Conflict management and the law in a technological world

Kenneth Moon*

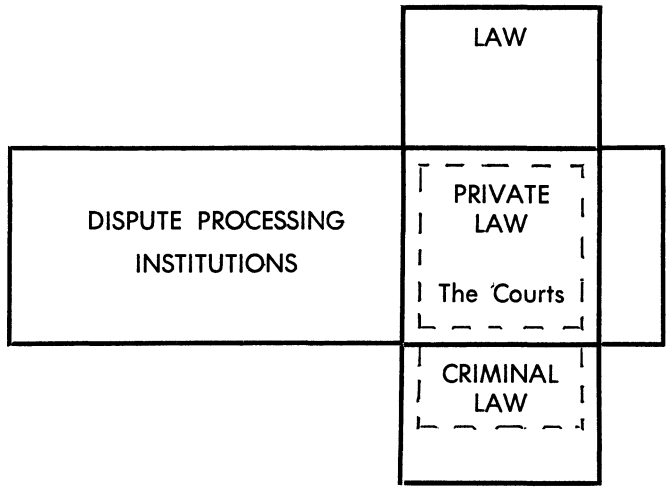
The industrial revolution and the rapid advances of pure and applied sicence since that time have established technology as the dominant characteristic of western society. Technology is pervasive both in its physical products and in its influence on patterns of thinking. It also permeates the institutions of society. In this paper Ken Moon examines the impact of technology on the law, the courts and related institutions.

This paper compares the nature of the different conflict managing institutions which have evolved in typical western societies, and the way in which each of these institutions has developed in the twentieth century. Its scope is further elucidated by defining some of the terms used. 'Conflict' has a very broad connotation but generally speaking the conflicts envisaged in this paper are those which have been considered at some time to be within the jurisdiction of the ordinary courts — that is, Dicey's English courts. The expression 'conflict management' is used in preference to 'dispute processing'[1] because the courts of law are one of the institutions to be discussed and their function cannot be properly described as simply the processing of disputes. A 'dispute' may be defined in the following way. "A dispute arises out of disagreement between persons (individuals or subgroups) in which the alleged rights of one party are claimed to be infringed, interfered with, or denied by the other party".[2] Now one of the concerns of the courts is criminal law, but is the criminal trial an outcome of a dispute? A simple substitution of 'state' for 'person' in the definition does not seem to gel. In the crime of assault, for example, what right of the state has been interfered with? Dispute processing seems associated with private law. Institutionalised dispute processing will be observed in many primitive societies, but criminal law, and public law in general, is dependent upon a high degree of social solidarity.[3]

* B.E.(Elec). This paper was presented for the LL.B.(Hons) degree.

1. 'Management' and 'processing' are to be preferred to 'resolution' and 'settlement', since they take into account the cases where no resolution or settlement is achieved, or even intended.
2. Gulliver, "Case studies of Law in Non-Western Societies — Introduction" in *Law in Culture and Society* (ed. Nader, Chicago, 1969) 14.
3. Quaere whether this is in conflict with Durkheim's use of the ratio of restitutive to repressive sanctions as an indicator of social solidarity: *Division of Labour in Society* (New York, 1964).

Hoebel notes the limited use of communal authority exercised on its own behalf in primitive societies:[4] "It takes the form of lynch law in some instances . . . [lynch law] is a first fitful step toward the emergence of criminal law . . . ." The relation between 'law' and 'dispute processing' is illustrated by the model in the following diagram where the courts when dealing with private law act as but one institution in the totality of dispute processing institutions.



The difficulty of assimilating the functions of the courts into the dispute processing category is highlighted by Boulding[5]

> In criminal law, the situation is much more complicated. Here, the law does not simply stand as an arbitrator of private quarrels but is itself one of the parties to the conflict. Much of the complexity of criminal procedure arises out of this dilemma, namely, that the law is both a party to the conflict and an agency for a settlement by award, that is, an arbitrator. In Anglo-American law, an attempt is made to resolve the dilemma by a sharp definition and differentiation of roles. The attorneys for the defence and for the prosecution symbolise the conflict; the judge and the jury symbolise the arbitration element. The conflict roles are highly stylised, as, indeed, is the whole procedure. This serves a function in resolving the dilemma imposed by the mixture of roles in the law . . . .

The present study is divided into two parts. Part I sets out a theoretical framework of conflict management grounded mainly on work by Aubert,[6] Eckhoff,[7] and Felstiner.[8] From this certain conjunctions between conflict management and technology are deduced. Part II, while having an empirical flavour is not an attempt to present a series of case studies in order to test the

4. Hoebel *The Law of Primitive Man* (Cambridge, Mass., 1954) 277.
5. Boulding *Conflict and Defense* (New York, 1963).
6. Aubert, "Competition and Dissensus: Two types of Conflict and of Conflict Resolution" (1963) *Journal of Conflict Resolution* 26; "Law as a Way of Resolving Conflicts: The Case of a Small Industrial Society", in *Law in Culture and Society* (ed. Nader, Chicago, 1969) 282.
7. Eckhoff, "The Mediator, the Judge and the Administrator in Conflict Resolution" (1966) 10 Acta Sociologica 148.
8. Felstiner, "Influences of Social Organisation on Dispute Processing" (1974) 9 Law and Society Review 63.

deductions made from the theory, but is rather a compendium of contemporary incidents and insights relevant to the conjunctions referred to. Considerable space will be devoted to the functioning of the courts, but it is asserted that this is justified in that other modern conflict managing institutions have waxed or waned in popularity in inverse correspondence with the popularity of the courts. Popularity is linked with utility and it is suggested that the utility of a conflict managing institution in the twentieth century is a least in part a function of the role given to expertise of a non-legal character. The scope of this role will be a recurring question.

I. SOCIETY, CONFLICT AND CONFLICT MANAGEMENT

There are two main theories or models of society: the structural-functional model and the power-conflict model. The structural-functional model explains why society is relatively cohesive, ordered and stable, while on the other hand, the power-conflict model explains why society is in a state of conflict, disorder and change. The structural-functional model is frequently associated with Talcott Parsons while the power-conflict model is associated with Marx. To many theorists the two models are mutually exclusive and one believes in one or the other as being the model of society. However others[9] see room for a duality of models using one or the other depending upon what is to be explained. That is, both models are considered equally valid perspectives of society, just as in physics two models are used to explain the nature of light — the wave-particle duality of light.

The essential components of the two models, as posited by Dahrendorf are:

Structural-functional model (or consensual, or Parsonian-Durkheimian Model)

1. Every society is a relatively persisting configuration of elements.
2. Every society is a well-integrated configuration of elements.
3. Every element in a society contributes to its functioning.
4. Every society rests on the consensus of its members.

Conflict Model

1. Every society is subjected at every moment to change: social change is ubiquitous.
2. Every society experiences at every moment social conflict: social conflict is ubiquitous.
3. Every element in a society contributes to its change.
4. Every society rests on constraint of some of its members by others.

The first point that Dahrendorf makes is that the structural-functional model does not shed much light on the phenomenon of social conflict and change. Institutions and individuals promoting conflict or change, intentionally or unintentionally, are seen as simply dysfunctional[10] or deviant. Dahrendorf asserts that a meaningful explanation of conflict can only be found in the conflict model.

9. E.g. Dahrendorf, "Toward a Theory of Social Conflict" (1958) 2 Journal of Conflict Resolution 170; Castles *Politics and Social Insight* (London, 1971) chapters 4 and 5.
10. Coser argues that conflict is functional to the existing order. Cf. *The Functions of Social Conflict* (London, 1956); *Continuities in the Study of Social Conflict* (New York, 1967), see chapter 6 for example.

Once the existence of a conflict model is recognised a study of conflict management in modern society seems prima facie rooted in a theoretical commitment to the structural-functional model. A Marxist would say that such a study was fundamentally irrelevant because the agencies of conflict management such as the courts are mere super-structural institutions resting on the economic structure of society, that is to say the means of production. The writer contends however that a study of conflict management is meaningful even in Marxist terms. In most developed societies, contrary to the expectations of Marxists, the proletariat has not realised the true interests of their class. False consciousness and irrationality prevail. The objective class conflict has not become manifest. Why? Because the dominant class, foreseeing the need to contain social conflict, has transformed the state so as to appear to more broadly represent society as a whole. Ostensible representatives of the proletariat have been admitted to power, even at some sacrifice to the dominant class. This transformed state has imposed a structure upon society which has contained the objective class conflict. The institutions of the state effectively channel behaviour along safe paths. This has not come about by the use of naked power but by socialisation — bourgeois values have been internalised. In Marcuse's words[11]

> Technical progress, extended to a whole system of domination and co-ordination, creates forms of life (and of power) which appear to reconcile the forces opposing the system and to defeat or refute all protest in the name of the historical prospects of freedom from toil and domination. Contemporary society seems to be capable of containing social change . . . this containment of social change is perhaps the most singular achievement of advanced industrial society; the general acceptance of the National Purpose, bi-partisan policy, the decline of pluralism, the collusion of Business and Labour within the strong State testify to the integration of opposites which is the result as well as the pre-requisite of this achievement . . . .
> But in the contemporary period, the technological controls appear to be the very embodiment of Reason for the benefit of all social groups and interests — to such an extent that all contradiction seems irrational and all counteraction impossible.

From this perspective it cannot be denied that the super-structural institutions have assumed a fundamental importance.

At a quite different level, the apparent necessity for a legal structure in all societies including socialist societies must be noted. Some would say that this is inevitable given man's basic nature, but whatever the reason this necessity for law in some form or another seems undeniable. Law in the Soviet Union is "a most important lever . . . in establishing the material and technical base for communism."[12] Attempts after the revolution to do without law failed.[13] Assuming a society can transcend the socialist state, what then? "Violations of norms of social behaviour will be met by 'measures' applied by 'public opinion, the strength of the group, social influence'."[14] A full circle will then have been executed with conflict management in the ultimate society taking the form practised by Hoebel's primitive man. The super-structure, then, appears ubiquitous: in primitive societies it is the structure; in industrial societies an economic sub-structure slips in

11. Marcuse *One Dimensional Man* (Boston, 1972, Abacus ed.) 11-22.
12. Per Ioffe and Shargorodsky in *Soviet Law and Government* Volume II, No. 2, p. 3, quoted in Lloyd *Introduction to Jurisprudence* (3rd ed., London, 1972) 644.
13. Lloyd, op. cit., 636.
14. Lloyd, op. cit., 645, quoted from Ioffe and Shargorodsky, op. cit., 7.

underneath; in truly communist societies it appears that it will be some form of super-structure that will remain.

A. Conflict Typology

The analysis of conflict management will start with Aubert's postulation of two distinct types of conflict: conflicts of interest (competition) and conflicts of values (dissensus).[15] A conflict of interest is where two parties both want the same thing but there is not enough of it to satisfy them both. A possible example of such a conflict was the Taranaki land dispute in the 1860s. The European settlers wanted Maori land, while the Maoris wanted to retain it.[16] A further possible example was the 1951 Waterfront Strike where the watersiders wanted a pay increase of 4/10½d per hour while the employers were prepared to pay only 4/7½d.[17] A typical interpersonal[18] conflict of interest is that which arises in commerce where a buyer would like to purchase a commodity at $X, whereas the seller would like a higher price $Y.

A conflict of values, perhaps better described as a dissensus, is where two parties disagree over the normative status of a social object and/or factual matters. A conflict of interest necessarily implies a consensus over the value of the object in dispute. An example of a dissensus is where two players in a game disagree over what rule should apply to a particular incident in the game.

The conflict typology described need not correspond to actual instances of conflict, but serves as a tool in the analysis of real conflicts which frequently will include a mixture of the two conflict types in pure form.

B. Conflict Management Typology

In one aspect the utility of the distinction between a conflict of interest and a dissensus lies in the potential to predict the most effective means of managing a conflict. To the typology of conflict there exists a corresponding typology of modes of conflict management. Simply put, negotiation is the appropriate device for managing conflicts of interest while adjudication is the appropriate device for managing a dissensus. "As long as a conflict of interest remains relatively pure, it is amenable to solutions through bargaining and compromise, on the condition that there is something to give and something to take on both sides".[19] There is an exception. Incompatibility of interests may be total, such as in the case where a contract has been negotiated but the contribution of one party (say goods) subsequently perishes. Here adjudication is called for as the relationship has

15. Aubert, op. cit.

16, 17. These conflicts reveal the intertwining of interest and values which occurs in real conflicts. At one moment they appear to involve values. Both were prosecuted with appeals to values and ideology, and both were "resolved" by one party suffering a complete defeat. However, it is submitted that the source of these disputes was a conflict of interest which was subsequently transformed to a conflict of values in order to facilitate a means of prosecuting the conflict which appeared to one or both disputants as being favourable to themselves. Transformation of an interest conflict to one of values paves the way for total commitment in a struggle which can then only end in defeat for one side. In certain circumstances an honourable defeat may be morally preferable to a "bought" compromise.

18. At times Aubert qualifies his typology as one of interpersonal conflicts.

19. Aubert (1963), op. cit., 30.

become a zero-sum game. Settlement of a disagreement over values or the truth of facts usually requires the intervention of a third party who ascertains the true facts, selects the relevant norm and decides which party is to prevail. A characteristic of adjudication is that one party wins and the other party loses — a "zero-sum game". The parties have no private rights in norms or truth which they can trade off.

In another aspect the utility of this typology of conflict and conflict management lies in its implications for the manipulation of conflict. A conflict where the parties are emphasising values might be resolved by negotiation and compromise if the value aspect is de-emphasised and the interests of the parties stressed. On the other hand a conflict of interest must be transformed to a dissensus if it is to be resolved by adjudication. Aubert observes that such a transformation is a necessary preliminary to conflict resolution in a court of law. The typology thus does not necessarily imply a rigid casual link between the conflict source type and the means of resolving it. For example, "a dissensus may arise out of opposing interests, either as a consequence of the conflict and hostility or as a consequence of the structure of the conflict-solving mechanism."[20] Again, "certain sources of conflict may tend to call forth a certain type of mechanism for conflict resolution, but the form of the conflict may also frequently be determined by the available means of solution".[21]

Mention must be made of some views critical of Aubert's typology. One of these holds that in reality all conflicts may ultimately be seen as conflicts of interest. Value aspects are apparent rather than real — a conflict is painted in value terms as part of a stratagem. No doubt this is often the case,[22] but it seems quite credible that a religious conflict for example, could subsist free of interest aspects. If instead of the somewhat loose term 'conflict of values', the terms 'factual dissensus' or 'normative dissensus' are used, the possibilities of there being conflicts which are other than conflicts of interest are more readily envisaged provided that interest is not given the meaningless interpretation of 'the will to win'. It is interesting that Boulding too derives an interest/value type distinction, although in a somewhat different way to Aubert. He divides the value structure of a person's image into two parts[23]

> An inner core around which he integrates his personality and which holds him together and an outer shell which he holds or possesses but which does not constitute an essential part of the image of the person who does the holding or possessing.

If the conflict is about a core value reconciliation will be difficult or impossible[24] whereas the shell is amenable to modification by discussion and argument. The boundary between core and shell may vary, even during the one conflict, and certainly differs between personalities.

Kidder[25] considers it a mistake to treat adjudication as a phenomenon which normally functions in a different way from negotiation and that the influence of rules in adjudication as opposed to bargaining strategy is overrated. Suffice to say at this point that there are a large number of cases where legal rules are

20. Ibid., 31.
21. Ibid., 26.
22. Cf. ante, fn. 16.
23. Boulding, op. cit., 312.
24. The core is subject to catastrophic conversion but not to small changes.
25. Kidder, "Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India" (1974) 9 Law and Society Review 11, 30.

omnipotent. Later some examples are given where legal rules have been decisive to the point of absurdity.

Gulliver[26] criticises the interest-negotiation, values-adjudication correspondence. He points out that in many conflicts of values there is no applicable norm. This, it is submitted, takes an unnecessarily narrow view of a norm — there is always a higher norm such as legal principle or public policy which can, and is, drawn upon in the absence of a specific legal rule. Skill in moving within the hierarchy of norms would seem the very essence of an adjudicator. This flexibility does not imply a compromise in place of a decision.

Gulliver also stresses the point that norms play a part in negotiation as well as in adjudication, especially in the definitional phases of negotiation. However this does not seem to effect the validity of the conflict/conflict management typology since a normative consensus is to be expected in conflicts of interest, and this consensus in many cases may come about in the bargaining preliminaries by reference to market prices and precedents set in prior exchanges.[27] An unfortunate example Gulliver chooses to illustrate his point must be mentioned at this point since the present writer will later elaborate on the mechanisms involved. Gulliver notes that a judge is frequently faced with conflicts of interest upon which he must and does adjudicate.[28] This is of course undeniable, but the explanation of such a phenomenon is perhaps the most valuable insight provided by Aubert's theory — that it is a pre-requisite to the functioning of a court that a conflict involving interest aspects be transformed to a dissensus of facts and norms, however artificial this transformation might be when the conflict is purely one of interest. The legitimacy of transformation is probably more evident if the correspondence is stated as being between conflicts as they are expressed and the respective management mode.

C. Further Modes of Conflict Management

The devices of negotiation and adjudication do not exhaust the modes of conflict management. At one extreme conflict may simply be avoided and as Felstiner[29] has pointed out, in a technologically complex rich society this mode of conflict management is probably the most common. A typical example of avoidance is where a person who has had something unsatisfactorily repaired goes to another repair firm in preference to pursuing the matter with the first repair firm. The conflict in this case is a conflict of interest, but avoidance is also applicable to value conflicts. In fact two parties having completely incompatible values may never engage in conflict since their lack of common ground may keep them apart.[30]

At the other extreme a conflict may be terminated by self-help or conquest. Boulding suggests that self-help is not common because the work and costs incurred by the active party are greater than would be the case if some other device of conflict management was used.[31] While this may be true where the conflict is between large groups or nations, in interpersonal conflict the degree

26. Gulliver, "Negotiation as Dispute Settlement" (1973) 7 Law and Society Review 667.
27. Aubert (1963), op. cit., 30.
28. Ibid., 682.
29. Felstiner, op. cit.
30. Aubert (1969), op. cit., 285; Boulding, op. cit., 308.
31. Boulding, op. cit., 308.

to which self-help is resorted to would appear to be a function of the degree to which societal values have been internalised.

A further mode of conflict management is mediation, which may be considered as negotiation assisted by the presence of a third party. "Mediation consists of influencing the parties to come to an agreement by appealing to their own interests".[32] Mediation is viewed by some as simply a sub-category of negotiation, another sub-category being conciliation. Yet a further mode of conflict management is arbitration, which because it may be analysed as agreed private adjudication can be considered as simply a sub-category of adjudication.[33]

If one ignores the categories of avoidance and self-help, it can be seen that the additional categories mentioned above are but sub-categories of Aubert's types. Mediation and conciliation are essentially negotiation with a third party superimposed, while arbitration is simply adjudication resting on a prior agreement to submit to adjudication.

D. From Dyad to Triad

Institutionalised conflict management is characterised by the addition of a third party to the parties in dispute. The third party takes part in the dispute but is "someone who is neither asserting or resisting the assertion of a claim in his own behalf nor is acting as the agent of such party".[34] The presence of the third party is not necessarily indicative of a dissensus as Aubert's analysis might suggest — the association of a mediator with the process of negotiation has already been noted — but is determined by a number of factors.[35] The factors include the pressure of society to have the conflict resolved, the parties' disagreement on norms, and the indivisibility of the object in dispute.

These factors are distinct from those which determine the potentiality of the third party to successfully manage the conflict, this being dependent both upon the characteristics of the conflict and the procedure adopted by the third party. The transition from dyad to triad is important for the purposes of the present study since it is an essential ingredient of institutionalised conflict management, and it may be expected that any impact made by the coming of the technological society will be manifested in a triadic process.

E. Third Party Typology

In this sub-Part the characteristics of the judge (or adjudicator), the mediator, the arbitrator and the conciliator will be discussed.

1. The judge

It is the function of the judge to make a decision about which of the parties to a conflict is right. This means that the judge must look at the history of the

32. Eckhoff ,op. cit., 158.
33. These classifications are discussed, post, in sub-Part *E. Third Party Typology.*
34. Felstiner, op. cit., 69.
35. The transition from dyad to triad is however undeniably a hallmark of law. "Law is distinguished from mere custom in that it endows certain selected individuals with the privilege/right of applying the sanction of physical coercion if need be . . . . In primitive law [sic] the tendency is to allocate authority to the party who is directly injured." Hoebel, op. cit., 276.

behaviour of the parties and determine guilt or fault by reference to a series of rules, or customs, or supposedly universal notions of what is right and just. That is, the judge must ascertain the facts, determine the appropriate norms, and apply the norms to the facts and deliver a judgment in favour of one of the parties.[36] In theory at least, the judge will not be concerned with the interests of the parties and their respective positions in the future.

Adherence to a judgment, bearing in mind that one party must lose, will be dependent on two main factors: respect for the framework of norms utilised by the judge and the authority of the judge. "There may be many reasons for the parties' respect for those norms on which the judge bases his decisions; for instance, they may be internalised, or one fears gods' or people's punishments if one violates them, or one finds it profitable in the long run to follow them".[37] It is of course a pre-requisite that the judge possesses a good understanding of the norms and has the skill to determine the facts of a dispute. Familiarity with norms and their application may require a special expertise which is possessed only by a chosen few. In modern western societies this expertise may be assessed in terms of experience and professional qualifications, but in other societies contact with supernatural powers may be considered more relevant.

Likewise, expertise in determining facts presupposes an ability to understand and clarify factual relations, and the level of expertise required will vary according to the nature of the subject matter comprising the facts. In a technological society it is inevitable that some cases to be adjudicated will involve factual relations demanding considerable scientific expertise to unravel. In the context of the courts where the traditional qualifications of a judge are experience and training in law, the pre-requisite skill may in such cases be absent. As technology percolates through society the legal norms themselves in many spheres become laden with the trappings of science and make yet further demands on the non-legal expertise of the judge. A judge is a specialist thrown up by general social role-differentiation and since the technological society multiplies role-differentiation, judicial specialisation would seem a necessary consequence.

The above discussion has dealt with the significance of respect for norms and judges as a factor in the effectiveness of a judgment. If this respect does not exist efficacy of the judgment is obtained by forcing the parties to comply with it. ". . . [T]here is also a set of secondary norms of adjudication which single out the judge as the proper person to settle the dispute and which . . . also impose upon the parties the duty to abide by his decision."[38] Accordingly, there will usually be a power behind the judge which can be called upon to coerce a recalcitrant party into compliance. Felstiner takes this further and asserts that compliance with adjudicative decisions is more a result of the coercive power which they command than their merits. To tell the losing party in adjudication that what he considers as history is either an illusion or a lie, and/or that the behaviour he considered acceptable is anti-social will frequently alienate that party from the legal process. The loser then has two options: to see the error of his ways, or to see the adjudicative process as irrelevant. The latter will frequently require less psychological effort than the former. "Unconvinced of their original

36. In certain types of cases in Common Law jurisdictions a jury will decide the facts, but see post p. 135.
37. Eckhoff, op. cit., 162.
38. Ibid., 163.

error, losers respond to an adverse decision only because the consequence of not responding would be worse."[39]

Where the "error" is deemed a crime, technological society is unlikely to be satisfied with the efficacy of a penal "solution" when a scientific re-education seems credible. This is a matter which will be elaborated upon in Part II.

2. The mediator

An essential distinction between the function of a mediator and the function of a judge is that while in adjudication it is the latter who makes the decision, in mediation it is the parties who make the decisions, and not the mediator. A corollary of this is that mediated settlements need not be backed by coercive power. This follows of course from the analysis of mediation as being negotiation facilitated by a third party. A further distinction between the mediator and the judge is that the mediator must look forward to the consequences which will flow from each of the range of possible outcomes, since he is concerned with harmonising the interests of the parties rather than deciding who is right and who is wrong. He must himself be an adaptable negotiator.

One function of the mediator is to ensure that messages between the conflicting parties are not distorted. This aspect, while essential to mediation, is really the raison d'etre of the conciliator and will be elaborated upon in the later discussion on the conciliator. The prime function of the mediator is, on the basis of his understanding of the parties and the conflict, to construct outcomes potentially acceptable to both sides. Due to his impartiality the mediator may elicit agreement to an outcome which if suggested by one of the parties in negotiation *simpliciter* might never be agreed to through reasons of stubbornness and the like.

Schelling[40] draws attention to the importance of a readily identifiable focal point in bargaining. Sometimes there is an obvious place to compromise, such as a river in a conflict between two armies, or the outcome of a previous bargain, beyond which one party may be expected not to retreat. Frequently there will be no obvious focus about which an agreement can crystallise and it is in this situation that the role of the mediator becomes apparent. "When there is no apparent focal point for agreement, he can create one by his power to make a dramatic suggestion."[41] It should be noted that by promoting intermediate solutions the mediator will enhance his own prestige and impartiality, and of course respect from the parties in dispute is a pre-requisite to successful mediation.

In some cases certain additional devices may be used to facilitate agreement between the parties. For example, the mediator may be in a position to make promises which act as incentives for one party or the other to move towards a mutually satisfactory outcome. On the other hand the mediator may be in a position to make threats if one or both of the parties remain rigid in their attitudes. These powers will often be available to a state appointed mediator or where the conflicting parties are sub-groups of the same group.

Bearing in mind Aubert's correspondence between negotiation and conflicts of interest it is to be expected that the effectiveness of mediation in the settlement of a dispute will be a function of the degree to which the conflict involves

39. Felstiner ,op. cit., 72.
40. Schelling *The Strategy of Conflict* (Cambridge, Mass., 1963) 67-74.
41. Ibid., 144.

interests rather than values. This suggests that one of the tasks of the mediator will be to try and concentrate attention on the competing interests of the parties and play down any dissensus. "But it may also go the other way. The mediator lets himself be influenced by the parties to see the normative aspects as the most important, and ends up judging instead of mediating."[42]

It is obvious that if mediation is to be successful in managing a dispute the parties must have confidence in the mediator and be willing to co-operate with him and respect his advice. There is more to this than impartiality and negotiating skill. Success will usually only be achieved where "mediators share the social and cultural experience of the disputants they serve, and where they bring to the processing of disputes an intimate and detailed knowledge of the perspectives of the disputants".[43] This is because a mediator is unlikely to receive all the information he requires from the parties, and what he does receive may be misleading to the uninitiated. To construct an outcome tailored to meet a specific dispute requires an understanding of the history of the dispute and an understanding of the perspective of the disputants. In the context of a technological society the utility of this form of conflict management may be expected to be dependent upon a high degree of specialisation within the ranks of mediators.

3. The arbitrator

Arbitration may be viewed as a sub-category of adjudication since the decision or award on the outcome is made by the third party arbitrator and not by the parties. It is however a condition precedent to arbitration that a preliminary bargain must be struck by the parties themselves. They must agree to submit their dispute to arbitration and also agree on the choice of arbitrator or on some stranger to choose him. There are other important differences between adjudication in the courts and arbitration. In arbitration it appears to be accepted that the arbitrator may perform some mediative function and attempt to influence the parties to reach some settlement themselves. This aspect of arbitration should not be over-emphasised since arbitration procedure ultimately rests on statutory prescriptions.

The arbitrator does not need to make known his reasons for making a particular award. He does not act publicly and consequently need not pay allegiance to a deterministic set of principles when justice would appear to demand a different decision.

The parties are free to choose their own arbitrator. While they will probably choose from a class of persons with known experience in arbitration, this class will itself be role-differentiated, and the parties may therefore select an arbitrator not only skilled in arbitrating, but also knowledgeable in the subject matter of the dispute. Arbitration might, then, be expected to be a popular form of adjudication in a technological society.

4. The conciliator

Many theorists do not appear to distinguish between the mediator and the conciliator but as has already been suggested, a useful distinction can be made. The conciliator's job is primarily one of communication:[44]

42. Eckhoff, op. cit., 160. 43. Felstiner, op. cit., 74. 44. Boulding, op. cit., 316.

> The conciliator can transmit messages between the parties with greater accuracy than is possible with direct messages and so we can achieve a certain reconciliation of images that would have been impossible without him.

He must attempt to generate purposive interaction between the parties. He does this not by acting simply as a bridge between the two parties; he controls the communication by putting limits on the offers and counter-offers and blocking off some 'transmissions'. "He can, for example, compare two parties' offers to each other, declaring whether or not the offers are compatible without revealing the actual offers".[45] The presence of a conciliator marks a transition of the original dyad not into a triad, but into two new dyads: PARTY 1 ⇄ CONCILIATOR, PARTY 2 ⇄ CONCILIATOR.[46] This is the key to the conciliators' control. The conciliator is a "broker".[47]

> The function of pure conciliation is simply to see that trading opportunities are not missed in the existing field of conflict through ignorance and a failure of communication; the conciliator, in this sense, is a broker, bringing the two parties together.[48]

II. CONTEMPORARY INSIGHTS AND INCIDENTS

In Part I it was noted that a successful adjudicator must be expert in, inter alia, the clarification of factual relations, and that in a technological society the limitations of this expertise in the traditionally trained adjudicator may at times become obvious. In this Part certain features which characterise the legal model of conflict management are isolated. These not only provide a basis of comparison for other models of conflict management, but together with the limitation of judicial expertise in fields outside the law, imply the existence of judgments which will find approval only from lawyers. One such case is described, then the way in which technology[49] is injected into the adjudicative process of the Common Law is reviewed and difficulties noted. Against this background alternative systems which attempt to avoid these difficulties are described. One alternative is what might loosely be called the administrative model — a model to which the processes of arbitration and mediation belong. It will be recalled from Part I that these modes of conflict management have characteristics which suggest a potential for more adequately processing disputes requiring extra-legal expertise.

A. The Legal Model of Conflict Management — the Courts

Conflict management is an important function of the law. There are two aspects involved. First, the promulgation and simultaneous promotion of adherence to rules serving the interests of the community as perceived by those powerful enough to determine the law. Secondly, the management of conflicts which arise as a result of non-compliance with the rules. These two aspects of conflict management are brought out by Röling[50]

45. Schelling, op. cit., 144.
46. Paine, "Second Thoughts about Barth's Models", Royal Anthropological Institute Occasional Paper No. 32 (London, 1974) 25.
47. An expression used by Barth in "Models of Social Organization", Royal Anthropological Institute Occasional Paper No. 23 (London, 1966).
48. Boulding, op. cit., 317.
49. This term is used to mean any specialised knowledge which is not of a legal character.
50. Röling, "The Role of Law in Conflict Resolution" in *Conflict in Society* (ed. De Reuck, London, 1966) 330.

> If we pose the question of the relation between law and conflict we can, therefore, conclude that the law prevents innumerable clashes of interests and of power by circumscribing the positions. If these positions are generally recognised, are fixed by a central authority and are enforced by a central power, the law succeeds in preventing a great many conflicts. But those conflicts that remain are commonly felt to be more intense conflicts than they would have been if there had been no legal arrangements. The law gives to clashes of interest an ideological aspect; the opponent is seen as a wrong-doer and a criminal. The violation of the law entitles one to anger and aggressive reaction.

The promotion of societal rules is a function of both the legislature and the courts. The processing of conflicts resulting from a breach of those rules has traditionally been the function of the courts. In the courts the judge is supreme and, in modern societies, is a specialist. In the following discussion emphasis will be placed on the judicial process of decision making since it is with this aspect of law that other institutions of conflict management may be compared.

Elements of the legal model[51]

(a) When a conflict is processed by the court the judge makes a finding on the facts, selects the norm or norms appropriate to the facts, and applies the norm to those facts to produce a decision. The reduction of the conflict to a controversy over facts and/or norms is possibly the most important characteristic of the legal model. The facts are not ascertained by an ad hoc process but in accordance with a secondary set of norms which prescribe rules of evidence and procedure. Formulation of the facts is not, however, entirely independent from the selection of the substantive norm. Either the parties or the judge will frequently tend to formulate the facts in such a way as to bring the conflict within the ambit of a norm which will produce the desired result.

(b) Familiarity with substantive norms and secondary norms of procedure, and the ability to apply norms to specific fact situations is not common to all. It is the cherished preserve of lawyers. As a result, when a party to a conflict takes his case to court, he almost inevitably must employ legal counsel to represent him. Thus, as well as the judge and the parties the presence of legal counsel is inherent in the legal model. In order to ascertain the facts the court will almost inevitably hear stranger witnesses who will contribute information which will be used to construct the history of the dispute. These witnesses comprise yet a further class of persons essential to the legal model.

(c) A legal decision is characterised by its either/or nature which may be contrasted with the compromise nature of a mediated outcome, for example. This means that one disputant may suffer total loss. This is closely linked with the importance placed on establishing the history of the dispute, since it is from this that guilt or illegality will be established. From this finding legal consequences will ensue. The relation between the consequences and the established facts is not, however, the causal link one would expect to find in a scientific model.[52] The

51. The notion of enumerating parameters of a legal model is adopted from Aubert (1969) op. cit., although this scheme differs somewhat from his.
52. Even in science, it is often not clear what a scientist means when he says that one event has caused another. "[H]e falls back on such phrases as 'bring about', 'bring forth', 'create' and 'produce'. Those are metaphorical phrases, taken from human activity": Carnap *Philosophical Foundations of Physics* (New York, 1966) 189.

relation is normative rather than causal. That is, the legal rules establishing the link between certain behaviour and certain sanctions establish that it would be right to invoke a sanction, not that the sanction is inevitable given the behaviour. At a practical level the normative character allows for the probability that much proscribed behaviour will not be detected. The distinction between human laws and physical laws is however more fundamental than this. A physical law establishes that if conditions x and y exist then result z occurs.[53] For example, if a metal body is heated it will expand. The value of a physical law is to explain known facts and to predict unknown facts. Physical laws "are subject to verification, that is, they can be true or false; but the notion of truth or falsity is inapplicable to normative rules. Such rules simply state what should or 'ought to' happen".[54] This distinction has unfortunately been confused by the claim that many rules of a normative character, some of which form part of positive law, are universal laws of nature. The error of this claim, described by Moore as the "naturalistic fallacy", was demonstrated by Hume, and more recently by Kelsen.

(d) A judicial decision is not made on the basis that it appears to be the most efficacious in the circumstances, but is made within a framework of legal rules. Whether the rule to apply in a particular case is abstracted from earlier judicial decisions, legislation, or a code, the abstraction is made by an exercise of logical reasoning. The pattern may be to derive a general rule from a number of specific decisions by induction, and then by a process of deduction formulate the specific rule for the case at hand. In an age of reason this logical consistency and symmetry is held in high esteem. A court which achieves a desirable result by an inexact use of legal conceptions causes more criticism from legal scholars than one which achieves an undesirable result in a learned way.[55]

There is however another strand in the legal rope — the dispensation of justice. The fulfilment of this aim may be incompatible with the logic of legal rules, and historically the harshness of the law has been tempered by the devices of legal fictions and equity. In the individual case, especially where equity is itself part of the harsh logic, the judge must endeavour to find some aspect peculiar to his case which he can seize upon as a reason for not applying the general rule. In this way, the judge can simultaneously affirm the general rule and secure justice in his case. Because the decision will rest on some special feature the result of future cases will not be prejudiced since judges in those cases will be free to ignore the decision because of its peculiar facts. Such a result, that is, an apparent contradiction to the general rule, would have grave implications for the rule if it were a physical law. Consistent reasoning, and thus predictability, and the desire for justice are simply two often contradictory symbols to which modern society pays homage.[56]

Despite the logic and apparent determinism, a decision made using legal rules is not scientific. It is only logical within the given rules but not necessarily so in relation to the real world. Some graphic examples of how the logical application of inherently rational principles of law can produce completely irrational results

53. Such a universal law is not the only type of scientific law. There are also statistical laws which will in some cases indicate lack of knowledge, but in other cases express the fundamental nature of the world. E.g. Heisenberg's uncertainty principle.
54. Lloyd *Introduction to Jurisprudence* (3rd ed., London, 1972) 8.
55. Arnold *The Symbols of Government* (New Haven, 1935) 9.
56. See Arnold, op. cit.

are given by Thurman Arnold.[57] One of the simplest examples is the need, in jurisdictions retaining capital punishment, to save the life of a convicted murderer who attempts to commit suicide, using blood transfusions from his guards if necessary, in order that he may be executed by the hanging his sentence demanded. Using Aubert's terms, such examples highlight the law's concentration on behaviour and sanctions rather than on utility and effectiveness.

(e) So far that pillar of Common Law, the jury, has not been mentioned. In orthodox theory the jury decides the facts while the judge decides the law. This arrangement can be preserved in those civil cases where the jury is still given a place provided the judge carefully formulates the questions which are put to the jury. However, in criminal cases where the jury must bring in a verdict, it is open to doubt whether the judge's directions on the law are definitive, and even whether the application of the rules of evidence during the trial amount to more than priestly incantations, or in Cross's language, "gibberish".[58] The realist may say the place of the law here is nothing more than symbolism. "Yet the legal realist falls into grave error when he believes this to be a defect in the law".[59]

> The jury symbolises the common sense of the ordinary man. If we get an acceptable result out of a jury we feel that our entire democratic institutions, depending as they do upon the judgment of the ordinary man, are justified. If on the other hand we get an unacceptable result out of them we are free to criticise this jury without in any way appearing to attack the judicial system itself. Every system which owes its prestige to deep-seated ideals must have an irresponsible body somewhere on whom the blame may be put when the ideals go wrong. Otherwise the system itself would have to absorb it, and one of the essentials of any of our fundamental institutions is that they be exempt from criticism as institutions. Thus the jury offers us an opportunity to be indignant at the actual result, but satisfied with the fundamental principles of law under which the result was reached.[60]

(f) Like all organised occupational groups the legal profession jealously clings to the field of work it has traditionally monopolised and protects that field from encroachment by outsiders.[61] The protection may be manifest as in statutory monopoly, or latent as in personal and collective resistance to change. The latter element appears typical, although of course there are always exceptions. In view of this empirically observed characteristic inherent in the legal model it seems not unreasonable to expect to find in a study of the courts at work positive resistance to penetrations of expertise of a non-legal character, the expertise which symbolises technological society.

B. The Legal Model at Work

In this sub-Part *Bognuda* v. *Upton & Shearer Ltd.*[62] is analysed to demonstrate some of the distinctions between legal and scientific thinking and the strains created in the transformation of a real conflict into a normative dissensus. The

57. Ibid., 11-17.
58. Cross, 'A Very Wicked Animal Defends the 11th Report of the Criminal Law Revision Committee" [1973] Crim. L.R. 329.
59. Arnold, op. cit., 44.
60. Ibid., 13.
61. While frontal attacks might be repelled there remains a further possibility — that of simply by-passing the traditional legal structure.
62. [1971] N.Z.L.R. 618 (S.C.).

end result raises the question of how a court can best be provided with expert opinion.

The plaintiff in this case owned a garage, one wall of which ran along the north boundary of his property. The wall was constructed of brick and built in 1929. In 1969, the owner of the adjoining property employed the defendant to construct a building on that property for him. The defendant in carrying out the foundation work excavated a trench between four and five feet deep and sixty-eight feet long immediately adjacent the plaintiff's boundary. The following night the plaintiff's wall collapsed and fell into the trench. The plaintiff contended that the defendant was liable for the damage caused to his wall and garage. Expert evidence was given for the plaintiff by two engineers on the cause of the collapse of the garage wall. The following are excerpts from the evidence given by the first engineer:

> Looking at the cause of the collapse, why did this wall come down in your opinion? It seems quite obvious to me that the sub-soil was poor and in fact should be described as muck. Without adequate precautions being taken it seems to me most obvious that any sort of similar structure would fall down if a deep trench had been dug beside it for the full length of it.
> How in the trade does one avoid this? You could under-pin if suitable. You could trench pile rather than sheet pile . . . . Or you could dig it in small sections if this was practical in the construction of the adjacent building but you might have to use a combination of the whole three.
> In the building trade when excavating close to another construction are such precautions taken? Very common.

The following are excerpts taken from the evidence given by the second engineer who was substantially in agreement with the first:

> From the results of those tests and the details about the trench and the wall, what did your calculations show? My calculations showed that under the applied load of the wall the soil supporting the foundation would fail resulting in a downward movement of the wall foundation . . . .
> At what depth of excavation would this failure occur? The failure would be imminent as soon as any excavation alongside the wall extended below the level of the underside of the wall footing. It would definitely have occurred as soon as the excavation was more than 12 inches below the underside of the footing.

While the experts thought that their evidence showed that the wall collapsed as a result of the defendant's excavations the judge did not. In his view the evidence showed something else[63]

> It was admitted that the evidence established that the soil underlying the brick wall was of a poor type. The evidence of Mr Gillespie, an expert in foundation engineering and soil mechanics, was that the load applied to the soil by the weight of the wall caused the subsidence and collapse of the wall. I think it is clear that but for the pressure of the wall there was no reason for the plaintiff's land to subside. This means that it was not the excavation of the trench which caused the plaintiff's land to collapse, but the pressure of the wall on the soil.

The judge then turned to the law and noted[64] that it was long established at Common Law that while an owner of land had a natural right to the lateral support of that land by neighbouring land, he had no right of lateral support

63. Ibid., 619. 64. Idem.

for any building on that land from the neighbouring land. Since it was the weight of the building which caused the land to subside the plaintiff had no cause of action based on the right of lateral support. Furthermore, since the plaintiff had no right neither the defendant nor his agent were under any correlative duty of care when developing the adjoining land. Thus the second cause of action, negligence, also failed. This judgment caused considerable consternation both within and without the engineering profession.

In *The Evening Post* of 25 March 1971, it was reported that a memorandum had been circulated to members of the Wellington City Council from Councillor W. G. Morrison, Chairman of the Town Planning Committee, urging that if the judgment in *Bognuda* was the law then a statute should be passed which would give building owners adequate protection against their neighbours. Councillor Morrison asked how in the light of *Bognuda* a building owner could protect his building — although he could carry his foundations deep the question of "How deep?" would remain. If he laid his foundations to forty feet, what if his neighbour was to construct an underground parking building requiring an excavation of fifty feet? Even if he set his building back from the boundary similar questions would arise.

In the 16 April issue of *The Evening Post,* an editorial supported the stand taken by Councillor Morrison and noted that his viewpoint received support from the New Zealand Institution of Engineers and the New Zealand Institute of Architects. The editorial reported that the Wellington City Council had before it a recommendation that the Council seek from Government changes or clarifications in the law to provide property owners with protection for their buildings against damage caused by excavations on adjacent sites.

The New Zealand Geomechanical Society at its meeting on 31 March 1971 passed a motion[65]

> that an appropriately worded letter be sent to the N.Z.I.E. expressing extreme concern at the implications consequent on the decision on this . . . case and urging that this be pursued at the highest level.

It is now history that the Court of Appeal[66] reversed the decision of the Supreme Court and, notwithstanding the House of Lords authority to the contrary, held that a cause of action could lie in negligence — a result compatible with common sense, scientific principle and commercial reality.[67]

In the context of the present study the Supreme Court decision can be analysed in the following terms. The norm which was relevant to the facts of the case was a legal rule of high authority stating that an owner of land with buildings upon it had no right to support for his buildings from an owner of adjoining land, although he did have such a right in respect of the land itself. It was in the context of this rule that the trial judge analysed the evidence. The evidence

65. *New Zealand Geomechanics News* No. 2 (June 1971) 5.
66. *Bognuda* v. *Upton & Shearer Ltd.* [1972] N.Z.L.R. 741.
67. The Court of Appeal used almost the full range of devices available to achieve the desired result: distinguishing, latin maxims, House of Lords decisions not technically binding, no need to look to see whether cause of action covered by old authority but whether it fell within recognised principles: *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004 (Lord Diplock's judgment in this case is an example par excellence of the Common Law model of judicial decision making).

could only show one of two things: that the land collapsed following the boundary excavation because the sub-soil was unable to sustain the stresses created by the weight of the wall, or, that because of the nature of the sub-soil the land would have collapsed even in the absence of the wall. Only if the latter was shown could the trial judge say that the second part of the norm applied and that then the defendant or his agent owed the plaintiff a duty, the breach of which might found an action for negligence. The evidence in fact showed, bearing in mind the nature of the sub-soil and the weight of the wall, that the sub-soil immediately under the wall could not sustain the stresses imposed in the absence of lateral support. To the judge, this meant that collapse of the soil and the wall following the removal of lateral support was caused by the weight of the wall. To the expert witnesses, and no doubt to the man in the street, the cause of the collapse was the removal of the lateral support. While the apparent function of the expert evidence was that it established that the defendant had caused the damage suffered by the plaintiff, its real function was that it removed the case from the ambit of the norm which the plaintiff sought to invoke.

C. Infusing Technical Know-How into the Courts

The way in which the Common Law courts receive technical assistance is apparent from the previous sub-Part. It is received in the form of evidence, in the same way as the court receives any other evidence, from witnesses called by the parties to give evidence on their behalf. The expert witness is treated in the same way as other witnesses and is examined and cross-examined like any other member of his side in the symbolic battle.

> And so, when in a trial in the courts a medical man is summoned to give evidence, he steps into something which is not designed for the pursuit of abstract justice, but into a contest which is being fought according to certain rules, where success depends so often on the man, on the skill with which the battle is fought. In this contest counsel's duty is to fight his client's case with all the vigour at his command. He must not let his personal sympathy with other professional men blunt his attack. He can be no respecter of persons.[68]

The scientist in this sort of atmosphere is like a fish out of water — the proceedings to him seem to be more like a game played by the lawyers than an inquiry into truth. In the case of expert witnesses the traditional procedure, which is designed to ensure the credibility and veracity of evidence given by witnesses is in many respects unnecessary and unsuitable. "Cross-examination moreover, frequently converts an expert who is trying to be impartial into one who is partisan when he finds himself attacked and his authority challenged."[69] Given this atmosphere it is probably not surprising that experts and the courts have not combined well. The courts have not had a high opinion of expert evidence:[70] "hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked". The passing of time does not seem to have improved the situation:[71] ". . . this class of evidence has, I regret to say, become suspect in the eyes of some of the judicial office-holders — not all, by any means, but some".

68. McCarthy J., "The Expert Witness" [1966] N.Z.L.J. 8, 9.
69. Hammelmann, "Expert Evidence" (1947) 10 M.L.R. 32, 34.
70. Per Lord Campbell in *The Tracy Peerage* (1843) 10 Cl. and Fin. 154, 191.
71. McCarthy J., op. cit., 11.

On the other hand experts have been critical of the courts. They criticise the court's lack of appreciation of scientific fundamentals, and the adversary system.

> Science and the law shared a laudable aim in their unstinting search for truth and it must therefore be a matter of considerable concern to New Zealanders to discover that decisions taken in law could so often be based on complex scientific evidence that brought the specialists themselves into conflict as to its meaning . . . . It is surely a weakness of our system if specialists' evidence purportedly introduced to clarify facts ends in obscuring truth.[72]

Experts feel they have to suffer unjustifiable personal attacks which add insult to injury already suffered simply as a result of, as they see it, having to deal with the twentieth century in a nineteenth century setting. They are most concerned at being thrown against their colleagues in contest situations where the reputation of their profession is bound to suffer in the minds of people who do not appreciate the complexities of science.[73]

In view of the doubts expressed by both courts and experts on the value of expert evidence obtained in an adversary setting, it might have been expected that reforms would have been instituted many years ago. Unfortunately the reforms have been too timid, not utilised, or have not got beyond the draft stage.[74] In some instances it is possible for the court to appoint an expert assessor,[75] but even in these situations assessors are rarely appointed in practice,[76] and are not apparently regarded as officers of the court, but instruments of proof which the court may disregard if it feels so inclined.[77] A hint of change in so far as one specialised area of the law is concerned was given in the Banks Report[78] where it was recommended that judges in patent cases should have qualifications in science. However, the use of assessors or specialist judges may not overcome some of the problems referred to since these arise as a result of the parties being free to call their own experts.

It is tentatively suggested that the changes needed in the legal system if the courts are to receive technical assistance in a rational way, and thereby come to grips with the technological world, not to mention a more accurate ascertainment of truth, have not been made for two reasons. First, because of the natural inertia of the legal system which seems anchored to bygone eras where the position of the courts was unchallenged, and secondly, because of the reluctance of the courts

72. Statement by the President of the New Zealand Institute of Chemists following the *Thomas* case retrial and reported in *The Evening Post,* Wellington, 23 April 1975.
73. Points made at a meeting of the New Zealand Institute of Engineers and the New Zealand Geomechanical Society on "Legal Problems arising from Geotechnical Works", Wellington, 17 April 1975, and by Ron Locker and Guy Salmon on radio station 2YC in "Topic", 10 May 1977.
74. For an account of the repeated failures to institute changes in the United States, see Travis, "Impartial Testimony under the Federal Rules of Evidence: A French Perspective" (1974) 8 International Lawyer, 492.
75. For example in patent cases: The Patent Rules 1956, rule 5.
76. The court in *Valensi* v. *British Radio Corporation* [1973] R.P.C. 337, appointed a scientific adviser for the first time in a patent case since 1935. This case dealt with a patent for a colour television system.
77. Per Lord Summer in *Australis* v. *Nautilus* [1927] A.C. 145, 153. In this case the penalty for the court's failure to understand scientific evidence was made evident. The loss lay with the party on whom the burden of proof rested for the issue in question.
78. *The British Patent System, Report of the Committee to Examine the Patent System and Patent Law* (London, 1970, Cmnd. 4407).

to share their role with persons having expertise outside the field of law. A patent, and some would say shocking, demonstration of this latter element was given in *Epperson* v. *Dampney,*[79] by the Court of Appeal of the Supreme Court of New South Wales. The case concerned the competing claims of a mother and father for the custody of their two children. A psychiatrist and a psychologist had given evidence for the respective sides and there had been substantial agreement between them on what action would be the most beneficial as far as the interests of the children were concerned. All other factors being equal the judge at first instance decided on the basis of the expert evidence to grant custody to the father in preference to following the "mother principle". Two appeal judges (the majority) were scandalised. Glass J.A. said[80]

> But I am satisfied that the trial judge in giving the expert evidence such a decisive operation misapprehended its tenor and accorded to it disproportionate weight . . . . No witness, however expert, may be asked in whose custody the welfare of the child will best be served. Since the answer to that question depends on the application of a legal standard, it can be given only by the judge . . . . I am directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers.

Street C.J. in agreeing said[81]

> The topic is to be evaluated against the background that our system of jurisprudence does not, generally speaking, remit the determination of disputes to experts . . . . Our society has selected a curial tribunal as that which in the greatest number of cases will come nearer to the best answer . . . . But the antiseptic philosophy of Huxley's *Brave New World* has not yet rendered obsolete a human evaluation of the complex web of parental and filial emotions that entangle all the persons concerned in disputed custody cases. It is ultimately the conventional and human wisdom of the judge, experienced as he is in matters of this sort, that must be applied in resolution of the contest.

D. Alternatives to the Common Law Way

Other modes of conflict management, and even curial systems, have evolved which may better handle disputes requiring technical know-how.

1. The Civil Law way

The courts of France, for example, receive expert assistance not from a witness for one of the parties, but from an expert appointed by the court. The expert makes an investigation and presents a report of his finding to the court in a proceeding known as an *expertise.*[82] In the *expertise* the expert's role is that of an investigator. He may conduct experiments, make on-the-spot enquiries, and even examine witnesses, who do not testify under oath as they would before a judge, but whose statements nevertheless are accepted as inferences under the

79. (1976) 10 A.L.R. 227. There are numerous examples both judicial and extra-judicial. In an extra-judicial comment Lord Justice Harman is reported as saying in 1966 that "when he was young psychiatrists had not been invented, and no one was any worse for it." — Quoted in Abel-Smith and Stevens *In Search of Justice* (London, 1968) 184.
80. (1976) 10 A.L.R. 227, 240-241. 81. Ibid., 228.
82. Full information on the *expertise* may be found in Herzog *Civil Procedure in France* (The Hague, 1969) Chapter 7. See also Travis, op. cit., and, for additional comments and criticism, Schlesinger, *Comparative Law* (London, 1960).

relaxed rules of evidence typical of the Civil Law. The expert presents his report in written form at the final hearing in the case, the *audience,* where counsel for the parties may question it as being, for example, in conflict with recognised authority or inconsistent. Notwithstanding any criticism the report will usually be accepted by the court, if only as an inference. As with all evidence the court will usually admit everything and give to individual items of evidence whatever weight it sees fit. There is no question of a party being penalised if the court cannot understand the expert's report. In appropriate cases there will be an order for clarification or a new *expertise.* In general, however, the court and the parties will usually accept the expert's findings.

The response of the Civil Law to the increasing need for the court to receive expert assistance has been to establish a position for the appropriate expert or experts in the tribunal itself.[83]

To adopt this course was, it is only fair to mention, much easier for the Civil Law than it would have been for the Common Law, since the statements of witnesses had always been presented to the full court in documentary form following investigations made by one of the judges in an *enquête.* The *expertise* is no doubt a more scientific approach than that taken by the Common Law, and certainly in France experts are highly regarded by the courts, but "some French practitioners are . . . of the opinion that the French Courts are inclined to accept the expert evidence too lightly at its face value, and assert the courts have fallen into the 'bad habit' of throwing their responsibility too often, and unnecessarily, upon experts".[84]

2. *The administrative model*

> At the turn of the century it seemed to many that the English courts and English lawyers were at the heart of affairs; but as the Welfare State expanded most new and vital issues were left either completely in the hands of the increasingly powerful Civil Service, or if some adversary procedure were deemed necessary, governments came to prefer flexible policy-conscious administrative tribunals to the more cumbrous and formalistic courts of law . . . . Meanwhile even former patrons of the courts, such as the commercial and industrial interests, gradually turned to arbitration rather than settle their disputes in the courts. The result was that a relatively smaller number of the major problems of modern society were coming before the courts of law.[85]

Administrative bodies set up in New Zealand are legion, and many require expertise of a non-legal character.[86] The number of cases heard by administrative tribunals in comparison with the number of cases heard by the courts is not known for New Zealand, but it is possibly similar to the situation in Britain where such bodies hear more cases than all courts combined.[87]

Many administrative tribunals are essentially adjudicative in nature, and in the present context it is more interesting to confine attention to those bodies which employ different modes of conflict management and to the conflict managing agencies of the private sector.

83. It seems accepted in France that the expert is part of the tribunal and not simply an instrument of proof who is not a witness: Hammelmann, op. cit.
84. Hammelmann, op. cit., 38.
85. Abel-Smith and Stevens, "Lawyers and the Courts" in *Sociology of Law* (ed. Aubert, Penguin 1969) 279, 280-281.
86. E.g. Town and Country Planning Appeal Boards, and Regional Water Boards.
87. Abel-Smith and Stevens, op. cit., 285.

(a) Institutionalised mediation and conciliation

It is very much the trend for administrative bodies set up to deal with disputes to be given conciliative rather than adjudicative powers. An example of this approach is found in the Human Rights Commission Act 1977, where among other functions the Commission is, in relation to complaints about industrial unions and professional and trade associations, "to investigate any complaint made to it . . . and to act as conciliator in relation to any such complaint."[88] And, if "the Commission is of the opinion that the complaint has substance, it shall use its best endeavours to secure a settlement between the parties concerned."[89]

Another example is to be found in the Small Claims Tribunals Act 1976 — "The primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement."[90]

Why has conciliation as a means for managing disputes become so popular with legislators? Is it because it has been recognised that the sort of disputes envisaged will all be Aubert's interest conflicts? This is hardly likely bearing in mind the subject matter — are complaints to the Race Relations Conciliator, for example, really going to be conflicts of interest? It is suggested that the real reason for this trend is a recognition of the shortcomings of the adversary procedure as a means of resolving disputes. The adversary procedure implicit in adjudicative proceedings in New Zealand serves to exaggerate conflict and is inclined to leave permanent scars on those who participate.

An early example in the trend to conciliation may be found in the Domestic Proceedings Act 1968. Section 13 creates a duty on solicitors to give consideration to the possibility of a reconciliation of the parties. More importantly persons having expertise in marital conciliation or marriage guidance counselling are given statutory recognition. The courts must refer the case to such persons upon, inter alia, receiving an application for a separation order and adjourn legal proceedings pending a report.[91] Thus purely legal machinery has been considered as inadequate in the area of marriage breakdown.[92] But is a marital conflict a conflict of interest for which conciliation is the appropriate managing device? In Aubert's terms it probably is not, but in Boulding's terms conciliation may possibly lead to an alteration of self-image and a reconciliation of images. Certainly the accepted settlement upon a couple parting is a separation agreement, a contract which establishes the respective rights of the parties in terms of an allocation of interests. Maybe conciliators in this field would be more effective in negotiating an amicable agreement to separate, than in reconciling the parties.

(b) Arbitration

Many contracts in the commercial field contain arbitration clauses which bind the parties to refer any dispute arising from the contract to an arbitrator named in the contract, to be determined by agreement, or to be named by some third party. Contracts which customarily include arbitration clauses extend from property leases and patent licences to construction contracts. Arbitration is facilitated by the Arbitration Act 1908 which prescribes procedure, and the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933,

88. S. 69(1)(a). 89. S. 70(1). 90. S. 15(1).
91. Domestic Proceedings Act 1968, s. 15(1).
92. More recently proposals for family courts suggest bodies which, because of expert personnel and absence of adversary procedure, no longer resemble courts.

which makes municipal law a protocol under which the signatory countries recognise arbitration awards made in other countries. As well as the factors of speed, informality, low cost, and international certainty, arbitration possesses two other advantages attractive to the commercial and technical community.

> In the first place, an arbitration is a private meeting; the only record is the arbitrator's award handed to the parties. In the second place, the arbitrator will almost invariably have first-hand knowledge of the practicalities of the problems involved, and because of the flexibility and informality that is possible in arbitration proceedings the parties get the benefit of this knowledge and are not necessarily faced with the 'yes or no, black or white' type of decision that courts tend to make.[93]

The possibility of having an adjudicator who has an understanding of the subject involved is very attractive to parties involved in contracts of technology and is possibly the most important reason why arbitration is popular in these spheres.[94]

There are some aspects of arbitration which may be disadvantageous in some circumstances. In New Zealand arbitration retains the adversary system of the courts. As a result of this the arbitrator must make his award on the basis of evidence submitted by the parties and is unable to make his own investigations, and thus fully utilise his personal, and neutral expertise. Also commercial and professional organisations usually insist on arbitration clauses in contracts with lay clients, with the result that a client finds himself governed by trade customs or professional practices which he had no hand in creating.[95] In this sense the basic foundation of arbitration, the agreement to arbitrate, may exist in the letter but not in the spirit.

Many commercial disputes do not even go as far as arbitration. They may be solved by direct negotiation, or negotiation under the guidance of an ad hoc mediator or conciliator (who may in fact be the nominated arbitrator). Whatever mode is chosen the courts seem the least popular.[96]

E. Caveat Emptor — The Therapeutic State

While new dispute processing institutions have arisen to better handle facts which are beyond lay comprehension, and better procedures for dealing with such facts in the courts should rightly be advocated, society ought to be wary of giving a technocratic establishment carte blanche. This is particularly important in relations between the state and the individual.

There are many who believe that technological society has met the challenge of convincing deviants of the error of their ways in a manner far more effective than the application of simple coercive power. The basic notion is that the state has embraced the concept that deviants are sick and therefore need to be treated rather than punished.[97]

93. Brickell, "Arbitration of Civil and Engineering Contracts" (1974) 29 *New Zealand Engineering,* 352, 353.
94. See Brickell, op. cit., and Turner *Contracts and Contract Administration* (Wellington, 1967).
95. Abel-Smith and Stevens *In Search of Justice* (London, 1968) 88.
96. Macaulay, "Non-Contractual Relations in Business" in *Sociology of Law* (ed. Aubert, Penguin, 1969) 194.
97. This tendency is a characteristic of modern as opposed to primitive societies according to Gluckman. In primitive societies individual responsibility is emphasised or even exaggerated, whereas in modern societies individual responsibility is diminished and structural causes emphasised: "Moral Crises: Magical and Secular Decisions" in *The Allocation of Responsibility* (ed. Gluckman, Manchester, 1972).

> Within this system [the 'therapeutic state'], little or no emphasis is placed upon an individual's guilt or a particular crime; but much weight is given to his physical, mental, or social shortcomings. In dealing with the deviant, under the new system, society is said to be acting in a parental role (*parens patriae*) — seeking not to punish but to change or socialise the non-conformist through treatment and therapy.[98]

While broadening the commitment standards for entry into psychiatric hospitals has delighted psychiatrists, "the decision about compulsory admission is now largely in the hands of those experts in psychiatric illness, and in this way patients may, if necessary, be admitted in order to forestall inevitable permanent deterioration . . ."[99] has disturbed others who would advocate that the same procedural safeguards available to a person being dealt with under the criminal justice system should be available to persons being dealt with by the therapeutic state.

If it is accepted that the therapeutic state is concerned with social control as well as individual welfare, this is a field where science has outstripped the law, not for the benefit of society but rather to its detriment, conjuring up images of Huxley's *Brave New World.*

III. CONCLUSION

There has been a decline in the importance of the courts as conflict managing agencies which has been accompanied by a growth in administrative conflict managing agencies. This trend has been noted by a number of writers, some of whom have been referred to here. It is submitted that this situation is primarily due to the inability or unwillingness of the legal system to undergo change. The courts have failed to adjust to the needs of technological society. The reform needed to enable the courts to acquire the non-legal expertise necessary to successfully cope with the growth in dispute subject matter beyond the understanding of intelligent laymen has been resisted. "There must still be fought in the realm of law the struggles that philosophy and theology had to go through when confronted by the natural sciences."[100]

Given this situation it is hardly surprising that many conflicts have been steered wilfully, and by legislation, away from the courts to mediation, arbitration and other extra-legal adjudicative bodies, where the necessary expertise could be more easily found, and where, for some cases, a more appropriate compromise decision could be obtained.

However this is not to say the legal system is becoming irrelevant. Some decisions cannot, because of inadequate information, be made by experts alone, and indeed, the experts in these situations are really being used as little more than ritualistic trappings to legitimate the decisions of others.[1] Furthermore the challenge to the courts' role in criminal law by the mis-use of technology by society is to be resisted. Where civil liberties are concerned the courts are the most appropriate forum, and are tolerably effective, since in such conflicts there is no necessity for the interest-to-value transformation usually required when the conflict is a private dispute.

98. Kittrie, *The Right to be Different* (Baltimore, 1971) 3.
99. Hays *New Horizons in Psychiatry* (2nd ed., Penguin, 1971) 337.
100. Marshall *Law and Psychology in Conflict* (Indianapolis, 1966) 104.
1. See Frankenberg's analysis in "Taking the Blame and Passing the Buck" in *The Allocation of Responsibility* (ed. Gluckman, Manchester, 1972) 257.