
Costs of Cooperation Rather than Competition in the Provision of Justice?

The civil law reforms starting in the USA and exemplified by Lord Woolf's reform package(1995; 1996) in the U.K. are considered in the context of diminishing legal aid and pressure on judges to become case managers responsible for the economic performance of their courts. The reforms are being sold in a package that promises a fairer system for all, greater access, cheaper and quicker justice, less stress and greater party control. This move from the welfare state to a civil society is analysed using Habermas's critical theory in an effort to uncover and debate its assumptions. Specific recent changes in civil procedure in Queensland are referred to in this context.

Law and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress (King 1963)

The public is aware of the debate surrounding the impact of the new accountability procedures in their application to public health, education and more recently tertiary education sectors. The effects of new accountabilities on the democratic process in the context of our public justice system and its outcomes in the longer term are only now starting to be considered (Hanger 2002; Hinchy 2002). The work of the critical theorist Habermas (1971 ; 1987) provides a useful mechanism by which this process of change can be understood and critiqued. Habermas's theory of communication, based on what he describes as 'system' and 'lifeworld', depicts the colonising of the lifeworld of law as institutions by systems, or the procedural imperatives of the law. He argues that this occurs at two levels. First, the invasion into the provision of justice of accounting systems language leads to informalism, namely the adoption of alternative dispute resolution (ADR) methods. Second, the lifeworld method of conflict resolution through informal mediation is itself being colonised by the law through the process of juridification (Langer 1998). The accounting technologies demand a new overriding objective namely efficiency, speed and effectiveness (Andrews 2000).¹

The swift way in which these reforms are being taken up around the world has left little room for public debate, other than in some rarefied academic and elite spaces. Citizens, while gradually experiencing the impacts,

have little ability to construct their opposition, the horse having already bolted (Spigelman 2001).² Government needs to be able to consult with its citizens involving them in policy making to develop solutions in a proactive way rather than allowing colonising media to determine public policy in crisis situations (Lau 2000).³

There is a need to look behind the systems justification at the lifeworld dimensions and see who really benefits from these reforms. A valid argument is that the accounting changes are not introduced to solve specific problems such as cost and access to the legal system (these have been around for hundreds of years) (Auerbach 1983:95) but rather to express an ideological commitment to the free market economy for the benefit of the agenda-setting elite, wealthy groups and corporations (Sibley 2002).

The question arises whether the civil reforms are likely to achieve what proponents claim, specifically in regard to access to justice. Secondary sources are reviewed for the growing literature both justifying (Harris 2000; Silbey & Sarat 1995:437)⁴ and criticising these reforms (Andrews 2000; Galanter & Cahill 1993; O'Brien 1999) which include the adoption of ADR methods in an increasing juridification of the settlement process. The effects of the reforms on the access to justice, rule of law and wider democratic and cultural process are considered. It is clear that some writers, judges and lawyers are concerned about the different

conceptions of appropriate economic and social policy and its implications in the reforming process (Auerbach 1983; Spigelman 2001). The lack of consideration of such broader values diminishes society.

Shared values such as democracy and equal treatment under the law also shape citizens' desires. Without these values, citizens are more likely to focus only on short-sighted services based on narrow interests (Lau 2000:27).

Reforms are so wide-ranging as to prohibit a thorough overview; specific reference is made to two particular Queensland reforms. Part 2 of the *Uniform Civil Procedure Rules* provide for summary judgement and s102 (3) of the *Supreme Court of Queensland Act 1991* introduces case appraisal. Both are designed to reduce the courts' caseloads by preventing matters reaching trial and by diverting matters once introduced in the courts. There is an urgent need to open this debate and look at the implications of institutional and societal changes affected by the civil procedure reforms. The way disputes are resolved and the practice of the law has impacts for concepts such as the rule of law. The economic theory of allocative efficiency treats recipients of justice as 'clients' with the courts being seen as service providers. Such notions deny the broader role of courts as political institutions that, through the rule of law and the provision of substantive justice, act in the lifeworld of norm creation and are not just there for litigant clients.

The law has a long tradition of providing a mechanism for society to have its laws upheld and observed based on an understanding of the rule of law. Sir Laurence Street, former Chief Justice of NSW, has clearly defined the position of the courts as having an inherent sovereign duty as the fiduciary custodian of the rule of law to apply and enforce it. CJ Street affirms that there can never be any other mechanism for this function just as we cannot:

...countenance any alternative parliament or legislature; we may provide, and indeed, we do provide, additional or delegated

mechanisms whereby to legislate or regulate. Again, we cannot countenance any alternative to the executive authority of the sovereign such as, for example, a military executive power structure. And so it is with the judicial branch of government, the court system (Street cited in Hinchy 2002:10).

Political Context

Gone are government by bureaucracy, direct planning and citizenship with universal entitlement bounded by the rhetoric of equal opportunity. Instead states use market control, with contracts, audits, risk management and the competitive, responsible self and community, defined in neo-liberal terms. The decentralised but increased control by the state is achieved through its direct control of funding formulae linked to contractual outcomes which set defined state objectives in a way that ignores the local community vision (Harrington 1985:64). A example of how this works is government influence over specific tertiary sector courses with the encouragement of some professions and discouragement of others (such as law) through its HECS fee structure (Finney, Leslie & Stojanovich 2002).⁵

The ideological commitment to small government inspired by Milton Friedman (Moore 2003) in the Thatcher (Bevan, Davis & Pearce 1999:240) and Reagan years – resulted in deregulation and an attack on the Keynesian model of the welfare state. No longer are taxes used to provide for all to have access to justice through a fair and democratic legal aid system (see Regan 2000). Somewhat surprisingly, this commitment to small government was taken up in the West by subsequent labour governments – Hawke, Blair, and Clarke and is still being followed.

Contemporary public reform is more likely to be driven by ideas, often borrowed from private sector management literature. In OECD countries, several political schools of thought such as Tony Blair's "New Labour", Bill Clinton's the

“Third Way” and Gerhard Schroeder’s “New Centre” are attempting to balance traditional ideologies with a more pragmatic perspective that focuses on economic performance (Lau 2000:37).

This ideological perspective persists despite the murmuring following the ENRON and HIH (Dixon 2002) collapses, and September 11, that there is a place for bigger and more interventionist government in the market place to protect society.

A civil society may argue that temporary hardships and suffering are necessary if people are to stand on their own feet and overturn a culture of dependency. Lindquist, in an OECD report, has suggested a ‘common vision shared across different parts of government: that governments actively seek ways to best use tax dollars and public resources, no matter the political history or administrative context’ (Lau 2000:40). This statement is indicative in its noticeable omission of an important element of the equation, namely the ‘social context’. Economic theory that sees the market as a site for allocation and efficiency alone fails in its inability to accommodate irrational/emotional beings acting in a social sphere.

Governments are tending to perceive themselves as businesses with the taxpayer much like a shareholder whose interests must be kept uppermost at all costs. This does not sit well with the concept of government and society regulating through its tax system the redistribution of income in the interests of a healthy functioning civil society for all, not just the components who are taxpayers. Society is responsible for children, the aged, the imprisoned and all members, including non-taxpayers.

Historically governments have made justice problematic by claiming inefficiencies. This perennial argument has been used to demand constant reform intended, it is claimed, to lead to efficiency and fairness (Auerbach 1983:115). One only has to look at the historical record of ADR, proclaimed as the solution of problems in the past. It didn’t then, and now is just as unlikely

to, solve these problems (Auerbach 1983; Harrington 1985). The question is will the public realise too late and demand a return to the goal of ensuring principles of substantive justice aligned with the rule of law to balance economic interests.

Customer surveys have shown little dissatisfaction with the adjudication system⁶ (see Silbey 2002). Yet government funding is being transferred to private providers of ADR and the question arises how this compares with the cost of providing legal aid and well-resourced public courts. Leibenstein’s (1987) concept of non-competition leading to greater organisational inefficiencies, known as X-efficiency, can be used to justify opening courts to competition in the provision of dispute settlement. However in application to social and political institutions this places the notion of value for money, higher than other values such as openness, fairness, impartiality, legitimacy and honesty, all aspects that are important with social institutions such as the courts. There is a risk that mediation will attract a new market of disputes that would have never reached the courts previously, instead being resolved in the social/ lifeworld. Any savings of legal aid costs may be more than absorbed by the attraction of new cases to ADR (Bevan, Davis & Pearce 1999:248).

The response in the legal sphere has been a move to increase judicial control through case management and civil procedure reform (Andrews 2000; O’Brien 1999; Spigelman 2001). NSW Chief Justice Spigelman describes the new managerial approach as adapted from the private sector, which presupposes that free operation of market forces equals an efficient use of resources. This approach uses a hierarchy of recording and measuring strategies dependent on being ‘...measurable, concrete, collectable at reasonable cost and comparable, either between institutions or over time for the one institution’ (Spigelman 2001:2). In Australia the *Report on Government Services* is used to provide these tables of comparison which, as Chief Justice Spigelman points out, contain footnotes with qualifications that are often ignored by the media and others who wish to use the simple power of numbers to argue their case (2001:3).

The recent focus on measurement in a structure of decision making perceived to be rational – overriding and often replacing an approach, which emphasises the significance of judgment – is not new. In the United States there has been a succession of fashionable schemes: in the 1950s there was “performance budgeting”. In the 1960s there was “program budgeting”; in the 1970s there was “management by objectives” and in the 1980s the current approach developed culminating in the hierarchy of documentation required by the *Government Performance and Results Act 1993*. Each of the previous approaches was accepted to be a failure (Spigelman 2001:2).

Reform has often been introduced abruptly (Sullivan 2003). In the arena of health we have seen how public hospitals have been transformed into commercial enterprises and dependence on private insurance has increased, with rising premiums despite government promises to the contrary (Shultz 2003).⁷ Parallels can be seen to be developing in the reform of the justice system. Litigants have now become ‘clients’ and justice is a marketable commodity with sophisticated accounting and information systems introduced to report inefficiencies.

None of this takes into account the role of the courts in a democratic system of government (Moore 2003). Just as the role of hospitals was to treat sick people, improve community health and eliminate disease, now the overriding factor is cost considerations and efficient expenditure of taxpayer money. In the same way the settlement of the greatest number of cases with the least cost to government (taxpayers) is now the imperative, not whether justice (whatever that may mean) has been seen to be done in the minds of the parties and the public. The critical theory of Habermas provides a basis to critique the new business mentality introduced into the legal sector.

Habermas

Habermas introduced the term ‘legitimation crisis’ to capture the problems facing Western capitalist societies (1971; 1987). Habermas argues that the instrumental reasoning associated with capitalism is penetrating deeply into everyday experience. This is occurring through the colonising of the social sphere by system technologies such as accounting and the distortion of communication, so that the understanding of human values such as truth and honesty are replaced by the rationality of science and technology (Harrington 1985:48; Silbey & Sarat 1995:463). The instruments for invasion of the lifeworld are the process of identification and management of risk, extensive and derogatory public commentary, reports of system logic, and troubleshooting through mechanisms of internal self review, performance appraisal, reviews of management structure, policy choice in the market, staff reviews and external audit. By placing these important issues on political agendas through critical reports, tighter ‘big brother’ surveillance occurs. In the pursuit of market driven competitiveness where the citizens are encouraged to self-responsibility, the neo-liberal social settlement, already unstable, becomes dependent on ideology to manage and repress conflicts and power struggles that boil under the surface.

Habermas views social evolution as producing an increasingly complex and diverse society. According to Habermas (1987) society is composed of both ‘lifeworld’ and ‘system’. The lifeworld is the place in which we grow up, it is about the shared meanings, norms and culture that are developed by the group. These social communications create the commonly shared values and the background for the formation of a legitimate self in relation to society.

A successful world according to Habermas holds lifeworld and system in balance with the lifeworld holding priority. The system’s motivation is efficiency and consistency achieved through rational economic actions and accountability. Habermas’s specific formulation of the law, mirroring the system/lifeworld dichotomy, is the law as the steering

medium reflecting system concerns through the procedural aspects of the law, guiding the application of law and not concerned with substantive issues of right and wrong and the law as an institution. Law's role in the lifeworld concerns the collective morality applied by judges to address substantive issues of social concern so that it can mobilise social change: *Mabo v Queensland (No.2)*⁸ being a case in point.

Habermas distinguishes between two kinds of linguistic action in the lifeworld and system, namely success-orientated action, and understanding orientated action. Success-orientated action is associated with rational scientific knowledge and relates to 'work' and 'system'. Such reasoning is realised in the action of administrative areas of modern society coordinated by money and power. Capitalist ideological agenda-setters increasingly utilise this system language to erode the communicative arena of public debate in the lifeworld. The move toward the courts controlling cases restricts judges and lawyers to consideration of success only in terms of a profitable business.

Habermas argues for the reinvigorating of the public sphere by the opposition of the colonisation of the lifeworld that occurs often through the process of juridification, a process of increased legal regulation. Habermas identifies ADR as a method for the lifeworld to fight back against juridification or the invasion of the social space of informal dispute resolution. However, the ADR envisaged by Habermas is not the juridified ADR of today. With the enthusiastic uptake of ADR in the civil reform process, ADR has been invaded by the system and now is a tool for courts in their case management strategies used in the name of efficiency (Langer 1998:181 Tasson 1999).⁹

Lifeworld and system come into conflict in complex, capitalistic societies. The steering media that mediate between the lifeworld and the system are the institutions that are responsible for the invasion of the lifeworld. Rather than expressions of the lifeworld, that is, courts applying substantive justice as has become the understood norm in society,

the courts become the steering media by which the lifeworld is colonised when the court becomes an instrument for diverting cases to avoid overspending budgets, rather than applying justice.

Habermas's legitimation crisis arises because of inequalities that cannot be justified. Communication becomes systematically distorted when agenda-setter interests attempt by deception and public relations techniques to legitimate inequalities. Distortion also occurs when established interests avoid humanitarian and social concerns by the use of misleading rhetoric, such as the view that the public sector is less efficient than the private. This distorted communication is destructive of democratic institutions. Deceptiveness is epitomised by the reform of legal aid and civil justice under the rhetoric of access to justice. This concept is misleading when individuals find that it doesn't mean greater access to the courts but in fact the reverse, whereby there is an intention to diminish access to the courts by directing disputes to alternative mechanisms instead (Fiss 1995).

Big business prefers individuals to be part of a responsible civil society and not dependent on handouts from the state. A recent example is the Australian government's new 'shared-responsibility' policy in relation to indigenous peoples. Governments may boast of balanced budgets with improved state finances but at the cost of an ever-widening gulf in the inequality of its citizens, such that one must not only have an arguable case but one with certain prospects of success to be heard by a court. This leaves begging the fate of *Donoghue v Stevenson*¹⁰ (the snail in the bottle case) in today's world (Hanger 2002:4). That such cases are prevented from reaching a public forum undermines not only the development of precedent but also the opportunity for social change.

Charities and some NGOs are raising their voices in concern over the increasing number of citizens living in poverty. This suggests that a more useful measure of the health of a community is not whether it has a surplus budget but rather how it treats its most vulnerable (ABS 1996). How a society lives and responds are just as important gauges as inflation, interest rates and economic

recovery. Not all human needs can be resolved by dollars.

Chief Justice Spigelman advocates resistance to the move by states to invade the lifeworld sphere of the courts.

Courts do not deliver a “service.”

The courts administer justice in accordance with the law...they serve the people but they do not provide services to litigants... it is not simply a publicly funded dispute resolution centre. The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes – these are all public purposes served by the courts, even in the resolution of private disputes. An economist might call them “externalities”. They constitute collectively, a core function of government... the constitutional role of the courts... is incapable of reduction to qualitative measurement. The judgments of courts are part of a broader public discourse by which a society and polity affirms its core values, applies them and adapts them to changing circumstances (2001:8).

Civil justice reforms

Developed countries minimised the discrimination in access to courts and the type of dispute resolution obtained in the welfare state by the redistribution of taxes so that legal aid was available to those who could not afford to bring a matter to court. The Swedish system of legal aid provided an excellent example of democratic access to justice in operation, until its dismantling through reforms (Regan 2000).

The USA started raising questions in the 1970s about efficiency and fairness as part of the move to smaller government and economic

rationalisation (Harrington 1985:76). Concern was raised regarding the equity of having a government funded legal aid system to which allocative mechanisms of the pricing system had not been applied. With little solid evidence of the costs of individual conflict resolution procedures or ability to measure their efficiency or effectiveness there was still a push to informalism (Galanter & Cahill 1993; Zander 2003). What can be the basis for measuring justice: the dollar cost to parties; the cost to society for adjudicating disputes; avoiding conflict; settling disputes; whether one party is happy; whether both are happy or neither; whether fewer matters reach the courts; whether violence and social harmony are on the decrease or increase? What is the measure of the effectiveness and efficiency of a legal system? (see McEwen & Wissler 2002: 140-42). Indeed, as Chief Justice Spigelman questions, should these standards ever be appropriately applied to a judicial system?

It is not possible to measure the success of the courts in terms of crimes not committed, accidents that don't happen, disputes avoided by proper advice on compliance or by well formed drafting (2001:8).

For instance, how much settlement in ADR is due to the fact that it's conducted in the shadow of the law? This hidden fact emphasises that sometimes important results do not fit within the new accountabilities (Galanter & Cahill 1993:1341).

If ADR is cheaper, quicker and more efficient, are we going to see a rise in disputes seeking settlement? Studies undertaken by the RAND Institute for Civil Justice found that there had been no aggregate decline in costs or time for resolution of disputes with the introduction of ADR, thus reducing the claims for efficiency (Sinnar 2001; Abel 1981:246-47). The cost of litigation has been one of the most influential factors in achieving high settlement rates and the success of the courts in avoiding the number of matters that end in a trial. In this regard it has been a tool of the courts, aiding in their successful resolution of disputes.

This trend for reform, led by the United States and closely followed in the

UK and Australia, involves giving judges unprecedented control over the conduct of litigation (Ipp 1995). The new theory of management can be seen clearly in the new civil procedure rules implemented in England as a result of Lord Woolf's report (1995; 1996). The concept of proportionality and fair allocation of resources introduces a realignment of the balance between the procedural measures used to reach a correct decision and the duration and cost of the proceedings (O'Brien 1999).

This move to new priorities and compromise is spreading beyond common law systems to civil law systems as well (Zuckerman 2000). Germany and the Netherlands are two civil law countries where a system with low costs and few delays is said to have been achieved. In Germany this is achieved by state control of litigation fees (Coester-Waltjen & Zuckerman 1999). In the Netherlands it is achieved by permitting non-lawyers to compete with lawyers in the provision of legal services (Zuckerman 2000).

The aims of the reforms are that courts should no longer operate as institutions providing justice but as successful businesses. To this end the idea of the control of a case being left in the hands of the parties and their legal advisers is overturned and put squarely in control of, allegedly, the already overburdened judges and under-funded courts. It is interesting to note the reverse argument regarding party control is being touted as one of the benefits of ADR, yet the same system sees such an established tradition in the adversarial courts as a definite disadvantage.

This move has placed greater burdens on lawyers. There is a need to offer no-win-no-fees, to ensure poor parties with legal claims may still have their day in court (Dixon 2002).¹¹ A further requirement placed on the legal profession is to guarantee a claim has merit, or a reasonable chance of success, both factually and legally, before advancing it. The need for a claim to be meritorious is enforced by sanctions such as the lawyer paying the costs of both parties and potential professional misconduct hearings.¹² Courts, acting as successful businesses, selling their wares

in a competitive market place, with multi-door options for 'pick and choose' dispute settlement, create a new burgeoning industry of private dispute settlement.

Specific Queensland examples

Lord Woolf originally proposed raising the standard of cases brought by ensuring that a case had merit before it would be heard. This is reflected in the UK *Civil Procedure Rules* Part 24, and the equivalent Queensland provision for summary judgement contained in Part 2 of the *Uniform Civil Procedure Rules*.¹³ While, on the face of it, this sounds a reasonable proposition, others argue it sounds the death knell to our legal system (Abel 1981; O'Brien 1999), because it raises the issue of how one can 'be compensated for the moral harm generated by the summary dismissal of a meritorious claim?' (O'Brien 1999:143).

A further interesting development in Queensland is the use of case appraisal. The *Supreme Court of Queensland Act* 1991, Section 102(1), entitles the court to refer a matter to an ADR process such as case appraisal. Division 4 of the *Uniform Civil Procedure Rules* provides that a case appraiser may decide the matter in an inquisitorial style, as if the court (r335(1)), by asking anyone for information and obtaining and acting on any information (r337(1)). The appraiser may give a decision without reasons (r339(1)), raising natural justice issues, and has the same power as a court to award costs (r340). Such decision is binding if the parties do not elect to go to trial (r341). This process has been criticised for going beyond the proper role of the court, and raises complex questions particularly where recalcitrant parties are involved (Dearlove 2000; Hinchy 2002).

Cultural implications

Globalisation has led to a cross fertilisation of societies and the adversarial system has been inspired to adopt mechanisms used in other legal systems (Glenn 2000). As noted above the civil systems inquisitorial model of evidence gathering influences case appraisal in Queensland. Mediation approaches of

societies such as Japan and China are also influential (Jardine 1996).

These societies in turn are adopting some of the influences of the West, using the same justifications of cost, efficiency and access to justice to move in the opposite direction towards a public adversarial system. While many western countries are cutting access to legal aid, China's local and state legal aid initiatives have expanded since the early 1990s (Jardine 1996). In Japan the new *Code of Civil Procedure* was enacted on June 18, 1996 with the justification for change being the need for efficiency and improved access to justice. It is interesting to note that these same justifications in Japan are used to achieve the opposite of the civil reforms in the West.

Japan, a society of hierarchical authority, was dependent on informal justice to avoid conflict (Sato 2000). However, contemporary governments have recognised this led to corruption and sacrifice of life quality such that a demand has arisen for greater transparency and accountability, together with a need to economically strengthen the country. Japan's past is an example of where civil justice reforms may well lead in the West. The policy of a small judiciary and number of legal professionals, together with limited legal aid funding, has led to a demand in Japan to overturn the paternalistic system in favour of strengthening the adversarial process. Legal aid is considered the cornerstone for this transformation to transparent dispute processing and strengthening of the adversarial system and rule of law (Sato 2000).¹⁴

In the West, a society of individuals in which conflict is not seen as bad, the cultural impacts of imposing structured mediation cannot be dismissed (Wolski 1997). Condliffe (1997) makes the point that mediation differs between cultures significantly. For instance, in China, mediation is not constrained by strict time limits nor is there seen to be a need for a neutral third party (in fact often a village elder is the mediator). The society is also one where the importance of the family collective means that the mediation will be honoured without enforcement being necessary. Condliffe

argues ADR literature is too dispute process focused and does not engage the wider considerations of the social context. Adopting aspects of another culture's system without consideration for its historical socio-cultural basis leads to considerable complexities and is fundamentally flawed (Condliffe 1997:78).

The use of ADR for conflict resolution, while based on the concept of community, may well work against the very groups it is advocated for. Indigenous societies that have had their culture and community diminished become further isolated with the imposition of reforms, absolving the state in relation to their needs. Beattie (1997:67) argues that disputes diverted to mediation are ones to which a low priority is given, such as community and family disputes, where the outcomes for the powerful are not immediate. Certainly, commercial disputes are also diverted when the powerful see it as in their interests to be outside the public law process (Galanter & Cahill 1993:1353). Beattie goes on to point out that some issues need to be addressed in a public ceremonial way to confirm publicly-held principles. Social responsibility for issues such as reconciliation and poverty can be ignored when relegated to a private domain behind closed doors (Auerbach 1983; Beattie 1997).

Judicial activism, seen in cases like *Mabo*, that protects the powerless and advocates social advancement and rights (where legislatures fear to tread), is often behind state support for the move to informal dispute resolution and civil procedure reform.¹⁵ Auerbach notes:

Nothing, it seemed, propelled enthusiasm for alternative dispute settlement like a few legal victories that unsettled an equilibrium of privilege. Once Native Americans litigated to retain tribal lands seized in violation of treaty rights, the Federal Bureau of Indian Affairs proclaimed the value of informality (1983:128).

In a similar vein, a number of critics question the value of ADR for women as it often fails to protect and empower them (Grillo 1995; Sinnar 2001; Field 2001).

Courts already resolve many matters before they reach that expensive trial so the system is working. The colonising of the lifeworld with the increasing application of more ridged methodologies results only in whole new money-making industries.

Legitimacy of the reforms

Under the new structure of legitimation, the justice system would appear to be regarded as just another commodity whereby government accountability to its taxpaying constituents is used to argue a right to expect value for money for each dollar spent on justice. It becomes the duty of judges not only to dispense justice, a lifeworld substantive role, but to now increase through-put via case management, eliminate waste via referral to ADR and operate more efficiently by taking control of cases from the parties, using the new civil procedure rules, such as in the provision for case appraisal. The legal system, through the move to informalism, is moving ever deeper into the lifeworld by inserting itself into the formalising process for mediation to juridify ADR much as experience has shown with arbitration (Brooker 1999; Harrington 1985). Cost efficiency is already no longer touted as one of ADRs main benefits, costs already having become inflated (Sinnar 2001; Bingham 2002:120).

Legitimacy and productivity are at the core of Habermas's communication theory, raising questions about the driving forces for changes, the mentality of the need for continual change, the change agents and why citizens are compelled to believe change is always a necessity. Public policy can be seen as a public relations exercise to educate or sell a policy to the public rather than a process involving consultation. In the justice reforms, the colonising media of bar associations, legal professionals and judges have been used to steer the policy and implement the reforms. As a result of the demise of government funding for legal aid, solicitors have stepped in by offering no-win-no-fees. This has been criticised for leading to a culture of litigiousness to the extent legislation now limits lawyers' right to advertise the use

of no-win-no-fees (Dixon 2002:14). At the same time, the use of no-win-no-fees has not been prohibited as governments recognise it fills a necessary void for those who could not otherwise access the courts.

The decentralisation of informal dispute resolution providers suits the commercial world that wishes to resolve its disputes outside the legal system.¹⁶ A number of questions require consideration. Is this a scheme to privatise justice and absolve government from responsibility for something that is a core duty of government (Moore 2003) in fact an arm of government? Is a limb being cut off because it irritates the other parts, such as the executive in its desire for power and the legislature in what it argues as its democratic right to be the only law maker (Auerbach 1983:120-28)? Is this attack an attempt to subvert the democratic process in favour of select business interest? Insurance companies benefit from mediated settlements financially but also from increased demand for private insurance against legal costs (Dixon 2002:10-12; Regan 2000). Other insidious developments are the in-house dispute settlement mechanisms for work related disputes where there is a large power imbalance (Bingham 2002:101-08).

The lack of democratic process in the form of public discussion of the directions public institutions are taking is a concern of Habermas. Whereas the denial of privatisation of the justice system is the rhetoric, the reality may see it occur without public awareness and consideration of the implications. The judicial activism of the courts in reforming the law and dealing with big political questions in protecting rights such as in Mabo and issues surrounding illegal immigrants leads to the executives' desire to overcome this.¹⁷ Protection of rights by the courts is threatening to the status quo and therefore seen as threatening to commercial activity (Abel 1981:257-58). Where the ideal of the rule of law, namely justice for all determined by an impartial adjudicator, seemingly exits, a countervailing action often arises. The silencing of opposition to capitalist interests is identified by Habermas, in his theory of distorted communication, as occurring for political reasons.

Domingo (1997) argues the strongest demand for reform comes from the economic elites, such as foreign investors and international financial institutions. Such parties' interest lies in strengthening the legal framework of private property. The economic elites' greater bargaining power results in reforms to the legal system that suits economic concerns only.

People feel overwhelmed by a global system that threatens human identity and leaves them feeling helpless, having lost control. A universal emotion in the West is one of fear and loss of community connectedness and reason. The space where community problem solving has always gone on outside of the law is now invaded in the move to informalism (Abel 1981; Beattie 1997). The distorted communication encourages parties' to believe it is for their benefit giving them greater access and control, yet in reality it results in the invasion by the state of the private social sphere of the citizen (Abel 1981).

There is little evidence from past experiments in civil procedure reforms of success in overcoming the efficiency 'problems' facing the public justice system (Abel 1981). While the waiting lists for courts may have lessened, as a result of diversionary tactics, there is now concern by parties that court enforced mediation increases the time and cost before a matter can be resolved by court adjudication if it does not settle. (Galanter & Cahill 1993; Zander 2003).

Conclusion

Critical theory provides a means by which to contrast distorted communications of the agenda-setting power elites with the ordinary communication of consensus and mutual understanding. It is argued the civil procedure reforms have been more to do with government reducing its expenditure and expanding its control than they have been with a concern to provide fair, quick and cheap access to justice.

The problematising of the judicial system and the consequent reforms diminish substantive public rights and lead to criticisms such as the development of a two-tier system of

justice. One system is for the poor, where access to adjudication is denied at a cost of greater invasion of their social space through informalism. A second system for the wealthy, allowing them to work outside the legal system. The economic theories of allocative efficiency, which require the maximum use of resources at the least possible cost, or X-efficiency theory, relying on cost efficiencies achieved through organisational efficiency, provide the system language which invades and distorts the realities of the lifeworld. This suits the agenda-setters ideological needs but does not encapsulate the needs of all citizens in a democracy. Such a result certainly weakens the concept of a rule of law in which all citizens are equal.

The new civil procedure reforms reflect the colonising power of accounting practices leading to the proliferation of ADR in the form of many organisations offering different services. These providers compete in their desire to explore business opportunities and, contrary to free market ideology, this leads to an increase in costs. Substantial beneficiaries of the reforms are not only government but also powerful business groups.

ADR is a natural process of itself but its uptake by the courts in their drive to efficiency and cost reductions under the influence of neo-liberalism invades a social space in which dispute resolution always went on. Habermas's approach to discussion of the introduction of accounting into the public sector provides a mechanism for uncovering an evaluative stance that goes beyond the surface.

Notes

¹ 'The court's overriding responsibilities include "fixing timetables or otherwise controlling the progress of the case" and "giving directions to ensure that the trial of the case proceeds quickly and efficiently" (Andrews 2000:32).

² 'The application of performance indicators throughout the advanced industrial world, schools, universities and hospitals are reaping a whirlwind of the new managerialism which determines, budgets and tenure on measurable performance indicators alone leading to the wholesale downgrading of the importance of

humanities at universities for example.’ (Spigelman 2001:4).

³ Note comments regarding the exclusion of Judges from consultation on the draft proposals and the civil justice reform with such matters being put in the hands of politicians as opposed to the judges for the first time in Davis (1997:5); and also ‘I was summoned to a meeting with the Attorney General last Friday at 12 noon...regarding the Governments reform package...we expressed our concern about...the speed with which the proposal was put together...without due consultation with QLS...at 10am this morning we were advised...that the AG would be releasing a package dealing with legal professional reform after the cabinet meeting today’ (Sullivan 2003).

⁴ Harris supports the move to a growing private market in legal advice and services but also acknowledges that the application of market rules to the courts gives rise to questions concerning ethics and constitutional issues (2000).

⁵ For a further example of the Queensland State Governments provision of governmental services through private contracts in the area of correctional services see Macionis (1997).

⁶ A very revealing study, the first large-scale national survey conducted in two decades in the US regarding the legal needs of Americans and the steps they do/do not take to meet those needs, shows that approximately half of the households surveyed faced a legal issue within a 12 month period and the predominance of concerns irrespective of level of income where in areas concerning personal finances, consumer issues, housing and real property. Legal needs that ended in the civil justice system were seen as having been satisfactorily resolved more than those that did not. Evaluations of the performance of lawyers over 6 different criteria showed more than half of both low and moderate income households as being completely satisfied, with especially high ratings for the lawyers honesty in dealing with the client (*Legal Needs and Civil Justice: A survey of Americans prepared for the American Bar Association* 1994)

⁷ Schultz (2003) states ‘Despite all these changes, insurance premiums continue to rise...IAG...announced a first half yearly profit of \$62m. Suncorp’s ..profits increased by 91 percent’.

⁸ (1992) 175 CLR 1.

⁹ Tasson confirms the belief that the system has, through the process of juridification, invaded the lifeworld of ADR and is pessimistic about the possibility of the

lifeworld being able to fight off the colonisation to reclaim the process of informal dispute resolution to the social world, where not every daily experience need be reduced to a legal issue (1999:2).

¹⁰ [1932] AC 562; ‘Where would we be if a certain ginger beer manufacturer had in 1932 chosen to mediate with a dissatisfied customer?’ (Hanger 2002: 4)

¹¹ No-win-no-fee situations, while recognised as necessary by the Queensland government, are curtailed by the limiting of lawyers ability to advertise. See Part 1 of the *Personal Injuries Proceedings Act 2002* Qld.

¹² Examples can be found in Rule 11 of the *Federal Rules of Civil Procedure*, discussed in Ipp (1995:705) and the *Civil Liability Act 2002* (NSW) discussed in Clark (2002:75).

¹³ QLD Rule 292(1) provides that: ‘The court may give judgement for the plaintiff.. if the court is satisfied-

- a) the plaintiff... is entitled to all or part of the relief sought..
- b) the defendant has no defence other than in relation to the amount of the claim; and
- c) there is no need for a trial of the proceeding.

Rule 293(2) Also, the court may give any judgement or make any other order the court considers appropriate if satisfied –

- a) no reasonable cause of action is disclosed; or
- b) the proceeding is frivolous, vexatious or an abuse of the process of the court; or
- c) the defendant has a defence to the proceeding.

¹⁴ If the West aims for speedy justice the Japanese system provides a good example- there a typical case lasts for 3 minutes (Sato 2000:243).

¹⁵ ‘There is a growing concern that government is intruding in almost all aspects of life and courts are the political constraints on the conduct of the executive’ (McHugh 2003:111).

¹⁶ A survey of Fortune 1000 companies indicated a strong preference for mediation over arbitration and other fact-and-law based dispute resolution (Bingham 2002:1:110).

¹⁷ A great cause of tension with the Judiciary is the Executives desire to exercise exclusive control over immigration (McHugh 2003:111).

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