SPECIFIC ELEMENTS OF ALTERNATIVE DISPUTE RESOLUTION FOUND IN CRIMINAL PROCEEDINGS

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Abstract: Alternative dispute resolution (ADR) (also known as external dispute resolution in some countries, such as Australia) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party. Despite historic resistance to ADR by many popular parties and their advocates, ADR has gained widespread acceptance among both the general public and the legal profession in recent years. In fact, some courts now require some parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried (indeed the European Mediation Directive (2008) expressly contemplates so-called "compulsory" mediation; this means that attendance is compulsory, not that settlement must be reached through mediation). The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute. Some of the senior judiciary in certain jurisdictions (of which England and Wales is one) are strongly in favour of the use of mediation to settle disputes.

Key-words: criminal, trial, mediation, negotiation, dispute resolution.

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ADR is generally classified into at least four types**: negotiation, mediation, collaborative law**, and arbitration. (Sometimes a fifth type, conciliation, is included as well, but for present purposes it can be regarded as a form of mediation).

In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution.

In mediation, there is a third party, a mediator, who facilitates the resolution process (and may even suggest a resolution, typically known as a "mediator's proposal"), but does *not* impose a resolution on the parties.

In collaborative law each party has an attorney who facilitates the resolution process within specifically contracted terms. The parties reach agreement with support of the attorneys (who are trained in the process) and mutually-agreed experts. No one imposes a

resolution on the parties. However, the process is a formalized process that is part of the litigation and court system. Rather than being an Alternative Resolution methodology it is a litigation variant that happens to rely on ADR like attitudes and processes.

In arbitration, participation is typically voluntary, and there is a third party who, as a private judge, imposes a resolution. Arbitrations often occur because parties to contracts agree that any future dispute concerning the agreement will be resolved by arbitration.

"Alternative" dispute resolution is usually considered to be alternative to litigation. It also can be used as a colloquialism for allowing a dispute to drop or as an alternative to violence.

In recent years there has been more discussion about taking a systems approach in order to offer different kinds of options to people who are in conflict, and to foster "**appropriate**" dispute resolution.

A short look at the administration of criminal justice in our tine reveals that multidirectional changes are in progress. Entangled convergences and differences arise among national systems, eluding conventional points of reference. Many of large-scale concepts by means of which we had been accustomed to sorting out the world of procedure have begun to come apart. Even the venerable frontier between Anglo-American and Continental European criminal procedures has became increasingly ill-marked, open and transgressed. Whether the adoption of hybrid forms resulting from these transgressions has moved a particular national system from its traditional sphere into that of its antipode remains uncertain. Nor is it clear whether rules culled from two disparate procedural cultures can in their practical application establish a virtuous equilibrium or usable consonance. Attracted by alien shapes, designers of newly mixed procedural forms may have created a terrain in which one can easily encounter odd angles of disparate procedural traditions. And a greater concern is that virtually all contemporary justice system find it harder and harder to function in accordance with their own long-standing formal principles. Are new procedural paradigms taking shape for those practical operation traditional principles are no longer suitable?

The only thing that can be said with certainty in this fluid situation is that the full adjudicative process is everywhere in decline. The symptoms of this trend are many. Criminal matters are often diverted from criminal courts altogether, or mutated downward to a type of lesser offence that allows summary processing. Where this is not possible, various devices are used that reward defendants who cooperate with authorities in their own conviction. But while the old mode of cooperation was for defendants to make damaging admission in the mere expectation of more lenient treatment, the novel mode is for authorities to offer concessions to defendants in exchange for an act of self-condemnation which permits avoidance of the full adjudicative process or at least its facilitation. This novel and rapidly spreading mode comes in two variants. One is for officials unilaterally to make fixed offers of concessions on a ”take it or leave it” basis; the other – more interesting one – is for them to negotiate with defendants over benefits that they would receive in exchange for an act of self-condemnation. The latter act can assume many forms and should not be equated with a guilty plea.

Present attitude towards the way in which defendants can contribute to the disposition of criminal cases are not exactly alike in Anglo-American and Continental jurisdictions: thy face discrepant problems in reconciling bargained justice with the systems’ respective procedural principles. It is difficult to give a summary account of these differences. Continental countries have developed a variety of bargaining devices and there is no single way in witch bargaining is practiced in Anglo-American countries. Although widespread, the belief is simply mistaken that guilty pleas are conclusive in all Anglo-American jurisdiction[1].

[1] For a great variety of attitudes, especially in regard to ascertaining the factual basis of the guilty plea, see A. Goldstein, ‘converging Criminal Justice Systems: Guilty Pleas and the Public Interest’, 49 *Southern Methodist University Law Review* (1996) 567, at 574-575.

But despite this internal variety, several contrasting features can be isolated that separate Anglo-American and Continental approaches to negotiated justice. They all testify to the persisting greater reluctance of Continental procedural authorities to negotiate with criminal defendants. The most conspicuous sign of this discomfort is that Continental legislators who permit the negotiated exchange of benefits between officials and defendants still refuse to allow it in the case of most serious offences[2].

Less visible and more interesting are some other differences between Anglo-American and Continental approaches to bargaining justice. Observe, first, the discrepant subject of negotiation and the different character of the defendant's act of self-condemnation. In Anglo-American lands, the negotiated subjects is concessions to be offered to the defendant in exchange for his guilty plea. On the Continent, by contrast, the subject of negotiation is concession in exchange for the defendant's confession – that is, incriminating evidence. Whether confession, even if confirmed by other evidence, will suffice to establish his guilt is regarded as a matter for the court to decide: he is viewed as incompetent to assess the legal significance of admitted facts. Asking him whether he pleads guilty is therefore a question mal pośee.

Related to the different character of the act of self-condemnation are different effects of Anglo-American guilty pleas and Continental admissions of facts: while the former dispenses with the need to go to trial, the latter only shortens them. And while Continental concessions lead to the reduction of punishment, Anglo-American concessions can also affect charges, leading to their alteration or even partial elimination. Moreover, in at least some Anglo-American jurisdictions, charging concessions, unacceptable to Continental law, are considered preferable to those concerning sentences. This is because charge bargaining need to implicate the Bench in the transaction and is thus easier to reconcile with the Anglo-American image of the judge as being 'above the fray'. This image, linked to the way in which the legal culture conceives of judicial neutrality, makes it more awkward for the Anglo-American judge than his Continental colleagues to assume the initiative in negotiations about mutual concessions.

Another difference in the effect of the guilty plea is more subtle. It's wrong to believe that the typical Anglo-American judge must accept inter-party deals. Much as his Continental colleague can look into the reliability of confessions, so can the Anglo-American judge inquire into the factual basis of guilty pleas. But while both judges are thus free to disregard inter-party arrangements, a subtle difference remains: inter-party deals have a firmer footing in Anglo-American than in Continental procedure. Anglo-American judges tend to treat these deals as a quasi-contract rather than as an informal gentlemen's agreement. Consequently, if the prosecutor reneges on the dealer the judge disapproves of it, then the latter will let the defendant revoke the plea. In Continental system, on the other hand, a defendant's confession remains valid even in the prosecutor violates the terms of the arrangement or the judge impose a harsher than negotiated sentence. Clearly, then, Anglo-American defendants can be more certain to obtain the negotiated benefits. But they can also come under greater pressure to 'cop a plea'. The greater pressure, at least in America, springs from the fact that the American prosecutor has at his disposal more potent bargaining tools than those available to his Continental counterpart. Not only are threatened penalties in American jurisdiction harsher than in Europe, but prosecutors have also more freedom to decide how many charges to drive from what many Continental systems would regard as a single criminal event. Due to easy overcharging, the Anglo-American defendant can spend his bargaining chips to reduce charges down to the level was the prosecutor's desideratum all long.

[2] In Germany, where negotiated justice is spreading without the legislature's express blessing, analogs to plea-bargaining can be encountered in all kinds of proceedings, including serious drug cases and homicide. The reason is that practicing lawyers are less concerned than legislators about harmony with procedural principles.