

Topic 37: Examine ADR and technology from a feminist perspective.

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No matter what arena one looks in, it appears that litigation and dispute processing are part of our modern daily lives. Conflict touches all parts of our existence, and these days almost any disagreement can end up in court, or be subject to legal intervention. The emergence of alternative dispute resolution has been welcome breath of fresh air, especially for feminist critics. Gone are the days of unavoidable, longwinded court battles based on male ideals and masculine constructs. Now there are other options for conflict resolution; options that allow freer expression and openness. But there are also problems with these new ideas, as it appears that technology will also be playing a leading role in modern dispute resolution. Feminists argue that this influence will only counteract the efforts of ADR to improve the litigation system currently in operation. This argument will now be examined, with reference to general feminist jurisprudence as well as ADR principles.

ADR is not an easily definable term, but is often used to refer to 'Alternative Dispute Resolution'¹. This broad description is used mainly to refer to processes that can be distinguished from the traditional court trial procedure. Consequently, it has been said that all ADR methods share four common features being privacy, procedural informality, absence of substantive rules, and an emphasis on compromise². These components are evident in such ADR processes as mediation, arbitration, negotiation and facilitation to name but a few. But to fully understand the influence of these alternative techniques on the legal system, it would be useful to examine some of the methods so it is then easier to identify with the feminist viewpoint.

Arbitration, as an ADR model, sits the closest to the litigation end of the spectrum. It usually involves a third party hearing submissions from both parties, and then making a judgment on the dispute that can be binding or non-binding, depending on the intentions of the parties. This method of dispute resolution is often used in commercial relationships, and in some cases a clause will be inserted into a contract stating the arbitration is the means by which future disputes will be settled. Arbitration is highly versatile, as it is also used commonly for many tribunals, such as industrial relations, and is also utilised in settling family law disagreements

¹ ADR is also referred to as 'assisted', 'additional' or 'appropriate' dispute resolution: Sourdin, T, *Alternative Dispute Resolution*, Lawbook Co, Pyrmont, 2002.

² Brunet, E, cited in Gunning, I, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, Journal of Dispute Resolution 1995, p 55.

Of the well-known processes, mediation is next down the line on the ADR scale, and also involves a neutral third party hearing a dispute between two or more parties. However, in these circumstances, the mediator's role is to advise on the negotiating process, not on the matters in question. The goals of mediation are identifying the problem issues, thinking about courses of action, and if possible, agreeing on a resolution. Each party is given an opportunity to speak and have their case heard, as the informality of conduct becomes more evident in mediation. This form of resolution is often used for more general conflicts, and lends itself to both commercial and personal disagreements.

Facilitation is a little more unstructured again, and also involves the input of an unbiased third party. In this instance, the parties aim to reach agreement on the course of action for resolving the dispute. Again, the facilitator does not make any determinations regarding the rights of the parties, instead they may advise on the facilitation process and how agreement can be fairly reached. Facilitation may also be used to recognize mutual goals or tasks to be completed by all parties involved.

Negotiation is probably one of the most informal techniques that fall under the ADR umbrella. Negotiation can be described as an informal discussion by two parties with an aim to seek some clarification regarding troublesome issues. During negotiation there is no third party involved, only the parties to the disagreement who may debate and confer in whatever manner they see fit. This form of dispute resolution is more appropriate for personal matters, and lacks formality and finality that would be needed in a commercial context.

These categories of resolution are by no means immovable, and can be combined to suit the parties' needs. ADR is a whole different construct to the Court system and is used to benefit and aid participants at their discretion. Almost all forms of ADR can be mixed, with the end product dependent on agreement of the parties involved.

Feminism, when faced with options of ADR and litigation, clearly swings in favour of the alternative methods. ADR is seen to have many advantages over the Court system that are not appreciated just by feminist theorists, but also by other minority groups.

Perhaps one of the biggest attractions for feminists is the flexibility and openness that ADR methods allow. It has been well documented that feminists have long objected to the adversarial and aggressive nature of our Court system that is viewed as a masculine characteristic. McKinnon³, for example asserts that the law is male, and thus the system requires parties to 'fight' against each other in the courtroom. She sees the current system as commercial, individualistic and harsh; and argues that the solution is a caring structure that considers the individual as well as the community, and listens to those who need to be heard. ADR answers some of these criticisms by promoting flexibility and placing importance on the needs of all concerned. ADR is also perceived as a helpful system, with all participants on a level playing field void of unnecessary aggression. So while ADR may not provide the perfect answer to feminist criticism of litigation, but can certainly be seen to correct some of the perceived 'faults'.

But its not all good reviews for ADR from feminist theorists, as some have leant their support to some other minority groups in the their criticisms of ADR. After detailed research by psychologist Professor Richard Delgado, it has been discovered that minority groups only have their individual differences highlighted during processes such as mediation due to their 'high visibility' and their 'limited power to retaliate'⁴. Professor Delgado refers to some prejudice reduction theorists who have hypothesised that for meetings between dominant and servient groups to be successful, there needs to be 'intimate' contact on like terms, with a view to resolving the conflict on fair terms. Gunning comments on this research by Delgado and agrees with his view that this can never occur, due to basic human nature. The 'intimacy' is likely to be achieved, but the attitudes of the parties are not so easily altered. It is suggested by Gunning that minority groups are more likely to be hesitant to participate in ADR processes, as they will feel isolated and patronised by the dominant party, so will be reluctant from the beginning. This attitude, along with possible superiority displayed by the domineering party is not conducive to negotiation, or any form of dispute resolution.

³ McKinnon in Thorton, M (ed.), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, 1995.

⁴ Gunning, I, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, Journal of Dispute Resolution 1995, p 55.

These problems with face-to-face interaction may not progress into the future of ADR, as in the last decade or so there have been considerable developments in the combining of ADR with technology⁵. Individuals are now able to log onto dispute resolution sites and have their problems solved without having to leave their home or office. These on-line systems have many advantages, such as saving time and money, and efficient and inexpensive provision of information. However, while feminist theorists have recognised these benefits, they take issue with technology as a whole, and thus suggest that the improvements made by ADR to dispute resolution will only be defeated by allowing resolution to be based on-line.

Feminists have long been critics of western technology, claiming that it is based on masculine values. This analysis brought further support for the 'female principle', that is that men seek to control nature and women, and technology is a form of achieving this. Cooley, in a paper by Wajcman⁶, highlights the absence of women from technological innovation in the last two decades, and observes that this deficiency may be a disadvantage to the advance of society as a whole. Cooley looks to characteristics that are present in our current technology: digital, objective, rational; and recognises that the opposing values⁷: analytical, subjective, tactile, are valuable, and should be utilised within our technology. However, some feminists argue that it is too late to make such enormous changes to an institution that is so well established within our modern lives⁸. Society has developed around technology, and affected the lives of everyone, be they from a minority or majority group. There are already many easily observable obstructions to women who may try to get involved in technology. We have already seen the establishment of certain social attitudes, differences in technological education for each gender, and the formation of particular employment policies in business. Women have been excluded from the outset and continue to play catch-up just to stay in touch with masculine society.

In relating this analysis to ADR, it would seem that the move towards on-line resolution would only further alienate women (and some other minority groups) from ADR methods and technology as an institution. Women already have problems

⁵ Clark, E & Stewart, K, *Dispute Resolution*, Law and Management for the 21st Century,

⁶ Wajcman, J, *Feminism Confronts Technology*, Allen & Unwin, Sydney, 1991.

⁷ These opposing values are named as female.

⁸ Ibid.

identifying with technology and its use within society⁹, so to make its use necessary for some forms of ADR will only cause problems for the female half of our society. So the feminist point of male domination again comes to the fore, as it can be argued the men have produced not only the general technology to exclude 'others', but have also facilitated the changes in the dispute resolution method. So not only are women (and others) who have little access or understanding of technology eliminated from using technology, but are also kept out of a majority of ADR options.

The push to make ADR a predominantly on-line process will also eliminate the need for parties to come face to face, thus de-humanising the issue¹⁰. One of the recognised advantages of ADR is that it allows parties to openly discuss and share ideas as well as allowing any emotions involved to surface and possibly play a role in the decision that is made. Feminists would likely argue that this would be a further attempt by men to control and manipulate minority groups. By reducing dispute resolution to a debate with a computer monitor and keyboard, it removes the emotional and personal element that face-to-face contact promotes. Thus the feminist argument that on-line ADR defeats some of the original advantages of ADR itself seems to have some merit.

Another cause for concern for feminists is the emergence of Artificial Legal Intelligence (ALI), which is a form of technology that seeks to mimic human responses to conflict¹¹. These programs attempt to perform certain tasks, some of which may be trying to resolve the conflict at hand. ALI has been a contentious innovation, as it removes the human element from the presiding third party. Additionally, there is a total lack of non-verbal communication due to the on-line environment, and if ALI is used the mediator is not even capable of non-textual communication, let alone non-verbal communication! Thus, it can be argued that ALI does not take the complete dispute into consideration, nor the full impact of each party's statement. Feminists could again argue that this program exhibits the

⁹Wajcman, J, *Feminism Confronts Technology*, Allen & Unwin, Sydney, 1991.

¹⁰ It should be noted here that Sourdin sites this as an advantage of on-line ADR. She echoes the words of Hardy, who state that physical distance will allow the parties to view the argument 'more dispassionately': Sourdin, T, *Alternative Dispute Resolution*, Lawbook Co, Pymont, 2002, p 164.

¹¹ Sourdin, T, *Alternative Dispute Resolution*, Lawbook Co, Pymont, 2002.

masculine characteristic of lacking emotion, which can play a major role in dispute resolution.

To conclude, it appears that feminist theorists are somewhat happier with the changes made to dispute resolution by the introduction of ADR. These alternative methods allow more freedom and expression than the traditional courtroom setting. However, the recent moves to make ADR an on-line process have drawn criticism from some feminist writers. They already see technology as a means of control used by men to dominate others and further their own interests. So the use of technology in fields such as ADR is seen as an additional attempt at maintaining the stronghold that men already have over the personal and working lives of women. In all, it can be said that ADR has made a useful contribution to modern society, and should continue to do so whether on line or in the flesh.

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