ADR
a threat to democracy?

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Alternative dispute resolution is both a powerful tool and a dangerous weapon.

There is a fierce debate going on in some circles about whether alternative dispute resolution processes enhance democracy or represent a threat to it. While the jury is still out on this question, it is timely to reflect on some of the critical issues in the debate.

Alternative dispute resolution or 'ADR' is the flavour of the moment and has been for some time. This generic term refers to a range of diverse processes and practices: mediation, conciliation and facilitation.[1] The precise content or meaning of each of these terms also varies considerably. Although encompassing diverse practices, a unifying thread seems to be the underlying commitment to involving parties in the resolution of their own conflicts, without the adjudication of an external third party.

Mediation is the most well known and established of ADR processes. Community mediation centres in the US spawned the modern ADR trend. These centres initially focused on a narrow range of disputes which were generally of an interpersonal nature, particularly neighbours and families. ADR is now a much broader movement. Many of Australia's largest legal firms have established ADR sections. A number of retired judges are practising their own form of mediation (Sir Laurence Street mediated to resolution in the well known Children of God case in NSW; Ken Marks, QC mediated the Children of God case in Victoria without resolution). ADR processes have also been incorporated in legislation in a number of jurisdictions and are used in all manner of conflicts: workplace, tenancy, labour/management, international conflicts, commercial disputes and minor criminal matters.

Various explanations are offered for the emergence of ADR. These primarily centre around the failures of the legal system: accessibility, comprehensibility, cost and delay, as well as issues about involvement and empowerment and quality of decision-making. It is the latter claims which underpin the recent phenomenon of using ADR in the area of public policy and public interest disputes – disputes which essentially involve questions of the allocation of public resources and the setting of policy priorities. For example ADR processes have been used for dealing with issues as diverse as where to put a national park, where to locate a tip, conflicts within communities over development proposals and race relations, as well as to regulate relationships between private and public agencies. In the United States, federal legislation requires government agencies such as the Environmental Protection Authority to negotiate with key players over governing regulations, a phenomenon known as 'regneg'. The Queensland Department of Housing, Local Government and Planning is currently looking at how mediation and dispute resolution processes can be incorporated in planning and environment legislation. Consideration is being given to institutionalising ADR processes for managing conflicts involving local governments, developers and the community over planning and zoning disputes.

The rationale for this trend is that ADR processes will generate more acceptable decisions, allow for greater community involvement, and ultimately will prove to be cheaper and more effective than conventional decision-making processes. ADR processes fit neatly within a pluralist analy-

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sis of government and decision-making processes. A pluralist analysis views policy and law as the product of negotiations and interactions of various interest groups. The state does not hold an ultimate monopoly on social control and does not have ultimate power to impose values/norms inconsistent with those of the majority of society. On this analysis, public policy would ideally reflect the distilled consensual values and norms of society.

On a theoretical level ADR processes seem to embody the pluralist conception of society.[2] The process itself manifests a particular version of democracy, one in which decision-making occurs through the reconciliation of diverse interests, rather than the supremacy of particular views over others. But is this how it works or is it all a hoax? Does it encourage genuine participation or does it merely extend bureaucratic control and appease powerful interest groups?

'Facilitation' is the ADR process primarily used for multi-party public issue disputes. The process may be initiated by a community group, a government agency or other stakeholder but depends on the agreement of all to participate. It involves bringing together disparate groups who are assisted by the facilitator to define the issues, focus on problem solving and identify points of agreement. The facilitator does not give advice or make determinations. Their role is to help all the participants to communicate. Accordingly facilitation aims to produce consensual decisions which accommodate the interests of these disparate groups. The process involves a problem solving and collaborative approach rather than one of confrontation. It therefore makes possible the transcendence of traditional interest divisions and the transformation of conflictual relationships. Timber representatives can work collaboratively with conservation groups.[3] It also makes possible the reaching of creative and innovative outcomes not possible in an adversarial and competitive model.

The facilitation process is also played out in a forum which is physically and culturally more accessible than either the legal system or the nebulous bureaucratic mechanisms which exist for policy formulation. People feel more comfortable expressing their views in an informal setting, because they are in familiar territory. ADR uses informal language, roles are determined by the group, it is comprehensible and there are few organisational layers to wade through.

In contrast, conventional policy formulation and decision-making can occur through a number of less accessible mechanisms. These commonly involve adversarial public hearings, public submissions, perhaps a series of discrete meetings with key interest groups, and finally an authoritative or recommendatory decision by an adjudicator. Alternatively the issues may be played out in the courts through a series of legal challenges to administrative decisions.

How democratic ADR is can only be judged in comparison to these conventional processes. It is clear from such a comparison that ADR processes are consistent with and promote democratic principles and decision-making:

- individuals outside government are able to participate on a more equal basis;
- the process is interactive and allows dialogue and discussion and information sharing;
- there is shared authority and responsibility for the decisions of the group;
- power is atomised, issues are dealt with in a multiplicity of local sites with different players;
- ADR processes are flexible, non-hegemonic and accessible.

Criticisms

Concerns have been loudly expressed that public policy issues should not be determined by a process of bargaining because social values and public interest decisions should emanate from more authoritative processes. Other criticisms of ADR relate to its representativeness and the potential for it to extend the power of the bureaucracy.[4]

Representation and accommodation

While ADR encourages people with diverse interests to resolve their differences, it is naive to think that all interests are always equally accommodated or that the full spectrum of societal interests are represented. Indeed who become stakeholders in major policy decision-making processes is a highly political question which requires further consideration. However, perhaps an important question is: do all interests and claims have a right to be heard and accommodated?

One of the main themes to emerge from criticisms of the use of ADR processes in public policy determination relates to its accommodatory nature. Precisely because diverse views and interests are accommodated, it is argued that specific social norms, values and precedents cannot be articulated or established. (Views differ on how these values should be determined depending on the particular conception of the role of the state).[5]

Though explicit differences are recognised, ADR does not aim to establish a hierarchy of interests/values/norms. For example in a dispute over sand mining in a sensitive environment, the values of environmental preservation and commercial profit are in direct conflict. ADR processes respond to this by encouraging all the participants to express their own values, to understand the values of others and to accommodate these conflicting values and produce an outcome that all parties can live with. Accordingly there is no winner takes all.

Clearly value conflicts are at the root of many significant public policy and public issues such as abortion, land rights, prostitution, and decriminalisation of drugs. In some of these it may not be possible or desirable to accommodate fundamentally conflicting sets of values. On the contrary it may be important that there be explicit endorsement and exclamation of one set of values over another. Aboriginal land rights cannot exist or be accommodated with racist values. Public endorsement and recognition is called for. There is no community of shared values in a heterogeneous society and ADR processes are not likely to produce one. The philosophy of ADR is essentially non-ideological and its politics of accommodation are essentially 'apolitical'. Accordingly it is not the appropriate mechanism for determining ultimate social values. These will usually require a more political determination.

However an accommodatory, consensual and interest-based approach does have a role to play in conflicts which have a values dimension. Community conflicts over land use and development involve a clash of values but do not always require one set of values to defeat others. ADR processes can facilitate understanding of different values positions and assist conflicting groups to work out livable solutions which are consistent with their own respective values frameworks: sometimes both may sit comfortably together. ADR processes may also be useful in clarifying issues prior to an authoritative decision, or to facilitate the implementation of decisions which endorse a particular set of values.

Public interest

A related criticism is that ADR processes do not permit a higher level consideration of the public interest and that broader social and political contexts are ignored.[6]

ADR processes are used to respond to particular disputes within particular communities or contexts in isolation from other social features and comparable disputes. Accordingly it is necessarily a piecemeal and fragmented approach to policy development or decision-making. Concern is therefore expressed that deals are being done over public issues without public scrutiny and without open and public debate. This concern is amplified where the process is conducted in private without proper documentation or evaluation. Naturally suspicions are aroused when private negotiations settle controversial public issues such as breaches of environmental legislation. While facilitators have an obligation to raise consideration of the interest of unrepresented third parties and the public interest generally, there is no structural way within ADR processes that these interests are really taken into account.

While this is an obvious weakness of the process for disputes involving substantial issues of public interest, safeguards and accountability processes can be built in. These may include openness, assured independence of service providers, documentation and developing stronger links with legal and political institutions so that a cohesive, integrated and informed dispute resolution system may be established. For example, it may be that facilitative processes are used to conduct debate and to clarify issues in relation to important public interest debates with a purpose of informing authoritative decision-making processes.

Bureaucratic control

Perhaps a more alarming issue consistently raised is that ADR provides a managerial approach to conflict which operates to extend bureaucratic control over dissent.[7] Through the managerial techniques used in ADR, government can give the appearance of consultation, involvement and participation with the hidden purpose and effect of suppressing conflict and preventing groups from collectivising their dissent. Conflict is managed, diffused and defused, order is re-established and existing social control mechanisms are consequently reinforced.

This issue requires greater consideration. However, on a simple analysis it is clear that the criticism points not to any inherent danger in ADR but to its potential. It also points to the need for scrutiny of the motives of government agencies in using ADR processes and for scrutiny and evaluation of both process and outcomes of facilitated processes. While governmental power is not such a monolithic animal that it can manipulate ADR processes in a systematic and complete way, specific instances of manipulation can present a fairly convincing argument.

Most of the loudest ADR critics look at ADR from a theoretical and global perspective, comparing it with idealised alternatives. The absolutism of the criticism means that both social reality and the genuine and immediate (and pragmatic) benefits of ADR are overlooked. And because ADR has developed as a practice without a clear theoretical framework, it finds it difficult to defend itself.

Inherent in much of the criticism also are a number of assumptions: that ADR processes value order over conflict; that all conflicts raise issues of universal significance; and that ADR processes will replace existing institutions for dealing with these. None of these assumptions are necessarily true. ADR processes simply provide another forum for conflict to produce meaningful outcomes.

All conflicts do not have the same potential for clarifying or establishing social norms. The issue of where to locate a tip within a given community does not necessarily raise any larger issues. By empowering local communities, whether geographic or interest based, to deal with conflicts in which they are primarily interested, better outcomes are possible and the role of other public institutions in establishing social values can be reinforced. As we know the majority of conflicts are not currently dealt with through existing institutions and even those which are initiated in court are generally resolved prior to adjudication. ADR provides another means for this to happen.

Conclusion

ADR has enormous potential to broaden participation in the determination of public policy and public issues. Its great strengths are the potential for direct involvement of communities in decisions which affect them, more or less equal participation between groups, information exchange rather than information competition and shared responsibility for decision-making. And while ADR doesn't fundamentally alter the distribution of power in society, in some circumstances it can broaden access to participation and even out power differences within a narrow context. It can also produce outcomes which have high social utility and acceptability. Whether it will ultimately succeed depends on whether the values it embodies (and the conception of the role of the state implicit in it) are accepted: the values of consensus, non-competitiveness, accommodation. It also depends on how well it is integrated with other social institutions and how it is used by government.

The preceding discussion points clearly to a need for a multiplicity of forums in which conflicts can be played out. There needs also to be greater clarity about which conflicts should be expanded and which should be settled at a local level by local participants. ADR processes should not replace established social institutions for determining social norms or the public interest. They need to operate within a broader framework in conjunction with other public institutions. ADR should not be seen as a threat to legal institutions but as an adjunct to them. ADR is both a powerful tool and a dangerous weapon. Further debate within a broader framework is necessary to ensure that its potential for enhancing democratic processes is realised.

References

1. Some definitions also include expert appraisal, private judging and arbitration, since they are alternatives to conventional legal processes. However because all of these involve reliance to some extent on adjudication by an external third party, they are not included for present purposes.
2. Ellison, C., 'Dispute Resolution and Democratic Theory' in Nagel, S. and Mills, M. (eds) Systematic Analysis in Dispute Resolution, Quorum Books, 1991.
3. This was the experience of the Alternative Dispute Resolution Division of the Department of Justice and Attorney-General (Qld) when it facilitated proceedings of a working group made up of Timber and Conservation and State Government representatives to develop a proposal for the extension of the Conondale National Park.
4. See generally Abel, R. (ed.) The Politics of Informal Justice, Academic Press, New York, 1982.
5. Abel, above, and see also Ellison above.
6. Amy, D., The Politics of Environmental Mediation, Columbia University Press, 1987; Ellison, above; Hofrichter, R., 'Neighbourhood Justice and the Social Control Problems of American Capitalism' in Abel, R., above.
7. Abel, R., 'The Contradictions of Informal Justice' in Abel, R., above; Ellison, C., above; Cain, M. and Kulesar, 'Thinking Disputes: An Essay in the Origin of the Dispute Industry' (1981-82) 16 Law and Society Review, 375.