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Are Courts Obsolete?

Joseph F. Weis, Jr.[*]

Resolution of an international dispute by peaceful means poses special problems, the most obvious being the lack of an enforcement mechanism. Difficulties of a different nature arise when resolving less dramatic controversies at national and community levels. The methods for resolving disputes, with their advantages and disadvantages, are discussed under the heading "Conflict Resolution."

The subject of this symposium, "Theories of Dispute Resolution," is a broad topic, raising a number of questions. What types of disputes are at stake? Who are the disputants? What individuals or entities are charged with the task of resolving the conflict? This Article will touch on the roles of the courts, contrasting them with other forms of dispute resolution. It will then propose some changes in the court system which would improve judicial administration.

I. Development of Dispute Resolution Systems

As is true with many topics, it is helpful to start with a review of the basics. Too often they are assumed to be understood and are passed over. But without articulation of their origins, discussion of later developments becomes unnecessarily complex.

A. *Origins*

Man took one of his most remarkable steps toward civilization when two disputants agreed, or were forced to agree, to abide by the decision of their group's elders as they sat around a fire. Although that moment by no means ended the practice of determining disputes by personal combat, it was the forerunner to peaceful adjudications of controversies between individuals.

When members of groups, tribes, and nations realized that settling differences without violence was necessary to maintain

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peace in their communities, governmental interest in the adjudicative process began. Concomitant with this development was born the realization that governmental power was necessary both to bring adversaries before an established tribunal and to enforce the decree handed down by that entity.

Along with the development of process came the need for substantive rules to forestall disputes as often as possible and, when that failed, to aid in their resolution. Establishment of rules to govern society followed two basic designs in western civilization: codification in the Roman mode on the continent and judicially-created common law in England. These two systems for creating substantive law also brought about differing procedures that resulted in distinctions that continue today.

The rule of law in the common law world grew out of trial by combat, vestiges of which remain. Today, although champions armed with pens and powers of persuasion have replaced those equipped with swords and lances, the adversarial theory continues to be the mainstay of the common law regimen.

A significant feature of that system is the relationship between judges and lawyers. Members of the bar are entrusted with the responsibility to investigate claims, assemble evidence, and present it to a fact finder for resolution. The judge generally acts as a referee of sorts to decide what evidence should be submitted to a jury—the body that has the decisive role of determining the facts, in other than bench trials.

In the continental system, by contrast, the judge takes a far more active and, in some cases, almost exclusive role in assembling the evidence. This kind of adjudication relegates lawyers to suggesting avenues of exploration.

In addition to their role at trial, common law judges, particularly at the appellate level, formulate substantive law by relying on, or analogizing from, court precedents that articulate legal principles. In civil law jurisdictions, by contrast, judges look to legislative codes as the source of law.

Perhaps it is the larger role of the judiciary in creating law in the common law courts that results in greater prestige and respect for the judges in that system. In civil law countries, on the other hand, the judges administering a seemingly all inclusive system of codes are perceived in many instances as functionaries, members of a bureaucracy similar to any other governmental department. It is anomalous that civil law judges, who enjoy less prestige, take a far more important role in the decisionmaking process than their

counterparts on the common law trial bench. As an aside, it may be that the increasing amount of statutory law and consequent decline of the judiciary's role in formulating substantive law in this country will diminish respect for the courts here as well.

Another feature that distinguishes common law countries, particularly the United States, is the use of the jury trial in civil as well as criminal cases. Although now seldom used in England, the country of its origin, the civil jury remains important in the United States, both in terms of procedure and effect on substantive law.

B. *Alternative Dispute Resolution*

Because the courts in this country have been straining under an overload of litigation that often leads to lengthy delays, legal commentators frequently suggest disposition of cases outside the court system. Proposals as diverse as rent-a-judge plans, arbitration, and mediation all come together as different facets of Alternative Dispute Resolution ("ADR").

ADR, which I support enthusiastically, has advantages, but drawbacks as well. Systems outside the courts lack the ability to invoke governmental compulsion and generally depend on cooperation of the disputants, usually achieved by appeals to enlightened self-interest.

ADR programs offer advantages such as flexibility in procedure and remedy. Parties may agree to permit innovative solutions, accept compromises, and avoid the rigidity of legal precedent. This adaptability is possible because the decision in an ADR proceeding is not precedential, and is not controlling in other situations. The process is not confined by the need for uniformity, but remains free to find novel solutions to specific problems. ADR is a worthy endeavor that should be encouraged, but it is important to recognize its limitations, some of which I shall note later in this Article.

Despite sometimes deserved criticisms, traditional court procedures developed by years of experience are not to be lightly cast aside. For example, the complexities of common law pleadings have frequently been described in scathing terms. Writings that stake out the perimeters of a dispute have evolved from the very technical pleading in centuries past to a more liberal pattern in modern times. But the prime purpose of pleadings remains the same—to determine what the parties understand their differences

to be, a circumstance not always as obvious as it may first appear. If a dispute can be carefully defined, a decisionmaker's task is refined and focused.

Common law procedures went astray when they put far too much emphasis on how information was imparted, rather than on what was disclosed. Nevertheless, the aim on substance was appropriate and remains so. The lesson to be learned is that experience gathered in centuries of dispute resolution should be used to retain procedures that are effective, and modify those that are not.

II. JUDICIAL DISPUTE RESOLUTION

Conflict resolution in the traditional court system involves two components—determinations based on fact and those based on law. Of course, many cases may involve both categories. A review of the two genre will be useful.

A. *Judicial Fact-finding*

In the vast majority of cases, a decisionmaker's most important task is to sift through the disputants' allegations to determine the facts. In this context, one weakness of the current American court system is over-reliance on the adversary system.

In theory, the clash of opponents with conflicting views should result in accurate findings of fact. These factual determinations may favor one side or the other, or may fall somewhere in between. The current system, however, does not always achieve objective truth. Sometimes the parties' disproportionate resources or the skill of superior counsel come into play. Although lawyers are officers of the court and thus owe a duty of candor to the court, that obligation often conflicts with a client's desire to win the case at almost any cost. Unfortunately, counsel often succumb to the pressures of a competitive business market and do as the client demands. Thus, rather than a search for objective truth, the quest is one for victory by the adversaries, with perhaps a bow to subjective truth.

It would be naive to believe that in all cases the ultimate factual findings comport with what actually did occur. As Judge Jerome Frank pointed out, accuracy in factual determinations is often suspect.[1] He was quite skeptical about the accuracy of factual re-creation in the trial courts given its dependence on human

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1 JEROME FRANK, COURTS ON TRIAL (1949).

memory and the ability to reconstruct events that occurred years earlier.

Often a dispute revolves around a sudden dramatic occurrence when no one knows what really did happen. Then too, faulty memories tainted by self-interest may, unconsciously or otherwise, paint a distorted picture of events, especially when the evidence consists of undocumented oral exchanges. The continuing vitality of statutes of frauds and parol evidence rules demonstrates the extent to which we distrust the memories and testimony of witnesses.

In addition to imperfect memories, few people indeed possess the talent to re-create a scene in words. Great authors can do so in writing—usually aided by revisions and re-writings—but a witness on the stand can rarely describe an event in vivid detail.

I can recall two instances in my own experience that illustrate this fact. In one, witnesses described a factory being destroyed by a fire that was fanned by high winds. Although the witnesses did their best, their testimony was not nearly as dramatic and convincing as a motion picture depicting the event shown later in the trial. What was said on the witness stand simply did not have the impact of the spectacular conflagration shown in the motion picture.

In another case, the issue involved action by police officers controlling a large demonstration. Eyewitnesses described the event as best they could, but a television clip—displaying a mob engulfing a bridge and, most dramatic of all, reproducing the frightening roar that came from the crowd—made indelible impressions on me as a trial judge.

Not all the problems connected with the lack of accuracy in fact-finding are products of the adversary system. It must be conceded, however, that continental law procedures which emphasize the role of a neutral judge in developing the evidence in the case do have merit. A judge can perform that task more efficiently and in a less hostile atmosphere than the fact finder in the adversary system. On the other hand, the continental system has its costs. The judges do much more in each case than their American counterparts, and thus the civil law system requires more judges. Moreover, because the court takes such an active part in procuring evidence and developing the records, the government shoulders more of the litigation expense.

In the United States, the evidence gathering and investigative roles are assumed by counsel and paid for by the parties. To that

extent, the costs to the government of a trial in the United States are probably lower. In addition, a greater volume of litigation may be handled by fewer American judges.

These economic factors, among others, make it doubtful that the United States will adopt continental trial procedures. The American judge, however, can become a more forceful figure in the trial—interrogating witnesses when the parties, for reasons of strategy, choose not to ask the critical questions; appointing independent experts to assist in evaluating those chosen by the parties; and taking similar actions that focus the trial more on developing objective truth than relying solely on the adversaries' presentations.

In recent years, judges and magistrates in the federal system have taken an increasingly active role in the pretrial management of cases. All indications are that the practice will continue and extend in time to greater control over the trial itself. The federal courts use an individual docket system and, as a result, more intensive supervision is feasible. Most state courts, however, resort to a master calendar because of the higher volume of litigation. In that system, the judge does not see the case until the day of trial and thus has a very limited knowledge of the issues or facts until all of the evidence has been produced.

Courts have begun to improve the means used to prove facts, but they must continue to progress in the future. Courts should utilize technology more intensively as it becomes available. For example, why should courts tolerate confessions typed out by the desk sergeant when the police could record the session on videotape? Recording could convey the flavor of the interview and effectively forestall disputes over such allegations as coercion and duress.

B. Fact-finding by Jury

Some fact-finding difficulties are attributable to the jury system. There is, however, one decided advantage to the use of juries. Although litigants may be willing to concede some lack of knowledge of legal precepts on their part, they are unlikely to surrender their views on the facts at issue. It is in this area that the American jury system serves a most useful function.

Litigants, who are apt to attribute corruption, ignorance, or lack of concern to the judge who decides facts adversely to them, find no such personal focus in a jury verdict. Perhaps jury anonymity and lack of continuity help litigants more readily accept

the verdict of jurors. Moreover, jurors have the advantage of support for their findings in group consensus and are perceived as having no interest in the outcome of the case.

In this respect, ADR systems are at a disadvantage. They have no power to summon individuals from the community to decide difficult factual issues, and no comparable institution through which resentment at an unfavorable result may be diffused.

In sharp contrast to the jury's important role in the resolution of factual disputes, the high degree of finality in verdicts, and the fulsome tributes paid to the jury system, severe restrictions are placed upon the panel during a trial. Much of the treatment of juries dates back hundreds of years to a time when many veniremen could neither read nor write. Jury illiteracy has long since passed, but even today the jury is generally considered a passive body that needs to be spoon-fed information in a manner designed to prevent interference with its detached, neutral role.

Recent years have shown only slight improvement. For example, a few courts have allowed jurors to submit questions that are then put to a witness by the judge. However, even this extremely limited participation has not been generally accepted.

Is it not strange that lawyers who voice such confidence in the jury system also insist upon restrictions that often keep jurors from arriving at the truth? For example, the exclusionary rules of evidence in many instances are based on outdated stereotypes or asserted unfair prejudicial effect—suppositions that have never been established by empirical data.

It is often said that a judge may be trusted to discard evidence that has little or no validity, but that same respect is not accorded a jury. Hearsay evidence, for example, is often received "for what it's worth" by a judge during a bench trial, but will be barred in the jury trial. A judge may well be aware that the defendant in a criminal case has a prior record, but if such information reaches a jury a new trial may be required.

It is worth wondering why the restrictive rules of evidence designed for supposedly easily influenced juries also are applied in bench trials. A welcome development in our courts would be a thorough review of our rules of evidence with a more realistic approach on admissibility. One advantage of ADR systems is that they are not historically shackled to such rules.

Despite some mistrust of juries, American trial lawyers prefer a jury to a judge in most criminal and civil cases. Why? The an-

swer probably lies in the traditional American faith in juries and distrust of trial judges—attitudes dating back to Colonial days.

We need new thinking about juries and trials, focusing on competence as well as confidence. The basic benefit of a jury is to bring a representative group of citizens into the court. That goal does not require that jurors be relegated to a passive role, or that information submitted to them be confined to what parties wish the fact finders to hear. Instead, a jury's value can be increased by allowing responsible involvement in the fact-finding process.

III. JUDICIAL DECISIONMAKING

Most cases are resolved at the trial level, but in recent times the number of cases going up on appeal has increased in both the state and federal systems. In the federal Courts of Appeals, one of every forty district court dispositions was appealed in 1960. By 1990, that ratio had changed to an astounding one of every eight trial court dispositions. At the same time, the absolute number of filings in the district courts also increased substantially.

These major additions to case loads have strained the resources of the Courts of Appeals. One reason why the appellate system has not crumbled under this weight is that once a case comes to a United States Court of Appeals, the odds are that it will not present a difficult legal question for resolution. Approximately twelve percent of cases are reversed—a tribute to the care given to conflict resolution by trial courts.[2] Furthermore, of all the cases appealed, at least one half will present no issues worthy of a published opinion because the results are dictated by settled law. Approximately another thirty percent (an estimate lacking scientific certainty) will present no particularly difficult matters, and may or may not warrant a published opinion.

Only a few appealed cases present intricate or complicated legal issues. Only in these isolated instances must judges grapple with truly difficult choices between conflicting legal precepts. Generally, these are the cases that attract the interest of academia and are studied, more or less avidly, by law students. However, it is important to realize that, to a large degree, judicial decisionmaking is devoted to the routine application of well settled law. That should not be surprising. After all, litigation reflects

2 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 23 (1991).

life in the community with its commonplace occurrences and lack of drama. Disputes over quality of goods sold, inability or unwillingness to pay debts, intersection auto collisions, robbery, illegal drug trafficking—these are daily fare.

While these cases may not test the intellect of the judiciary to any great extent, they do demand significant time, thereby limiting the amount of deliberation and study that can go into difficult cases. A certiorari court, like the Supreme Court of the United States, can control its docket to prevent domination by the mundane. No such authority is given to federal Courts of Appeals and state appellate courts that must contend with stifling volume. In evaluating the quality of judicial opinions and techniques of conflict resolution, an appreciation of the atmosphere in which they are generated is necessary for a proper perspective.

When judges wrestle with legal issues in difficult cases, they must weigh conflicting precepts and make choices. Deciding complex legal questions involves an elaborate process of testing various theories and possible outcomes—much like walking through a labyrinth. Many avenues turn out to be dead ends while other paths eventually make sharp turns that send them off in the wrong direction.

If the case involves statutory interpretation, frequent fodder for federal courts, the choice is often between taking Congress at its word or looking at the language from a perspective that leads to a result that Congress might have chosen if it had thought about the problem. Here the jurisprudential leanings of judges are critical. Do they believe whole-heartedly in legislative supremacy? Or do they have an unarticulated faith in the common law tradition of judge-made law (at least to the extent that flexibility can be exercised within the perimeters of the statute)? Students of conflict resolution must recognize that judges may use a statute as a springboard to reach a result they believe reflects public policy, or read the language to have no more effect than that clearly and unequivocally expressed.

Judicial attitudes toward statutes may vary with the subject matter. If the statute is in an area that attracts a judge's particular interest, the decision may reflect that leaning. On the other hand, a judge may feel that a statute was ill-advised and therefore choose to interpret it in a quite restrictive manner so that it does the least possible damage. Reactions of this nature need not be reprehensible and, depending on one's view of the issue, may be commendable.

Obviously there are many, oft times imperceptible, factors that shape judicial decisions. Judges, after all, are human. They have had experiences—relationships with people and causes, successes and disappointments, hopes and fears, to name a few—that affect a person's outlook on life. Does this mean that judges' decisions are primarily subjective? By no means. The traditional court system, unlike some ADR systems, has built within it an intricate series of checks and restraints.

Trial judges look over their shoulders at the appellate courts, aware that their decisions will be reviewed by appellate judges who may have entirely different leanings. An intermediate appellate court, similarly, tries to anticipate the reaction of the court of last resort in that jurisdiction.

Judges do not like to be reversed—except in the few instances when they suggest that course to the next higher court. The pride in their work product that drives judges is frequently under estimated. Even the possibility of criticism by law review writers is a limiting factor. In a collegial court, the necessity of persuading fellow judges to join in an opinion is a powerful force to inhibit individual idiosyncracies. Peer pressure to conform to established norms and traditions of the court are not easily brushed aside. In the common law system, precedent is a formidable barrier to wandering off the range.

An important question is the extent to which the subjective factors underlying dispute resolution in the courts affect public confidence. The carefully reasoned judicial opinion, particularly of an appellate court, that defines the contours of the law is a significant means to generate public support. It has been said that the public, as a whole, does not read opinions, but bases it perceptions on the results in a given case. There is more than a little truth to that observation, nevertheless, judicial opinions do have some effect on influential individuals in the community.

Although one may disagree with the outcome, a sound, well reasoned decision lends a court's ruling the strength required to maintain public confidence and acceptance. A court that loses public respect is in serious trouble.

Not only do judicial decisions affect public confidence in the system, but the anticipated public reaction sometimes helps shape those decisions. Although judges are not to be deterred from reaching proper, but unpopular, decisions by public pressure, the necessity for justifying rulings by persuasive reasoning can lead to subordination of individual biases. In short, although judges are

persons of varying backgrounds and inclinations, the nature and organization of a court system impose very substantial restrictions on individual leanings.

These institutional constraints do not apply to many ADR decisionmakers and, indeed, a reason for using ADR may be to escape from the restraints of precedent and collective decisionmaking. Nevertheless, it must be acknowledged that ADR provides far less protection from the sometimes unjust influences of bias and public pressure. Unfortunately, some forms of ADR provide no means for public validation of the results—if an outcome does become public and is unpopular, the institution may be irreparably damaged because it can no longer attract voluntary usage.

Given all of these considerations, how do judges go about making decisions in cases with difficult legal issues? Depending on experience, judges often have "hunches," a more or less unconscious perception that a case should be decided in a certain way. Although these hunches may ultimately not prevail, they at least act as tentative avenues for exploration and testing against other possible solutions.

But sometimes even the most experienced judges encounter cases where no hunches come forth, where no philosophical leanings give help, and where any of a number of solutions are acceptable or, at least, non-objectionable. Even the judges' biases don't help. What to do then?

First, judges will look for anything that will shed light on the problem—its origins, proposed solutions, and the likely results of a decision one way or another. Judges are likely to search the literature for philosophic and pragmatic views on the subject. Briefs and arguments of counsel will be closely reviewed again, as the judges immerse themselves in the cases and focus their thoughts. Perhaps slowly, perhaps suddenly, the answers come, sometimes seeming like a jigsaw puzzle where the missing pieces at last come to hand and fill in the critical gaps.

In deciding novel issues of law, appellate judges are heavily influenced by the precedential effect an opinion will have. An ad hoc judgment based on the equities of a particular case will not necessarily serve the best interests of the law or of the administration of justice. It may be tempting, for example, to excuse a delinquency of a day or two in a statute of limitations case. However, this is one of those areas in which arbitrary rules must be enforced despite appealing circumstances in individual cases.

When parties rely on legal rules to conduct their business, only strict enforcement of the rules can insure the orderly conduct of commercial affairs.

If such rules are not uniformly applied, lawyers sitting in their offices are unable to counsel their clients and can only point out the likelihood of unpredictable litigation. The ability of lawyers to advise their clients with some degree of certainty is critical in avoiding disputes. It is in lawyers' offices that most legal entanglements are forestalled and most questions of law are resolved. Based on an attorney's advice, a client determines the most prudent course of action that is least likely to lead to undesirable litigation.

Courts would be unable to cope with the avalanche if every business decision led to legal action that ended up in front of a judge. Overloading the judicial system by removing the element of predictability is too high a price to pay for ad hoc decisions inconsistent with uniform rules.

These considerations suggest one way in which ADR could complement the court systems. If alternative methods of dispute resolution could minimize the number of "predictable outcome" appeals, then appellate courts could dedicate more time to the difficult cases that help define the scope of the law. This is an area of ADR application that has yet to be developed to any substantial degree, but one that has great promise.

IV. REMEDIES AND ENFORCEMENT

The rigidity of common law remedies is another problem that needs greater attention. An interesting example was presented during a trial in a state court not long ago. Two parties had a dispute over whether they had an agreement to share the proceeds of a winning lottery ticket. The amount involved was in the millions of dollars. Because the parties had no writings, the decision whether there was a contract depended solely on their testimony. After deliberating for some hours, the jurors sent a note to the judge asking if they could award less than half to the plaintiff. The judge advised them that under the law the plaintiff got either half or nothing. The judge was correct, but I could not help wondering whether it would have been better if the law had given the jury freedom to award a compromise.

Another area where the law of remedies should be scrutinized is in the lump sum award of damages for personal injuries that are likely to continue into the future. Resolution of the problem

of future disability losses by awarding a lump sum is questionable because the court must anticipate what will happen in the future, a process that is simply guess work.

Should not the remedy be in the form of periodic future payments terminable on cessation of disability? Consider, for example, two persons who receive identical injuries when struck by an army truck. One, a serviceman, receives a pension that may be reduced or terminated when he is no longer disabled. The other, a civilian, sues the federal government in court and receives an award in a sum that may be less or more than the value of the serviceman's pension.

Even if a lump sum award is of greater value than a pension, it may still provide less long term security for the injured party if not thoughtfully invested. To avoid the danger of poor investment, many personal injury settlements today contain structured payments spread over a period of years. This is an improvement over lump sum arrangements, but courts still may not award relief to take effect in the event of future increases or decreases in disability.

Flexibility of remedies is a potential benefit from the use of ADR, but enforcement in general is a serious problem, as is the inability to include all who may have an interest in the dispute. Any device for deciding controversies that depends on acquiescence of the participants has a serious weakness, that is, the inability to definitively end the conflict when all of the litigants are not willing to take part in the proceedings.

It has always been possible for reasonable disputants to agree that a third party mediate or decide their dispute. Sometimes, however, the spirit of cooperation on the part of one of the adversaries vanishes when the result is not to his or her liking. Thus, government based court systems are necessary both to bring a recalcitrant party into the resolution process and to enforce the ultimate judgment. Voluntary procedures cannot completely supplant those provided and enforced by government.

There is an important distinction between cases that deal with private disputes—a disagreement over a routine contract between individuals, for example—and those that present challenges to, or actions by, the government. Various forms of ADR may be suitable for the private disputes, but different considerations play a role when the government is a party.

A governmental agency may agree to fact-finding by a private body under some circumstances, but no such entity could declare

a statute unconstitutional or give an authoritative interpretation of legislation. When questions such as those arise, it is essential to have courts that can impose a binding ruling on another branch of government.

Limitations on ADR methods are highlighted in the recent Administrative Dispute Resolution Act of 1990[3] and corresponding congressional hearings.[4] Although that statute gives an agency some discretion to accept non-governmental fact-finding, constitutional difficulties with dispute resolution outside the traditional court system have yet to be resolved. The legislation is, however, a favorable development that may spur other private entities to give serious consideration to ADR.

V. CONCLUSION

And so we end on a not completely unpredictable note. Courts are not obsolete—they serve in areas and ways that no other entity can. Nevertheless, they can improve their procedures and stimulate thoughtful change in substantive law so that the goal of prompt and just resolution of disputes may be brought ever closer to fruition.

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3 Pub. L. No. 101-552, 104 Stat. 2736, 2739 (to be codified at 5 U.S.C. § 582 (1988)).

4 S. REP. NO. 543, 101th Cong., 2d Sess. 6-7, *reprinted in* 1990 U.S.S.C.A.N. 3931, 3936-37.