Adjudication and dispute settlement

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This paper looks at the concept of adjudication and suggests limits to the applicability of adjudicative procedures in the settlement of disputes.

I. INTRODUCTION

> One of the primary purposes of government is the maintenance of peace and order within the community by settling disputes between citizens or citizens and the State according to law. In our country the attainment of this goal is vested in the courts.[1]

The above statement, which preceded the Beattie Commission's discussion of the proposed court structure, should be cause for some concern. Not that the statement, as a generalization, is inaccurate or misleading in any way — society does need to ultimately resolve conflicts,[2] and in New Zealand, reliance is placed predominantly on the judicial system in attempts to resolve conflicts and maintain social order. What should be of concern is the tacit assumption that the legal system offers some kind of panacea for our social ills. Indeed the Commission, having correctly diagnosed stress and disillusionment[3] within the judicial system prescribed more courts, more judges and more law. But is this unswerving deference to the legal system acceptable? — it is submitted not. Social anthropologists have clearly shown that among societies there is a wide variety of means for solving the recurring problem of social order. It is becoming increasingly recognised that such variations are equally available within the one society. It is not being suggested that the judicial system should cease to exist or even that it should lose its status as the most important agent of social control. What is being suggested is that particular kinds of dispute might be beneficially diverted to alternative forums of dispute resolution. The difficulty, of course, is in identifying the strengths and weaknesses of the judicial process, and the kinds of problems which it is most suited to resolving.

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1 *New Zealand Royal Commission on the Courts Report* (Government Printer, Wellington, 1978) 74.

2 Although for a discussion of the positive aspects of conflict, see R. E. Walton, *"Interpersonal Peacemaking: Confrontations and Third Party Consultation"*, (Addison-Wesley Publishing Co., Massachusetts, 1969) 5.

3 See in particular the addendum of J. H. Wallace, Q.C. op.cit. 337 supra n 1.

In attempting to confront these issues, this paper focuses on adjudication — a concept which is reflected most explicitly in the procedural component of the legal system. What is involved in the adjucative procedure and what kinds of problems are suited to resolution by what procedure?

It is worth noting that any analysis directed towards these questions is of practical significance to those with an interest in administrative law. One of the issues which continually confront the courts in exercising their judicial review powers is that of the appropriate procedure. The doctrine of natural justice is specifically directed toward the determination of what constitutes fair and appropriate procedure in the context of a given decision-making power. That determination is increasingly being seen as depending in part on the nature of the problem which must be solved. The current debate surrounding the Erebus Report[3a] and planning procedures in relation to large scale national development projects reflects a concern for the adequacy and appropriateness of existing forums vested with the responsibility of resolving issue of considerable importance. In particular, concern has been expressed as to the kind of participation existing forums provide to those with substantial interests at stake. The Coalition for Open Government, in relation to the first tribunal hearing concerned with the issuing of consents for the Petralgas methanol plant, commented that[4]

> not only is the hearing limited to the consideration of site-specific problems, it is clearly not a forum for the public at large to share in decision-making about major projects. If not at the ballot box, and not in the administrative procedures, then when does the public have a chance?

II. THE CONCEPT OF ADJUDICATION

Before attempts can be made to suggest limits to the adjudicative process, it is necessary to attempt a definition; to have some idea of the features which set it aside from other forms of social ordering or conflict resolution. No attempt is being made to expose "true adjudication" since in reality there is possibly no process which is wholly adjucative. Even at a level of abstraction, it may be misleading to talk of true adjudication in terms of necessary and sufficient conditions. Nevertheless, if institutionalized methods of social ordering exist as an expression of pursued goals and principles, albeit imperfectly, then there is a basis within those goals and principles upon which it is possible to give shape to the concept of adjudication. Construction of such a theoretical model is perhaps the only way in which the proper role of adjudication can be critically examined.

It is suggested that the adjudicative method of social ordering is an institutional expression of the belief, ideal or principle that social relations are best ordered on the basis of existing and entrenched norms,[5] or, in the judicial context, substantive rules of law.

3a *N.Z. Royal Commission to Inquire into the Crash on Mount Erebus, Antarctica, of a DC10 Aircraft Operated by Air New Zealand Limited* (Government Printer, Wellington, 1981).

4 Open Government Report, Issue No. 8 (Coalition for Open Government, Wellington, 1982) 5.

5 No explanation is being offered as to the underlying source of these norms or the process of entrenchment — a topic properly relegated to "conflict-consensus" theory.

At a secondary level, the process may also be concerned with modification or even the construction of norms. Perhaps in more general terms, adjudication can be seen as a way of institutionalizing "experience", i.e. those normative solutions which have achieved a degree of acceptance can reassert their workability through a forum which has them stored and available for future application. The solution already exists — it only has to be retrieved and applied to the problem at hand.

In contrast to what can be seen as a forum for normative continuity, other forums of conflict resolution can be seen as proceeding in an ad hoc fashion. For example, mediation can be seen as proceeding upon the belief that an as yet unidentified norm will provide an individualized solution. The mediator works not toward the application of a solution, but the fostering of one. The distinction being attempted here is perhaps reflected in the following statement by MacCormack[6] in his discussion of dispute procedures in "simple" societies:[7]

> The basic character of mediation [as opposed to adjudication] is that the parties do not refer the dispute to an independent, third person in order to obtain a decision. Rather the good offices of another person are used to bring about communication between the parties and facilitate the negotiation of an agreement.

The distinction is based on the "obtaining" of an existing solution on the one hand, to the "facilitating" of a negotiated solution on the other. Fuller[8] has similarly observed that "mediation [as opposed to adjudication] is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves".[9]

Given this distinction in principle, it becomes somewhat easier to identify the more specific procedural elements of adjudication. Fuller has argued that the most important of the procedural characteristics of adjudication[10]

> lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour.

Eisenberg argues that such participation is perhaps equally as guaranteed in other forums — his example being the consultative process often adopted by executive decision makers operating in both the public and private sector. What does distinguish adjudication, concludes Eisenberg, is that "the decision ought to proceed from and be congruent with those proofs and arguments".[11] On the other hand, the consultor may base his decision on "evidence he has himself collected, on his own experience, on his institutional preferences, and on rules neither aduced nor addressed by the parties".[12] Similarly, within the mediation process there is no

6 MacCormack "Procedures for the Settlement of Disputes in 'Simple' Societies" (1976) 11 The Irish Jurist 175.
7 Ibid. 176-7.
8 L. L. Fuller "Mediation — Its Forms And Functions" (1971) 44 S. Cal. L. Rev. 305.
9 Ibid. 308.
10 L. L. Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv. L. Rev. 353, 364.
11 Eisenberg "Participation, Responsiveness, and the Consultative Process" (1978) 92 Harv. L. Rev. 410, 412.
12 Ibid. 414. See also A. D. Jergesen "The Legal Requirements of Consultation" (1978) Pub. Law. 290.

obligation for parties to reach a decision based on notions of proof and reasoned argument. It is the acceptability of the solution reached which is paramount, not the cogency of the reasoning processes underlying the solution.

It is suggested that Eisenberg's adjunct to Fuller's formulation is helpful. It gives effect to the importance of pre-existing rules as a basis for solving problems as opposed to human resources such as intuition, personal opinion, common sense or expertise.

In light of the above discussion, it is suggested that adjudication involves the resolution of conflicts through the reasoned application of entrenched norms to facts established by the proofs of both parties. It is the premise which is central to what, in the remaining part of this paper, I have identified as the adjudicative paradigm. It is the premise which underpins, for example, the perceived need for partisan advocacy, for an impartial decision maker, for extensive examination and cross-examination of witnesses, and for a doctrine of stare decisis. The question is, to what extent is the adjudicative forum universally applicable given the extraordinary range and nature of problems which become the centre of social conflict. Is the adjudicative paradigm one which needs to be reassessed in terms of its ability to provide acceptable solutions?

III. THE LIMITS OF THE ADJUDICATIVE PARADIGM

Much of the criticism directed towards the judicial process in particular, is the claim that it involves high costs and considerable delay. Yet it is suggested that a far more substantive criticism can be made, namely, that the adjudicative problem-solving method itself is inherently unsuitable for solving many of the conflicts which require resolution. Its monopoly over conflict resolution is perhaps more a result of historical factors than an inherent ability to provide the "best solution" in all circumstances. As already suggested the analysis can perhaps be couched within Kuhn's[13] relativist interpretation of the nature of science. His original thesis was that "particular coherent traditions of scientific research"[14] emerged from "paradigms" which he defined in general terms as "universally recognizable scientific achievements that for a time provide model problems and solutions to a community of practitioners".[15] This global entity, he claimed, consists of a strong network of "conceptual, theoretical, instrumental, and methodological"[16] commitments which provide a foundation for exploring aspects of nature. So to, can it perhaps be said, that the judicial process is a global entity providing a framework for defining and solving problems. It equally has commitments to its developed conceptual and methodological precepts as well as its community of committed practitioners who adhere to the paradigm.

The relativist component of Kuhn's thesis centred on the abandonment of a particular paradigm when repeated attempts to solve anomalies fail:[17]

13 T. S. Kuhn *The Structure of Scientific Revolutions* (2nd ed., University of Chicago Press, Chicago, 1970).
14 Ibid. 10.
15 Ibid. viii.
16 Ibid. 42.
17 Ibid. 90-91.

> Confronted with anomaly or with crisis, scientists take a different attitude towards existing paradigms, and the nature of their research changes accordingly. The proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals. all these are symptoms of a transition from normal to extraordinary research . . . Scientific revolutions are inaugurated by a growing sense . . . . that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself has previously led the way.

It is suggested that the legal paradigm, or even more narrowly, the adjudicative paradigm, may be similarly faced with anomaly and crisis. The increasing range and complexity of the issues which face modern society, demand a responsive solution, i.e. one that is acceptable and one that works.

Perhaps at this stage it is worth returning to the conclusion reached in the first part of this paper — that adjudication is a form of resolving problems through the reasoned application of established norms to facts established by the proofs of both parties. At first glance it might be considered that such a procedure has universal application. What better standard could we wish for than one of institutionalized rationality? Yet as suggested in the introduction to this paper there are different ways in which problems can be solved — different conflict-resolution paradigms. Fuller's[18] analysis of "polycentric" problems and Eisenberg's discussion of "problems of multiple criteria"[19] are perhaps the two most searching attempts to isolate problems which require a non-adjudicative solution.

Fuller's concept of polycentricity is perhaps most explicitly defined as involving "a situation of interacting points of influence"[20] where the parties' preferences change and interact as each identifiable issue is determined. Examples which Fuller relied on included the equal division of the valuable Timken art collection,[21] the problem of allocating players on a football team,[22] and the problems faced by the administrator of an irrigation district in allocating scarce water among the district's farmers.[23] The many issues which require resolution cannot be solved by the narrow focusing of proof and reasoned argument on each issue. Rather, a wider managerial or negotiated solution must be made by fitting the problem together like a jigsaw puzzle. For example, the positioning of x at centre forward in a soccer team from a pool of eleven players, may affect y's position. That determination will be made by a manager with a global view of all placements, not primarily by the "proofs and reasoned arguments" of y as to his preferences. In the context of national development projects, issues such as the economic and social need for a particular development may similarly involve elements of polycentricity and, as a consequence, require other than an adjudicative solution.

In contrast, the problem of discovering whether x did y with intent z thus bringing him within rule a is perhaps one that can appropriately be adjudicated

18 Supra n.10, 394.
19 Supra n.11, 424.
20 L. L. Fuller "Irrigation and Tyranny" (1965) 17 Stan. L. Rev. 1021.
21 Supra n.10, 394.
22 Ibid. 395.
23 Supra n.20, 1021.

upon. There are identifiable and autonomous issues, the determination of which will remain relatively constant as other issues become resolved. But also, as Fuller says,[24]

> [i]t is not . . . a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.

Again, within the context of national development projects the site — specific problems mentioned by the Coalition for Open Government[25] may be suited to adjudicative type procedures, especially where the contentious issues relate to the competing demands of perhaps two property owners.

Eisenberg brings a different slant to the same issue. His thesis is essentially that adjudication, as a process of ordering by established rules, becomes inappropriate when multiple norms or criteria become equally relevant, none asserting paramount importance. Thus, there is no criteria which can be objectively weighted without "impoverishing the solution".[26] The solution must ultimately be based on a discretionary and subjective process, rather than one involving judgment as to the proof and reasoned argument addressed to each criteria. The football team manager decides placement primarily on an autonomous view of factors such as experience, ability, motivation, intelligence, and fitness, rather than rationally deducing a solution from proof and reasoned argument directed towards such criteria. The solution is not one determinable by resort to established and entrenched norms. Eisenberg forcefully argues that[27]

> Adjudication is an appropriate ordering process only when decision can be reached by determining rights through the application of an authoritative standard. Thus the . . . football cases are unsuitable for adjudication . . . because they involve situations in which are competing claimants for a given subject-matter, none of whom has a substantive right that can be determined by the application of an authoritative standard . . . . At most . . . each player has a right to have his claim fairly considered under appropriate criteria applied to all those who are similarly situated . . . an optimum solution can normally be arrived at only by vesting a single decision-maker with "managerial" authority.

Admittedly, the analyses offered by both Fuller and Eisenberg are not exhaustive in terms of identifying the kinds of problems which are unsuited to resolution by adjudication. They merely provide one way of approaching the question as to appropriate forums.

The recent case of *CREEDNZ* v. *Governor-General*[28] is broadly illustrative of the ideas suggested in this paper. The plaintiffs challenged an Order in Council applying the National Development Act 1979 to the aluminium smelter project at Aramoana. In part, the plaintiffs argued that affected property owners were entitled to a reasonable opportunity of making submissions dealing not only with the effect of the works on their properties but all matters relevant to the national interest. In relation to those broad issues the court considered that[29]

24 Supra n.10, 398.
25 Supra n.4.
26 Supra n.11, 425.
27 Supra n.11, 424, 425.
28 [1981] 1 N.Z.L.R. 172.
29 Ibid. 177.

> The Executive Council, as the name implies, is the body at the apex of the governmental structure, necessarily dealing with major issues in a somewhat broad way. In New Zealand it is comprised of the same Ministers of the Crown as make up the Cabinet, a body existing by constitutional convention rather than law, and for the purposes of this case there is no practical distinction between the two. It would be very unusual to impose on this body of Ministers a duty of considering, whether directly or even in summarised form, the views on matters of national interest and the economy of all the individual property owners affected by a proposal who happened to wish to make representations.

In the light of Fuller's analysis of "polycentric problems"[30] or Eisenberg's "multiple norms or criteria"[31] there would appear to be merit in the court's decision that issues such as the desirability of a project are not properly the subject of adjudicative type procedures.

IV. CONCLUSION

The aim of this paper has been to offer a preliminary analysis of the adjudicative process as a paradigm directed towards the attainment of conflict resolution. In light of the paradigm analysis offered by Kuhn, it has been suggested that adjudicative parameters need careful consideration. In particular, how appropriate is adjudication as a forum of conflict resolution given the diverse and complex range of problems which now face society? Is the adjudicative paradigm faced with problems and anomalies to which it can no longer offer viable solutions? Some attempt has also been made to link the theoretical with the practical. There is considerable current debate as to the kinds of forums and procedures within which important issues should be resolved. It is submitted that some consideration must be given to the dynamics of dispute resolution. What is the nature of the problem at hand, what are the strengths and weaknesses of various forums, and how can the two be matched so as to enable viable and acceptable solutions?

30 Supra.
31 Supra.