Sabah and Sarawak are permitted to practice their indigenous traditions in Native Courts (Schedule 9, Item 1 and Article 95B of the Federal Constitution).

The entire sweep of Malaysian history, especially Malay history will testify that the legal process was, up till recently, secondary to alternative means for ordering human relations, resolving disputes, maintaining social harmony and preserving an idea of communitarian justice. Arbitration, mediation and conciliation reflect the values and ideas of Malaysian society far better than the gladiatorial combats of an adversary system of justice. But with colonial conquests the "legalization" of Malaysian society was seen as a sign of civilisational progress. In the days of the British, indigenous legal systems were pushed to the periphery and the triumph of formal justice with its presumed virtues of rationality, consistency, impersonality and predictability was regarded as one of Britain's greatest contribution to Malaya. From an anthropological point of view, however, the "legalization" of the Malay community had its darker side.

Firstly, it led to the adoption of a narrow and artificial concept of law.

In legal systems wedded to the British brand of legal positivism, religion, ethics and morality are excluded from the definition of `law'. So are customs and social practices even though their norms contribute to community life and lend stability and legitimacy to social arrangements. Non-state law is refused the appellation of law because it lacks the instruments which in any system of law provide the minimum requirement for enforcement. "The absence of codes, constables and courts backed with a central authority upon which their legality and legitimacy may be founded "[7] is normally put forward as the justification for confining law to posited norms. However a long line of anthropologists like Gluckman and Fallers have observed that the tribal law of many African communities-has all the attributes of law required by John Austin. [8]

“It is noteworthy that the religious and customary law of the Malays and the customary law of the natives of Sabah and Sarawak seem to meet the requirements of "codes, constables and courts." The laws exist in several juristic expositions. The enforcement machinery is in place. People feel bound by the law and have internalized the non-state norms. Malay custom is not static and is capable of growth and change. Rulings on religious and customary matters are available free of cost from duly constituted authorities. There is a court system with a system of appeal. As to the problem of justice and equity and the subjection of custom to the judicial test of reasonableness, Hamnett points out that "this is usually little more than an ethnocentrism."[9]

Secondly legalisation of community led to litigiousness and encouraged people to inverse the "love thy neighbor" command to an invitation to "sue thy neighbor."

But anthropological evidence from earlier societies shows persistent patterns of rejection of lawyers and courts in favor of alternative means of settling discords. Auerbach informs us that in New England congregations in the USA, among Quakers and Mormons, and in religious utopian communities, Christian doctrine encouraged alternatives to the formal law. The Chinese in San Francisco, the Scandinavians in Minnesota and Chamber of Commerce businessmen resisted the formal processes of the law and instead strove for social harmony, mutual access to conciliation techniques and mutual trust and responsibility.[10] This is in contrast with today's "hyper-lexis" which expresses the values of an individualistic, capitalistic, win-at-all cost culture.

In the whole sweep of Islamic and Malay history, the role of lawyers and courts was subordinated to alternative means of settling discords in society. Family and community involvement in maintaining social harmony was emphasised. Negotiation and compromise were cherished values. It was considered improper to shame an adversary. He should be allowed to "save face". Marital disputes were committed to a *hakanz* (a mediator) to resolve. The procedure of the courts was inquisitorial, not adversary. Complaints against the government and against traders in the market could be investigated by a *Muhtasib* - an Islamic ombudsman administering the system of *Hisba*. Like the French *Conseil d'Etat,* a developed system of *Mazalim courts* existed to oversee mal-administration in the government. Religious authority did not belong to any high priests. It had to be earned by piety and popular acceptance. Religious and community leaders advised on all personal and commercial disputes and tried always to find a middle path after hearing all parties.

The concept of law was holistic and included principles and doctrines contributed by religion and custom. Justice and equity rather than rigid adherence to rules of law were emphasized. The law of crimes included principles of compensation from the law of torts. The law of theft could be suspended if the crime was committed due to force of circumstances during a famine. What is *haram* (forbidden) could become permissible if no other choice was available. An illegitimate child could be deemed legitimate if the biological parents had a genuine belief in the legality of the relationship. Squatters had equitable rights over public land provided they had revived dead land for a lawful purpose (the concept of *ihya al-mawat)*.

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7 Lakshman Marasinghe, (1998) 25 JMCL 12

8 ibid at pp. 13-14

9 ibid

10 J. Auerbach, Justice Without Law?, pp. 3-4

CONCLUSION

How people dispute is a function of how and whether they relate to each other. Dispute settlement procedures reflect the most basic values of society. They indicate the ideals people cherish and the quality of their relationship with others.

We need to explore and revive the folkways of our culture; to strengthen non-legal, informal, expeditions and inexpensive remedies for solving grievances; to supplement court-processes with the widest range of ADR techniques. We need to restore the sense of community, harmony, trust and reciprocity and to involve village elders, community leaders and mosque and church officials in informal, neighborhood tribunals to smooth away discords and to make justice accessible to all. The tension between legality and justice prevalent today needs to be eradicated.

In Malaysia the institution of the village Penghulu and the District Officer used to play an active role in informal adjudication of disputes and this role needs to be revived. Values historically associated with informal justice should again gain our attention.

But we need to be aware of the seductive appeal of alternative institutions. ADR techniques (like arbitration) should avoid the same vices as in litigation.

A two-track justice system, dispensing "informal justice" to the poor and "justice according to law" to the affluent has its own dangers.