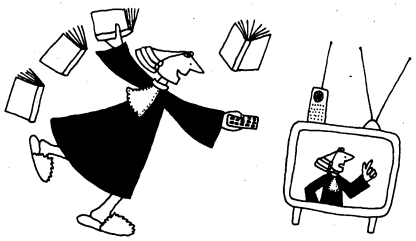
LAW & CULTURE



NON-ADVERSARIAL JUSTICE

Michael King, Arie Freiberg, Becky Batagol and Ross Hyams; The Federation Press, 2009; 302 pp; $55 (paperback)

The mission is just: to liberate us from the shackles of adversarialism as an overused delivery agent of justice.

Justice may be dispensed in many ways and forums. The most familiar depiction is one of adversity in a courtroom, comprising barristers cloaked in gowns and wigs engaging in brutal cross-examination in the battle for triumph, presided over by an elder judge draped in regal red. Then there are alternative methods that focus on problem-solving, process, forging partnerships with oversight by active adjudicators. These newer forms, according to the authors of *Non-Adversarial Justice*, can be described as 'restorative, therapeutic, managerial, technocratic, collaborative, [and] participatory' (p 1).

The authors are all well-published academics based at Monash University. King is a specialist in non-adversarial justice and related concepts. His scholarship has focussed on therapeutic jurisprudence. Freiberg has a special focus on sentencing. Batagol's research focuses on dispute resolution in the context of family law and policy. Hyams' publications have centred on clinical legal education. All of these specialities have a place in the book.

The book is well-structured. There are 16 chapters covering a panoply of neatly segregated matters including preventive law, holistic approaches to the law, and sentencing of Indigenous offenders. Despite the separation into chapters, readers should be aware that such matters are often not separable; law touches the life of common people at many points. The chapters are all of digestible but varying lengths which will hold a reader's attention, although there is one noticeable distraction from this positive feature: the text itself contains source citations despite the authors using footnotes for other purposes.

The introductory chapter leaves the reader in no doubt as to the breadth and depth of non-adversarial justice, defined very briefly as 'an approach to justice, both civil and criminal, that focuses on non-court dispute resolution' (p 5). I believe that readers should neither enter nor emerge from the book believing that litigation is to be frowned on. The authors do not point out that, at least in civil cases, litigation is often, if not always, preceded by some form of non-adversarial attempt at resolution. It is when this fails that litigation is inaugurated. It is not the function of the adversarial process to recount these attempts.

It is clear from the book that the law and the legal system cannot 'go it alone' but must be illuminated in the interpretive and applicative phases by sociology, psychology and allied fields of knowledge. But how far and to what extent can it go it alone? In Chapter 2, King suggests that therapeutic jurisprudence cannot 'be applied in all circumstances' (p 30). This, however, is an imperfect reflection of what he later claims: '[t]herapeutic jurisprudence says that the therapeutic implications should be a factor to be considered in all aspects of judging and legal practice, not simply in particular situations' (p 37). Such a broad ideological brush-stroke is unlikely to gain traction in an 'argument culture' (p 4).

Criminal law is an obvious example where therapeutic jurisprudence must be applied very conservatively and even then, to non-egregious cases. Yet it is this area of the law where it is principally making its debut. Unfortunately, when promoting non-adversarial justice, King — and indeed the book generally — omits a discussion of the deterrent effect that is expected of the criminal law. Non-adversarialism and therapeuticism are hardly prosecutorial, judicial or societal responses that would deter criminal offending. Regardless of whether victims are voluntary participants in the restorative justice system, as discussed by King in Chapter 3, one must not forget the public dimension of criminal law. King further acknowledges that '[s]entencing does not always involve the infliction of pain—some offenders are released without sentence'. If this is done in the name of restorative justice, it has no sense or appreciation of the macro-effects of re-offending on the public. There is a legion of contemporary examples in Australia of this reality.

I also felt that King's chapter on 'therapeutic jurisprudence' has its shortcomings. Although he states that 'therapeutic jurisprudence has begun to be referred to in a number of jurisdictions', he does not delve into them. Mere reference adds little value to the practitioner-oriented reader. In addition, his exposition is not always clear. If therapeutic jurisprudence is the study of the effects of law on the behaviour, emotions and mental health of people, one will largely agree that the judiciary 'already do that' (p 37). However, King retorts that 'it is a mistake to equate therapeutic jurisprudence simply with imposing a sentence that favours rehabilitation without thinking about the therapeutic implications of the formulation of the sentence and the court and other legal processes involved' (p 37). Is he suggesting that the judiciary do not consider the implications? Why the judiciary do what they do in the realm of sentencing is difficult to decipher. Is, for example, a judge who grants bail to an offender doing so for therapeutic or restorative reasons or because of a lack of prison resources?

Further, King states that neither statute nor common law 'provides much guidance concerning court processes aimed at promoting motivation for positive behavioural change that are a key element of problem-solving courts' (p 35). This raises a number of questions. Is he advocating that statute in particular play a bigger part, if it is playing one at all, in 'therapeutic jurisprudence'? Should it? What type of statutes would play that part? In what way would a statute play that part?

Nevertheless, what is truly occult is the profuse attention given to therapeutic jurisprudence and restorative justice, which still remain reactive measures. Attention is in need of re-diversion to preventive law, a subject discussed in Chapter 4 by Natalia Belcher — an alarmingly short chapter. Belcher is succinct in her analysis and adequately considers the growth-inhibiting limitations of preventive law.

Preventive law, of course, seeks to anticipate and prevent legal problems and litigation in a broad scope of areas such as estate planning, corporate compliance,

business planning and environmental law. Although it has wide applicability, it may be allergic to inherently private matters such as family law. Applying preventive law to crime would have the most positive widespread effect on society than any other theory of justice. Belcher argues that preventive law is best supplemented with therapeutic jurisprudence and holistic law. While this is true, creative problem solving (Chapter 5), particularly in civil cases, is as important depending on whether preventive law seeks to avoid litigation after the problem has arisen, as Belcher suggests it does — in which case creative problem solving should assume its place — or whether it seeks to avoid the problem altogether.

Holistic approaches to law are given a separate treatment in Chapter 6 by King. Holism essentially studies 'an object as a whole entity' (p 80). Holism has much to commend it. It addresses problems in context rather than in isolation. Virtually every corner of the book and any area of the law could benefit from holistic approaches.

King argues that basic criminal justice principles are often 'grounded in incomplete conceptions of human nature and behaviour' because, he states, there are a 'number of factors affecting human behaviour' (pp 81–2). Disappointingly however, he, and indeed other academics, do not use holism to consider the real causes of an otherwise proliferation of crime. To consider holism in this way, one also needs to accept that crime, largely, has its genesis in government policies. Crime is inescapably, intricately, yet sufficiently directly affected by policies in education, human services, policing, employment and even immigration. But as King would say, the lawyer may then be 'going beyond the areas of professional responsibility and competence' (p 87). But arguably, this 'emergency exit' could conceivably apply to many forms of non-adversarial justice including therapeutic jurisprudence. Holistic approaches in these areas should at least be considered, by those with the necessary competence.

'Creative problem solving' is within the ken of a lawyer's responsibility. Chapter 5, also written by King, is short and succinct. However, the discussion is launched fairly much within the confines of theory without much application to specific areas of legal practice. Constitutional law is one such practice area mentioned by King but in the context of judicial practice: 'drafting of key legal documents such as constitutions has produced different approaches to government and created new legal institutions' and that '[d]evelopments in constitutional law often occur through a court's creative interpretation of the language used in a constitution' (p 74). While this is true, constitutional law practice can also be subject to intense creative problem solving by legal practitioners using a multitude of public law tools. King states that the 'United States has been the principal source of scholarship on the creative problem solving approach to the law, but its application has extended far beyond that country.'

The oldest form of non-adversarial justice is narrated in a comparatively lengthy chapter by Batagol, entitled 'ADR: Appropriate or Alternative Dispute Resolution' which provides a detailed account on the various forms of ADR: facilitated negotiation, mediation, conciliation and arbitration. Each of these is placed in its proper context. ADR was born as 'alternative dispute resolution but is now becoming known as 'appropriate dispute resolution'. Reasons are given in the chapter but are also summed up by Western Australia's Chief Justice in his recent address to the Australian Lawyers Alliance (post-publication of the book under review):[1]

> statistics show that less than 3% of the cases commenced in our court are resolved by a trial, which of course means that more than 97% are resolved by some other means ... There are a number of conclusions which flow from this ... The first is that the expression 'alternative dispute resolution' is a misnomer. Resolution of a dispute by agreement between the parties is not the 'alternative' — it is the primary means by which disputes in our court are resolved. In our court, and in many others, the trial is the alternative means of dispute resolution.

Freiberg takes the book in a new direction in Chapters 9, 10 and 11, which canvass problem-oriented courts, diversion schemes and Indigenous sentencing courts respectively. He provides a sketch of the current landscape in Australia in these areas supplemented richly with statutes governing them, rather than engaging in an extended philosophical narration. These chapters are written in a largely accessible format and language compared with the preceding chapters.

The last three chapters will be of prime interest to judges, lawyers and law students. Chapter 14 discusses implications for courts. King covers such interesting topics as courthouse architecture and design and how this effects perceptions of adversarialism — a matter often overlooked by academics and practitioners alike.

In Chapter 15, 'Non-adversarialism and the legal profession', Hyams embarks upon fairly controversial discussions, such as 'redefining lawyering roles' which is undoubtedly destined to provoke some criticism. Hyams, in absolute good faith, suggests that the 'emerging non-adversarial environment also provides the current generation of lawyers [and this can be extended to any generation of lawyers] with a unique opportunity to reflect on the appropriate lawyering role ... by embracing therapeutic and collaborative roles' (p 232). While this would be a positive step in enhancing their generally poor reputation, the reality is that those lawyers, operating in a competitive environment, aspiring to a higher profile role in society, the legal profession or legal system, 'senior counsel' designation, or judicial appointment are well aware that their personal skills and competence, requiring the requisite level of publicity or acknowledgement, may (but not necessarily will) be eclipsed by the more 'privatised' or 'non-public' dimension of therapeutic jurisprudence.

Hyams further suggests that making non-legal skills (such as emotional intelligence and communication skills) — previously not required of lawyers in the context of continuing professional development — compulsory 'may be the only way to ensure that Australian lawyers have the competencies required to participate appropriately in emerging non-adversarial environments' (p 237). If this were true, then a course in ethics ought to ensure an ethical lawyer!

The most important point, perhaps in the entire book, is the growing importance for lawyers' 'ability to communicate and engage well with the variety of other people that lawyers come into contact with' (p 239). One may add, however, that the greatest indictment against lawyers is their inability to *adapt* their communication skills to fit the mould of their clients' cultural background, language limitations, age and stage.

One way to promote non-adversarialism is through appropriate legal education at university. This is discussed by Hyams in the final chapter. Unfortunately, Hyams does not appear to tell his audience exactly how this is to be achieved. Are there to be distinct courses on non-adversarialism? Or do we adopt the Menkel-Meadow approach and enshrine it directly into various black-letter law courses?[2] One may decipher the chapter and reasonably conclude that a mixture of the two is what is advocated by Hyams.

As readers emerge from this book, they must condition their mentations into accepting that non-adversarialism can be stretched to an unnatural extreme such that it trespasses into the terrain properly the province of adversarialism. Sadly, this may already have taken place in Australia. For the 'quiet revolution'[3] to ignore this encroachment would yield to at least two punishing effects on society. Firstly, the civil or criminal wrongdoer will have no incentive to refrain from wrongful conduct given the punishment will be merely 'therapeutic' and indeed may cause an individual to assume risk where that individual otherwise would not have. Secondly, this would take certainty, coherence and meaning of the common law to an uncommon low. The authors, citing Cannon,[4] touch this point in a different milieu: 'the private resolution of disputes … can reduce corporate and governmental accountability, create a multiplicity of standards or rules and exacerbate existing power imbalances between the rich and the poor' (p 12). It can also be stretched to such blatantly improper extremes as to seek culture-specific courts functioning as a 'voluntary and non-binding dispute resolution mechanism … [with a view to defusing Muslim] community tensions before they reach litigation.'[5] This is not 'non-adversarial justice' but sectarian justice with a view to incrementally elevating their powers and profile.

The book in its totality is highly commendable. It owes its beauty to the fact that it will provoke thought and even instigate far-reaching arguments not only between lawyers but by wider legal system functionaries, sociologists, psychologists and the broader community. The authors have splendidly dissected the plenary dimensions of non-adversarial justice. Purely lay audience, however, may experience difficulty in comprehending the book given the authors employ a degree of aloofness or complexity in their expression. Nevertheless, as the authors' mission is just, one hopes they get appropriate mileage, but no more, and that more ideas emanate from their upcoming conference![6]

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CIVILISING GLOBALISATION: HUMAN RIGHTS AND THE GLOBAL ECONOMY

David Kinley, Cambridge University Press, 2009; 272 pp; $49.95 (paperback)

GLOBAL GOOD SAMARITANS: HUMAN RIGHTS AS FOREIGN POLICY

Alison Brysk, Oxford University Press, 2009; 304 pp; $52.95 (paperback)

In *Civilising Globalisation*, Professor David Kinley explores the intersections between the global economy and human rights, asking: 'In what ways does, can and should the global economy support and assist human rights, and in what ways do, can and should human rights instruct the global economy?' (p 1).

In answering this question, Kinley explores the ways in which international aid, trade and commerce variously promote and violate human rights and makes concrete recommendations as to how to harness the human rights benefits of globalisation while minimising the abuses. At the core of Kinley's thesis is that human rights are the 'ultimate foundation upon which rests the legitimacy of the actions of our governments, our international institutions, our corporations and business enterprises [and] our organs of civil society' (p 239) and that, by consequence, human rights must be deeply integrated and mainstreamed into the functions and actions of these entities. As Kinley writes: 'Poverty does not cause human rights abuse; the actions or inactions of governments and other institutions and organisations, as well as other individuals, *cause* human rights abuse' (p 27). By consequence, he says, 'governments, international finance and multinational corporations must be forced to do more than pay lip service to their legal and ethical duties to protect human rights'.

Approaching human rights as part of 'core business' is similarly the focus of *Global Good Samaritans* by Canadian political scientist Professor Alison Brysk.