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"TECHNOLOGICAL SOCIETY AND INSTITUTIONALISED CONFLICT MANAGEMENT"

Research paper in Conflict and Conflict Management,

1977 LL.M. Special Topic

Victoria University of Wellington,
Wellington, New Zealand,
1977.

INTRODUCTION

The industrial revolution, and the rapid advances of pure and applied science since that time have in one or two centuries established technology as the dominant characteristic of western societies. Technology as a way of thinking as well as by its physical products permeates every institution of such societies. Or does it? What impact has the ascendancy of technology had on conflict managing institutions? Or put another way, are these institutions in tune with technological society?

This paper includes within its purview a comparison of the different types of conflict management institutions which have evolved in typical western societies. Of particular interest is the way in which the various institutions have developed since the industrial revolution.

It is appropriate before proceeding further to indicate the scope of this study and to define some terms. "Conflict" has a very broad connotation. Generally speaking, the conflicts envisaged in this paper are those which have been considered at some time to be within the jurisdiction of the ordinary courts - that is Dicey's English courts. The expression "conflict management" is used in preference to "dispute processing"[1] because among the institutions to be discussed are the courts of law and their function cannot be properly described as simply the processing of disputes. A "dispute" has been defined by Gulliver in the following way. "A dispute arises out of disagreement between persons (individuals or subgroups) in which the alleged rights of one party are claimed to be infringed, interfered with, or denied by the other party".[2] Now one of the concerns of the courts is criminal law, but is the criminal trial an outcome of a dispute? A simple substitution of "state" for "person" in the definition does not seem to gel. In the crime of assult, for

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1. As with other writers "management" and "processing" are preferred to "resolution" and "settlement".

2. Gulliver, "Case Studies of Law in Non-Western Societies:- Introduction", in Nader (ed), Law in Culture and Society (1969), 14.

example, what right of the state has been interefered with. Dispute processing seems associated with private law. Institutionalised dispute processing will be observed in many primitive societies, but criminal law and public law in general is dependant upon a high degree of social solidarity[3]. Hoebel notes the limited use of communal authority exercised on its own behalf in primitive societies "it takes the form of lynch law in some instances... [lynch law] is a first fitful step toward the emergence of criminal law..."[4] The relation between "law" and "dispute processing" is illustrated by the model in figure 1 where the courts when dealing with private law, act as but one institution in the totality of dispute processing institutions.

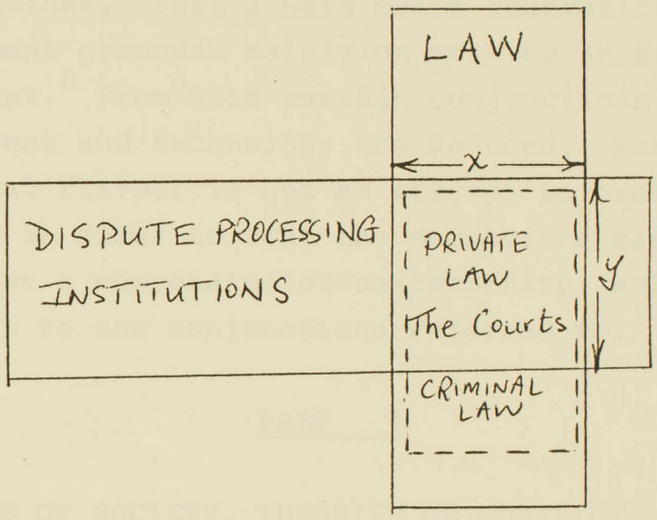

FIG 1

The difficulty of assimilating the functions of the courts into the dispute processing category is highlighted in the following, "In criminal law, the situation is much more complicated. Here, the law does not simply stand as an arbitrator of private quarrels but is itself one of the parties to the conflict. Much of the complexity of criminal procedure arises out of this dilemna, namely, that the law is both a party to the conflict and

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3. Quaere whether this is in conflict with Durkheim.
4. Hoebel, The Law of Primitive Man (1954), 277

an agency for a settlement by award, that is, an arbitrator. In Anglo-American law, an attempt is made to resolve the dilemna by a sharp definition and differentiation fo roles: The attorneys for the defence and for the prosecution symbolise the conflict; the judge and the jury symbolise the arbitration element. The conflict roles are highly stylised, as, indeed, is the whole procedure; this serves a function in resolving the dilemna imposed by the mixture of roles in the law,..."[5]

The methodology of the present study involves the use of the courts as a reference institution, and an important yard used will be to assess the place given to, or capable of being given to, non-legal expertise in the various conflict managing institutions. Part I sets out a theoretical framework of conflict management grounded mainly on work by Aubert,[6] Eckhoff,[7] and Felstiner.[8] From this certain conjunctions between conflict management and technology are deduced. Part II, while having an empirical flavour is not an attempt to present a series of case studies in order to test the deductions made from the theory, but is rather a compendium of contemporary incidents and insights relevant to the conjunctions referred to.

PART I

THEORIES OF SOCIETY, THEORIES OF CONFLICT

There are two main theories or models of society: the structural-functional model, and the power-conflict model. The structural-functional model explains why society is relatively cohesive, ordered and stable, while on the other hand, the power-

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5. Boulding, Conflict and Defense (1963)

6. Aubert: "Competition and Dissensus: Two types of Conflict and of Conflict Resolution"(1963) Journal of Conflict Resolution 26; "Law as a Way of Resolving Conflicts: The Case of s Small Industrial Society", in Nadar (ed.) Law in Culture and Society (1969), 282.

7. Eckhoff, "The Mediator, the Judge and the Administrator in Conflict Resolution",(1966) 10 Acta Sociologica, 148.

8. Felstiner, "Influences of Social Organisation on Dispute Processing",(1974) 9 Law and Society Review, 63.

conflict model explains why society is in a state of conflict disorder and change. The structural-functional model is frequently associated with Talcott Parsons while the power conflict model is associated with Marx. To many theorists, the two models are mutually exclusive and one believes in one or the other as being the model of society. However, others[9] see room for a duality of models, using one or the other depending upon what is to be explained, that is both models are considered equally valid prespectives of society. An alalogue from the physical sciences is the wave-particle duality of light.

The essential components of the two models, as posited by Dahrendorf is set out below.

Structural-functional model (or consensual, or Parsonian - Durkheimian Model)

1. Every society is a relatively persisting configuration of elements.
2. Every society is a well-intergrated configuration of elements
3. Every element in a society contributes to its functioning.
4. Every society rests on the consensus of its members.

Conflict Model

1. Every society is subjected at every moment to change: Social change is ubiquitous.
2. Every society experiences at every moment social conflict: Social conflict is ubiquitous.
3. Every element in a society contributes to its change.
4. Every society rests on constraint of some of its members by others.

The first point that Dahrendorf makes is that the structural-functional model does not shed much light on the phenomenon of social conflict and change - institutions and individuals promoting conflict or change (intentionally or unintentionally) are seen as simply dysfunctional[10] or deviant. Dahrendrof asserts

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9. e.g. Dahrendorf, "Toward a Theory of Social Conflict", (1958) 2, Journal of Conflict Resolution, 170

10. Coser argues that conflict is functional to the existing order: The Functions of Social Conflict (1956); Continuities in the Study of Social Conflict (1967), see ~~P. 177, para~~ chapter 6, for example.

that a meaningful explanation of conflict can only be found in the conflict model.

A study of conflict management in modern society seems prima facie rooted in a theoretical commitment to the structural-functional model. A Marxist would say that such a study was fundamentally irrelevant because the agencies of conflict management such as the courts, are mere super-structural institutions resting on the economic structure of society, that is to say the means of production. The writer contends however, that a study of conflict management is meaningful even in Marxian terms. In most developed societies, contrary to might have been expected, theproletariat has not realised the true interests of their class. False consciousness and "irrationality" prevail. The objective class conflict has not become manifest. Why? Because the dominant class, forseeing the need to contain social conflict, has transformed the state so as to appear to more broadly represent society as a whole. Ostensible representatives of the proletariat were admitted to power, even at some sacrifice to the dominant class. This transformed state has imposed a structure upon society which has contained the objective class conflict. The institutions of the state effectively channel behaviour along safe paths. This has not come about by the use of naked power but by socialisation - bourgeois values have been internalised.

"Technical progress, extended to a whole system of domination and co-ordination, creates forms of life (and of power) which appear to reconcile the forces opposing the system and to defeat or refute all protest in the name of the histroical prospects of freedom from toil and domination. Contemporary society seems to be capable of containing social change... this containment of social change is perhaps the most singular achievement of advanced industrial society; the general acceptance of the National Purpose, bi-partisan policy, the decline of pluralism, the collusion of Business and Labour within the strong State testify to the intergration of opposites which is the result as well as the pre-requisite of this achievement...

"It is precisely this need (to express their true interests) which enables the established society manages to repress to the degree to which it is capable of "delivering the goods" on an increasingly large scale, and using the scientific conquest of nature for the scientific conquest of man...

"Technology serves to institute new, more effective, and more pleasant forms of social control and social cohesion...

"But in the contemporary period, the technological controls appear to be the very embodiment of Reason for the benefit of all social groups and interests - to such an extent that all contradiction seems irrational and all counteraction impossible".[11]

From the perspective outlined above it can be seen that the "super-structural" institutions have assumed fundamental importance.

At a quite different level, the apparent necessity for a legal structure in all societies including socialist societies cannot be ignored. Some would say that this is inevitable given mans basic nature, but whatever the reason this necessity for law in some form or another seems undeniable. Law in the Soviet Union is "a most important lever... in establishing the material and technical base for communism"[12] Attempts to do without law after the revolution failed.[13] Assuming a society can transcend the socialist state, what then? "Violations of norms of social behaviour will be met by 'measures' appled by 'public opinion, the strength of the group, social influence'."[14] A full circle will then have been executed - conflict management in the form practiced by Hoebel's primitive man. The super-structure then appear ubiquitous - in primitive societies it is the structure; in industrial societies an economic sub-structure slips in underneath; in truely communist societies it appears that it will be some form of super-structure that will remain.

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11. Marcuse, One Dimensional Man (1972, Abacus ed.), 11-22

12. per Ioffe and Shargorodsky in Soviet Law and Government Volume II, No. 2, page 3, quoted in Lloyd, Introduction to Jurisprudence (1972, 3rd ed.), 644.

12. Lloyd, op. cit, 636

13. Lloyd, op. cit., 645, quoting from Ioffe and Shargorodsky, page 7.

CONFLICT TYPOLOGY

The starting point of this discourse is Aubert's postulation of two distinct types of conflict: conflicts of interest (or competition); and conflict of values (dissensus).[15] A conlfict of interest is where two parties both want the same thing, but there is not enough of it so satisfy them both. A possible example of such a conflict was the Taranaki land dispute in the 1860's - the European settlers wanted Maori land, while the maoris wanted to retain it.[16] A further possible example was the 1951 Waterfront Strike where the watersiders wanted a pay increase of 4/10½d per hour while the employers were prepared to pay only 4/7½d.[17] A typical interpersonal[18] conflict of interest is that which arises in commerce where a buyer would like to purchase a commodity at a price $X, whereas the seller would like a higher price $Y.

A conflict of values, perhaps better described as a dissensus, is where two parties disagree over the normative status of a social object and/or factual matters. Note that a conflict of interest necessarily implies a consensus over the value of the object in dispute. An example of a dissensus is where two players in a game disagree over what rule should apply to a particular incident in the game.

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15. Aubert (note 6).

16, 17. These conflicts reveal the intertwining of interest and values which occurs in real conflicts. At one moment they appea to involve values - both were prosecuted with appeals to values and ideology, and both were "resolved" by one party suffering a complete defeat. However, it is submitted that the source of these disputes was a conflict of interest which was subsequently transformed to a conflict of values in order to facilitate a means of prosecuting the conflict which appeared to one or both disputants as being favourable to themselves. Transformation of an interest conflict to one of values paves the way for total commitment in a struggle which can then only end in defeat for oneside. (Note that in certain circumstances an honourable defeat may be to morally preferable to a "bought" compromise).

18. Aubert qualifies his typology as one of interpersonal conflicts at times.

The conflict typology described need not correspond to actual instances of conflict, but serves as a tool in the analysis of actual conflicts which frequently will include a mixture of the two conflict types in pure form.

CONFLICT MANAGEMENT TYPOLOGY

At one level, the utility of the distinction between a conflict of interest and a dissensus lies in the potential to predict the most effective means of managing a conflict. To the typology of conflict there exists a corresponding typology of modes of conflict management. Simply put, negotiation is the appropriate device for managing conflicts of interest, while adjudication is the appropriate device for managing a dissensus. "As long as a conflict of interest remains relatively pure, it is amenable to solutions through bargaining and compromise, on the condition that there is something to give and something to take on both sides".[19] There is an exception: incompatibility of interests may be total, such as the case where a contract is signed and the goods subsequently perish. Here adjudication is called for as the relationship has become a zero-sum game. Settlement of a disagreement over values or the truth of facts usually requires the intervention of a third party who ascertains the true facts, selects the relevant norm and decides which party is to prevail. A characteristic of adjudication is that one party wins and the other party loses. The parties have no private rights in norms or truth which they can trade off.

At another level the utility of this typology of conflict and conflict management lies in its implications for the manipulation of conflict. A conflict where the parties are emphasising values may be resolved by negotiation and compromise if the value aspect is de-emphasised and the interests of the parties stressed. On the other hand a conflict of interest must be transformed to a dissensus if it is to be resolved by adjudication. Aubert observes that such a transformation is a necessary preliminary to conflict resolution

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19. Aubert (1963) (Note 6), 30

in a court of law. The typology thus does not necessarily imply a rigid casual link between the conflict source type and the means of resolving it. For example, "a dissensus may arise out of opposing interests, either as a consequence of the conflict and hostility or as a consequence of the structure of the conflict-solving mechanism."[20] Again, "certain sources of conflict may tend to call forth a certain type of mechanism for conflict resolution, but the form of the conflict may also frequently be determined by the available means of solution.[21]

Mention must be made of some views critical of Aubert's typology. One criticism is that in reality all conflicts may ultimately be seen as conflicts of interest. Value aspects are apparent rather than real - a conflict is painted in value terms as part of a stratagem. No doubt this is often the case (see notes 2 and 3), but it seems quite credible that a religious conflict for example, could subsist free of interest aspects. If instead of the somewhat loose term "conflict of values", the terms "factual dissensus" or "normative dissensus" are used, the possibilities of there being conflicts which are other than conflicts of interest are more readily envisaged provided that interest is not given the meaningless interpretation of "the will to win". It is interesting to note Boulding too derives an interest - value type distinction, although in a somewhat different way to Aubert. He divides the value structure of a persons image into two parts: "an inner core around which he intergrates his personality and which holds him together and an outer shell which he holds or possesses but which does not constitute an essential part of the image of the person who does the holding or possessing:"[21a] If the conflict is about a core value "reconciliation" will be difficult or impossible, (the core is subject to catastrophic conversion but not small changes), whereas the shell is amenable to modification by discussion and

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20. Idem, 31

21. Idem, 26

21a. Boulding, op. cit. (Note 5), 312.

argument. The boundary between core and shell may vary, even during the one conflict, and certainly differs between personalities.

Kidder[21b] considers it a mistake to treat adjudication as a phenomenon which normally functions in a different way from negotiation - the influence of rules in adjudication as opposed to bargaining strategy is overated. Suffice to say at this point that there are a large number of cases where legal rules are omnipotent. Later some examples are given where legal rules have been decisive to the point of absurdity. Gulliver[21c] criticises the interest - negotiation, values - adjudication correspondence. He points out that in many conflicts of values there is no applicable norm. This , it is submitted, takes an unnecessarily narrow view of a norm - there is always a higher norm (legal principle, public policy) which can, and is, drawn upon in the absence of a specific legal rule. Skill in moving within the hierarchy of norms would seem the very essence of an adjudicator. This flexibility does not imply a compromise in place of a decision.

Gulliver stresses the point that norms play a part in negotiation as well as in adjudication, especially in the definitional phases of negotiation. However this does not seem to effect the validity of the conflict/conflict management typology since a normative consensus is to be expected in conflicts of interest - and this consensus in many cases may come about in the bargaining preliminaries by reference to market prices and precedents set in prior exchanges.[21d] An unfortunate example Gulliver chooses to illustrate his point must be mentioned at this point since the present writer will later elaborate in some detail on the mechanisms involved. Gulliver notes that a judge

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21b. Kidder, "Formal Litigation and Professional Insecurity: Legal Entrepeneurship in South India."(1974) 9, Law & Society Review 11 at 30

21c. Gulliver,"Negotiation as Dispute Settlement", (1973) 7 Law & Society Review, 667

21d. Aubert (1963), 30.

is frequently faced with conflicts of interest upon which he must and does, adjudicate.[21e] This is of course undeniable, but the explanation of such a phonomenon is perhaps the most valuable insight provided by Aubert's theory - that it is a pre-requisite to the functioning of a court that a conflict involving interest aspects be transformed to a dissensus of facts and norms, however artificial this transformation might be when the conflict is purely one of interest. The legitimacy of transformation is probably more evident if the correspondence is stated as being between conflicts as they are expressed and the respective management mode.

FURTHER MODES OF CONFLICT MANAGEMENT

The devices of negotiation and adjudication do not exhaust the modes of conflict management. At one extreme conflict may simply be avoided and as Felstiner[22] has pointed out, in a technologically complex rich society this mode of conflict management is probably the most common. A typical example of avoidance is where a person who has had something unsatisfactorily repaired goes to another repair firm in preference to pursuing the matter with the first repair firm. The conflict in this case is a conflict of interest, but avoidance is also applicable to value conflicts. In fact two parties having completely incompatible values may never engage in conflict since their lack of common ground may keep them apart.[23,24]

At the other extreme a conflict may be terminated by self-help or conquest. Boulding suggests that self-help is not common because the work and costs incurred by the active party are greater than would be the case if some other device of conflict management was used.[25] While this may be true where the conflict is between large groups or nations, in interpersonal conflict the degree to which self-help is resorted to would appear to be a function of the degree to which societal values have been internalised.

21e. Idem, 682

22. Felstiner (Note 8)

23. Aubert (1969) (Note 6), 285

24. Boulding (Note5), 308

25. Idem, 309

A further mode of conflict management is mediation, which may be considered as negotiation assisted by the presence of a third party. "Mediation consists of influencing the parties to come to an agreement by appealing to their own interests".[26] Mediation is viewed by some as simply a sub-category of negotiation, another sub-category being conciliation.[27] Yet a further mode of conflict management is arbitration which because it may be analysed as agreed private adjudication can be considered as simply a sub-category of adjudication.[28]

If one ignores the categories of avoidance and self-help, it can be seen that the additional categories mentioned above are but sub-categories of Aubert's types. Mediation and conciliation are essentially negotiation with a third party superimposed, while arbitration is simply adjudication resting on a prior agreement to submit to adjudication.

FROM DYAD TO TRIAD

Institutionalised conflict management is characterised by the addition of a third party to the parties in dispute. The third party takes part in the dispute but is "someone who is neither asserting or resisting the assertion of a claim in his own behalf nor is acting as the agent of such party".[29] The presence of the third party is not necessarily indicative of a dissensus as Aubert's analysis might suggest - the association of a mediator with the process of negotiation has already been noted - but is determined by a number of factors.[30]

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26. Eckhoff (Note 7), 158

27, 28. These classifications are discussed under "Third Party Typology" (post)

29. Felstiner (Note 8), 69

30. The transition from dyad to triad is however undeniably a hallmark of law. "Law is distinguished from mere custom in that it endows certain selected individuals with the privilege -right of applying the sanction of physical coercion if need be... In primitive law (sic) the tendency is to allocate authority to the party who is directly injured." (Hoebel, The Law of Primitive Man (1954), 277.)

Path 1 (eg) to be interpreted: "the greater the parties agreem
on norms the more likely ..."

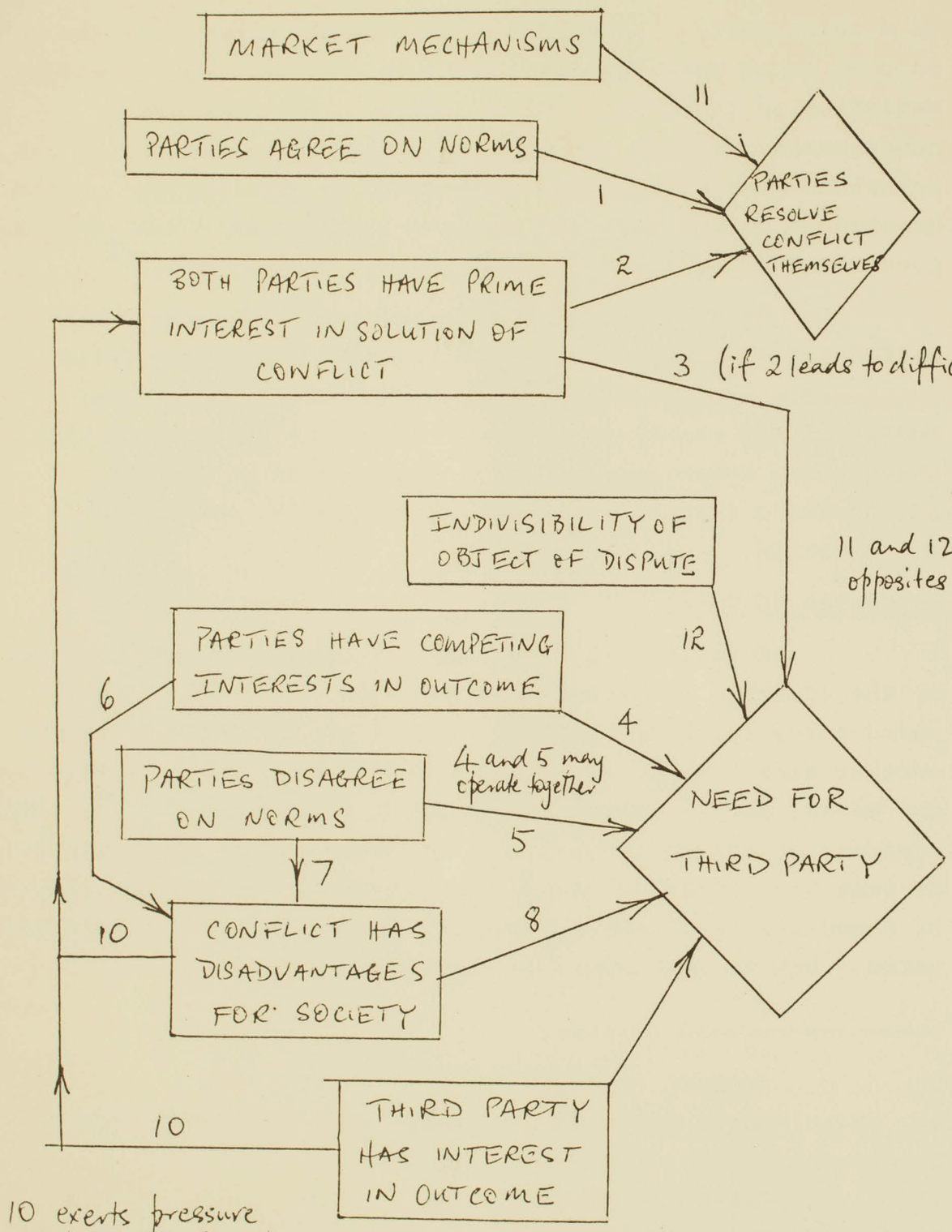

FIG 2

After Eckhoff, "The Medi
and the Administrator", (1966)
Sociologica, 148.

[Facing page 14]

These factors are distinct from those which determine the potentiality of the third party to successfully manage the conflict, this being dependent both upon the characteristics of the conflict and the procedure adopted by the third party. The transition from dyad to triad is important for the purposes of the present study since it is an essential ingredient of institutionalised conflict management, and it may be expected that any impact made by the coming of the technological society will be manifested in a triadic process.

A summary of some of the factors which can create a need for the introduction of a third party into a dispute is given in figure 2.

THIRD PARTY TYPOLOGY

In this section the characteristics of the judge, the mediator, the arbitrator and the conciliator will be discussed

The Judge

It is the function of the judge to make a decision about which of the parties to a conflict is right. This means that the judge must look at the history of the behaviour of the parties and determine guilt or fault by reference to a series of rules, or customs, or supposedly universal notions of what is right and just. That is, the judge must (i) ascertain the facts (ii) determine the appropriate norms and (iii) apply the norms to the facts at hand and deliver a judgement in favour of one of the parties.[31] In theory at least, the judge will not be concerned with the interests of the parties and their respective positions in the future.

Adherence to a judgement, bearing in mind that one party must lose, will be dependent on two main factors (i) respect for the framework of norms utilised by the judge and (ii) the authority of the judge. "There may be many reasons for the parties' respect for those norms on which the judge bases his

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31. In certain types of cases in common law jurisdictions a jury will complete step (i), i.e. decide the facts, but see pp 24 and 25, post.

decisions; for instance, they may be internalised, or one fears gods' or people's punishments if one violates them, or one finds it profitable in the long run to follow them".[32] It is of course a pre-requisite that the judge possesses a good understanding of the norms and has the skill to determine the facts of a dispute. Familiarity with norms and their application may require a special expertise which is possessed only by the chosen few. In modern western societies this expertise may be assessed in terms of experience and professional qualifications, but in other societies contact with supernatural powers may be considered more relevant.

Likewise, expertise in determining facts presupposes an ability to understand and clarify factual relations, and the level of expertise required will vary according to the nature of the subject matter comprising the facts. In a technological society, it is inevitable that some cases to be adjudicated will involve factual relations demanding considerable scientific expertise to unravel. In the context of the courts where the traditional qualifications of a judge are experience and training in law, the pre-requisite skill may in such cases be absent. As technology percolates through society, the legal norms themselves in many spheres become laden with the trappings of science, and make yet further demands on the non-legal expertise of the judge. A judge is a specialist thrown up by general social role - differentiation and since the technological society multiplies role -differentiation judicial specialisation would seem a necessary consequence.

The above discussion has dealt with the significance of respect for norms and judges as a factor in the effectiveness of a judgement. If this respect does not exist efficacy of the judgement is obtained by forcing the parties to comply with it. "...there is also a set of secondary norms of adjudication which single out the judge as the proper person to settle the dispute and which... also impose upon the parties the duty to abide by his decision."[33] Accordingly, there will usually be a power

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32. Eckhoff (Note 7), 162

33. Eckhoff (Note 7), 163

behind the judge which can be called upon to coerce a recalcitrant party into compliance. Felstiner takes this further and asserts that compliance with adjudicative decisions is more a result of the coercive power which they command than by their merits. To tell the losing party in adjudication that what he considers as history is either an illusion or a lie, and/or that the behaviour he considered acceptable is anti-social will frequently alienate that party from the legal process. The loser has two options: to see the error of his ways, or to see the adjudicative process as irrelevant. The latter will frequently require less psychological effort than the former. "Unconvinced of their original error, losers respond to an adverse decision only because the consequences of not responding would be worse."[34] In the context of the investigation which is the subject of this paper it may be simply noted at this point that where the conflict involves a crime a technological society can hardly be expected to be satisfied with an "unscientific" penalty when the possibilities of a scientific re-education seem credible.

The Mediator

An essential distinction between the function of a mediator and the function of the judge is that while in adjudication it is the latter who makes the decisions, in mediation it is the parties who make the decisions and not the mediator. A corollary of this is that mediated settlements need not be backed by coercive power. This follows of course from the analysis of mediation as being negotiation facilitated by a third party.

A further distinction between the mediator and the judge is that the mediator must look forward to the consequences which will flow from each of the range of possible outcomes, since he is concerned with harmonising the interests of the parties. He must himself be an adpatable negotiator.

One function of the mediator is to ensure that messages between the conflicting parties are not distorted. This aspect, while essential to mediation, is really the raison d'etre of the conciliator and will be elaborated upon in the later discussion on the conciliator.

34. Felstiner (Note 8), 71

The prime function of the mediator is, on the basis of his understanding of the parties and the conflict, to construct outcomes potentially acceptable to both sides. Due to his impartiality the mediator may elicit agreement to an outcome which if suggested by one of the parties in negotiation simpliciter might never be agreed to through reasons of stubbornness and the like.

Schelling[35] draws attention to the importance of a readily identifiable focal point in bargaining. There is often an "obvious" place to compromise, such as a river in a conflict between two armies, or the outcome of a previous bargain, beyond which one party may be expected not to retreat. Frequently there will be no obvious focus about which an agreement can crystallise and it is in this situation that the role of the mediator becomes apparent. "When there is no apparent focal point for agreement, he can create one by his power to make a dramatic suggestion."[36] It should be noted that by promoting intermediate solutions the mediator will enhance his own prestige and impartiality, and of course reppect from the parties in dispute is a pre-requisite for successful mediation.

In mediation, certain additional devices may be used to facilitate agreement between the parties. For example, the mediator may be in the position to make promises which act as incentives for one party or the other to move towards a mutually satisfactory outcome. On the other hand the mediator may be in a position to make threats if one or both of the parties remain rigid in their attitudes. These powers will often be available to a state appointed mediator or where the conflicting parties are sub-groups of the same group.

Bearing in mind Aubert's correspondence between negotiation and conflicts of interest one will expect the effectiveness of mediation in the settlement of a dispute to be a function of the degree to which the conflict involves interest rather than values. This suggests that one of the tasks of the mediator will be to try and concentrate attention on the competing interests of the parties and play down any dissensus.

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35. Schelling, The Strategy of Conflict (1963), 67-74

36. Idem, 144

"But it may also go the other way. The mediator lets himself be influenced by the parties to see the normative aspects as the most important, and ends up judging instead of mediating."[37]

It is obvious that if mediation is to be successful in managing a dispute the parties must have confidence in the mediator and be willing to co-operate with him and respect his advice. There is more to this than impartiality and negotiation skill. Success will usually only be achieved where "mediators share the social and cultural experience of the disputants they serve, and where they bring to the processing of disputes an intimate and detailed knowledge of the prespectives of the disputants".[38] A mediator is unlikely to receive all the information he requres from the parties, and what he does receive may be misleading to the uninitiated. To construct an outcome tailored to meet a specific dispute requires (i) an understanding of the history of the dispute and (ii) an understanding of the perspective of the disputants. The implication here for this form of conflict management in technological society is that its utility will be dependant upon a high degree of specialisation within the ranks of mediators.

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37. Eckhoff (Note 7), 160

38. Felstiner (Note 8), 74

The Arbitrator

As previously mentioned arbitration may be viewed as a sub-category of adjudication since the decision or "award" on the outcome is made by the third party arbitrator and not by the parties. It is however a condition precedent to arbitration that a preliminary bargain must be struck by the parties themselves - they must (i) agree to submit their dispute to arbitration and (ii) agree on the choice of arbitrator, or on some stranger to choose him. There are other important differences between adjudication in the courts and arbitration. In arbitration it appears to be accepted that the arbitrator may perform some mediative function and attempt to influence the parties to reach some settlement themselves. This aspect of arbitration should not be over emphasised since arbitration although presenting an informal appearance is backed by the full power of the law.

The arbitrator does not need to make known his reasons for making a particular award. He does not act publically and consequently need not pay allegiance to a deterministic set of principles where justice would appear to demand a different decision.

The parties are free to choose their arbitrator. While they will probably choose from a class of persons having known experience in arbitration, this class will itself be role-differentiated, and the parties may therefore select an arbitrator not only skilled in arbitrating, but also knowledgeable in the subject matter of the dispute. Arbitration might, then, be expected to be a popular form of adjudication in a technological society.

The Conciliator

Many theorists do not appear to distinguish between the mediator and the conciliator but as has already been suggested, a useful distinction can be made. The mediator's job is primarily one of communication:-

"The conciliator can transmit messages between the parties with greater accuracy than is possible with direct messages and so we can achieve a certain reconciliation of images that would have been impossible without him"39

He must attempt to generate purposive interaction between the parties. He does this not by simply acting as a bridge between the two parties. He controls the communication by putting limits on the offers and counter-offers and blocking off some "transmissions":-

"He can, for example, compare two parties' offers to each other, declaring whether or not the offers are compatible without revealing the actual offers".40

The presence of a conciliator marks a transition of the original dyad into not a triad, but two new dyads: PARTY 1 ⇌ CONCILIATOR, PARTY 2 ⇌ CONCILIATOR.[41] This is the key to the conciliators' control.

The conciliator is a "broker".[42]

"The function of pure conciliation is simply to see that trading opportunities are not missed in the existing field of conflict through ignorance and a failure of communication; the conciliator, in this sense, is a broker, bringing the two parties together".43

THE LEGAL MODEL OF CONFLICT MANAGEMENT; THE COURTS

Conflict management is an important function of the law. There are two aspects involved. First, the promulgation and simultaneous promotion of adherence to rules serving the interests of the community (as perceived by those powerful enough to determine the law). Second, the management of conflicts which arise as a result of non-compliance with the rules. These two aspects of conflict management are brought out in the following passage:-

"If we pose the question of the relation between law and conflict we can, therefore, conclude that the law prevents

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39. Boulding, op. cit. (note 5), 316
40. Schelling, op. cit. (note 35), 144
41. Paine, "Second Thoughts about Barth's Models", Royal Anthropological Institute Occasional Paper No. 32 (1974), 25
42. An expression used by Barth in "Models of Social Organization", R.A.I. Paper No. 23 (1966), and also others in somewhat different fields (see note 43)
43. Boulding, op. cit. (note 5), 317

innumerable clashes of interests and of power by circumscribing the positions. If these positions are generally recognized, are fixed by a central authority and are enforced by a central power, the law succeeds in preventing a great many conflicts. But those conflicts that remain are commonly felt to be more intense conflicts than they would have been if there had been no legal arrangements. The law gives to clashes of interest an ideological aspect; the opponent is seen as a wrong-doer and a criminal. The violation of the law entitles one to anger and aggressive reaction".44

The promotion of societal rules is a function of both the legislature and the courts. The processing of conflicts resulting from a breach of those rules has traditionally been the function of the courts. In the courts the judge is supreme, and, in modern societies is a specialist. In the following discussion emphasis will be placed on the judicial process of decision making since it is this aspect of law with which other institutions of conflict management may be compared.

Elements of the Legal Model[45]

(1) When a conflict is processed by the court the judge makes a finding on the facts, selects the norm or norms appropriate to the facts, and applies the norm to those facts to produce a decision. The reduction of the conflict to a controversy over facts and/or norms is possibly the most important characteristic of the legal model. The facts are not ascertained by an arbitrary process but in accordance with a secondary set of norms which prescribe rules of evidence and procedure. Formulation of the facts is not, however, entirely independent from the selection of the substantive norm. Either the parties or the judge will frequently tend to formulate the facts in such a way as to bring the conflict within the ambit of a norm which will produce the desired result.

(2) Familiarity with substantive norms and secondary norms of procedure, and the ability to apply norms to specific fact

44. Röling, "The Role of Law in Conflict Resolution", in Reuck (ed.), Conflict in Society (1966), 330.
45. The notion of enumerating parameters of a "legal model" is adopted from Aubert (1969), although this scheme differs somewhat from his.

situations is not common to all. It is the cherished preserve of lawyers. As a result when a party to a conflict takes his case to court, he almost inevitably must employ legal counsel to represent him. Thus, as well as the judge and the parties the presence of legal counsel is inherent in the legal model. In order to ascertain the facts the court will almost inevitably hear "stranger" witnesses who will contribute information which will be used to construct the history of the dispute. These witnesses comprise yet a further class of persons essential to the legal model.

(3) A legal decision is characterised by its either/or nature which may be contrasted with the compromise nature of a mediated outcome, for example. This means that one disputant may suffer total loss. This is closely linked with the importance placed on establishing the history of the dispute since it is from this that guilt or illegality will be established. From this finding legal consequences will ensue. The relation between the consequences and the established facts is not however the causal link one would expect to find in a scientific model.[46] The relation is normative rather than causal. That is, the legal rules establishing the link between certain behaviour and certain sanctions establish that it would be right to invoke a sanction, not that the sanction is inevitable given the behaviour. At a practical level the normative character allows for the probability that much proscribed behaviour will not be detected. The distinction between human laws and physical laws is, however, more fundamental than this. A physical law establishes if conditions x and y exist then the result z occurs.[47] For example, if a metal body is heated it will expand. The value of a physical law is to explain known facts and to predict unknown facts. Physical laws "are subject to verification, that is, they can be true or false; but the notion of truth or falsity is inapplicable to normative rules. Such rules simply state what should or

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46. "Even in science, it is, often not clear what a scientist means when he says that one event has caused, another ... he falls back on such phrases as "bring about", "bring forth", "create"

...../

"ought to" happen".[48] This distinction has unfortunately been confused by claims, which still persist, that many rules of a normative character (some of which form part of positive law) are universal laws of nature. The error of such claims was long ago demonstrated by Hume, more recently by Kelsen, and justly deserves Moore's epithet, "the naturalistic fallacy".

(4) A judicial decision is not made on the basis that it appears to be the most efficacious in the circumstances, but is made within a framework of legal rules. Whether the rule to apply in a particular case is abstracted from earlier judicial decisions, la jurisprudence, legislation, or a code, the abstraction is made by an exercise of logical reasoning. The pattern may be to derive a general rule from a number of specific decisions by induction, and then by a process of deduction formulate the specific rule for the case at hand. In the age of reason this logical consistency and symmetry is held in high esteem. A court which achieves a desirable result by an inexact use of legal conceptions causes more criticism from legal scholars than one which achieves an undesirable result in a learned way.[49]

There is however another strand in the legal rope - the dispensation of justice in particular cases. The fulfilment of this aim may be incompatible with the logic of the legal rules and frequently the result demanded by logic will prevail. From an historical perspective the harshness of the law has led to the devices of legal fictions and equity. In the individual case, especially where equity is itself part of the harsh logic, the judge must endeavour to find some aspect peculiar to his case which he can seize upon as a reason for not applying the general rule.

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46 (cont) and "produce". Those are metaphorical phrases, taken from human activity": Carnap, Philosophical Foundations of Physics (1966), 189.

47. Such a "universal" law is not the only type of scientific law. There are also "statistical" laws which will in some cases indicate lack of knowledge but in other cases express the fundamental nature of the world. e.g. Heisenberg's uncertainty principle.

48. Lloyd, Introduction to Jurisprudence (1972, 3rd ed.), 8.

49. Arnold, The Symbols of Government (1962), 9.

In this way, the judge can simultaneously affirm the general rule and secure justice in his case. Because the decision in this case will rest on some special feature the result of future cases has not been prejudiced since the judges in those cases will be free to ignore the decision because of its peculiar facts. Such a result, that is, an apparent contradiction to the general rule, would have grave implications for the rule if it were a physical law, as has already been pointed in regard to falsification: consistent reasoning and thus predictability, and the desire for justice are simply two often contradictory symbols to which modern society pays homage.[50]

Despite the logic and apparent determinism a decision made using legal rules is not scientific. It is only logical within the given rules and not in relation to the real world. Some graphic examples of how the logical application of inherently rational principles of law can produce completely irrational results are given by Thurman Arnold.[51] One of the simplest examples is the need (in jurisdictions retaining capital punishment) to save the life of a convicted murderer who attempts to commit suicide, using blood transfusions from his guards if necessary, in order that he may be executed by the hanging his sentence demanded. In Aubert's terms such examples highlight the law's concentration on behaviour and sanctions rather than on utility and effectiveness.

(5) So far that pillar of common law, the jury, has not been mentioned. In orthodox theory the jury decides the facts while the judge decides the law. This arrangement can be preserved in those civil cases where the jury is still given a place provided the judge carefully formulates the questions which are put to the jury. However, in criminal cases where the jury must bring in a verdict, it is open to doubt whether

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50. See Arnold, op. cit.
51. Idem, 11 to 17

the judge's directions on the law are definitive, and even whether the application of the rules of evidence during the trial have any greater effect than priestly incantations. The realist may say the place of the law here is nothing more than symbolism. "Yet the legal realist falls into grave error when he believes this to be a defect in the law".[52]

> "The jury symbolizes the common sense of the ordinary man. If we get an acceptable result out of a jury we feel that our entire democratic institutions, depending as they do upon the judgment of the ordinary man, are justified. If on the other hand we get an unacceptable result out of them we are free to criticize this jury without in any way appearing to attack the judicial system itself. Every system which owes its prestige to deep-seated ideals must have an irresponsible body somewhere on whom the blame may be put when the ideals go wrong. Otherwise the system itself would have to absorb it, and one of the essentials of any of our fundamental institutions is that they be exempt from criticism as institutions. Thus the jury offers us an opportunity to be indignant at the actual result, but satisfied with the fundamental principles of law under which the result was reached".53

(6) Like all organized occupational groups the legal profession jealously clings to the field it has traditionally monopolised and protects that field from encroachment by outsiders.[54] The protection may be manifest as in statutory monopoly, or latent as in personal and collective resistance to change. The latter element appears to typify the legal profession, although of course it is not exclusive in this regard, and there are and always will be a number of exceptions. In view of this empirically observed characteristic of the legal model it seems not unreasonable to expect to find in a study of the courts at work positive resistance to penetrations of expertise of a non-legal character, the expertise which characterises technological society.

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52. Idem,
53. Idem, 13
54. While frontal attacks might be repelled there remains a further possibility - that of simply by-passing the traditional legal structure. See post, p.45.

PART II

A - THE LEGAL MODEL IN TECHNOLOGICAL SOCIETY

This part will open by offering the views of a few writers, selected at random, on the conjunction between science and law.

SCIENCE AND THE LAW

Thomas, in his book, Scientists and the Legal System[55] identifies four ways in which the legal system uses science:

(1) use of the scientific method by which knowledge is categorised in an orderly manner,

(2) as a component of the adjudication process providing knowledge related to specific technical and scientific issues,

(3) as an impetus for change - science advances faster than the law,

(4) to establish policy in many areas.

For the purposes of the present study items 1 and 4 are not so relevant. However, it would seem open to doubt the extent to which the scientific method has influenced categorisation of legal knowledge in common law jurisdictions. In contrast to the systematic classification and emphasis on theoretical structure in the civil law the common law appears to be arranged in a distinctly un-scientific manner. As to item 3, it is suggested that change in the legal system as a result of the ascendancy of technology is not great. This point will be mentioned again later.

In describing the different way in which lawyers and scientists work, Thomas notes:

> "Most lawyers feel at ease in an adversary proceeding, but scientists generally shun this as a method for fact finding, preferring cooperation with fellow investigators in working towards a common goal. As more scientists become involved in the political process, they no doubt will accept the adversary procedure as a workable one when the issues involve social decisions that cannot be resolved by the familiar scientific regimens".56

This certainly seems typical of the situation in common law jurisdictions and is probably an apt comment on the situation in

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55. Thomas (ed.), Scientists in the Legal System (1974)

56. Idem, 2.

New Zealand. It certainly seems, and this will be mentioned again later, that there are a large number of decisions which have to be made in society which cannot be determined by scientific considerations alone. However, even in spheres where a scientific input should have a large and beneficial effect on certain decisions whether they be in the court or in the political arena, science fails to realise its true potential.

> "As scientists become more committed they become more shrill and more adversary - and less scientific".57

It seems that scientists run the risk of being tainted by their contact with politics and government, although Loevinger is perhaps over cynical when he says:-

> "When science becomes part of government, it is science that is corrupted, not the government that is ennobled".58

Many of the barriers between science and law, both real and imaginary, result from the fact that these two fields of knowledge have evolved and developed out of phase:-

> "During the long historical period when national legal systems developed, science was under-developed by comparison with its present status".59

Aubert points to the common aim of "predictability" which both law and science seek to satisfy. When science was in its infancy, whatever predictability could be achieved in social relations was primarily due to law and other normative structures:-

> "With increased scientific knowledge about the regularities of nature and also of economic and social life, the relative importance of law as a way of achieving predictability has been receding in modern societies".60

This is not to say that law has become superfluous, only that it is insufficient on its own to provide the social predictability needed if conflicts are to be successfully managed.

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57. Loevinger, "Jurimetrics: Science in Law", in Thomas, op. cit., 18
58. Idem, 20
59. Aubert, "Courts and Conflict Resolution", (1967) 11 Jo Conflict Resolution, 40 at 49.
60. Idem, 50

In 1966 Marshall[61] published a book which delivered a stinging attack on the refusal or inability of the legal system to take cognisance of modern science and in particular the implications presented to the legal system by the science of psychology. Marshall's main concern was that what the court called facts were often but a mere shadow of reality. There was ample psychological evidence to show that much of the evidence given in court did not correspond very well with the actual events due to the natural human failings of the witnesses which were accentuated by the traditional adversary system. He contrasted the legal method of fact finding - the adversary technique - very poorly with the scientific methodology of fact finding. He exaplained the situation thus:-

> "Science demands precision but not certainty. Law aims at certainty but glosses over the innumerable variations of individual and situational diversities, which probably will always cause the law to be uncertain ... To assume a scientific approach and seek precision amidst uncertainty would mean accepting uncertainty; and this would upset the balance of lawyers and appear to threaten the stability and the 'majesty of the law'.... There must still be fought in the realm of law the struggles that philosophy and theology had to go through when confronted by natural sciences".62

The use of the courts to protect the quality of the environment is common-place today. However it has been suggested that the courts are not the proper forum in which these matters should be dealt with and should be considered suitable for emergency measures only. Accordingly the pressure to allow citizen and class suits in environmental fields is misguided. The courts do not have the technical competence to handle the issues thrown up in environmental conflicts. A comparison is drawn with anti-trust suits where the courts have floundered even although only one non-legal discipline - economics - is required:-

> "Environmental problems frequently involve a diverse mix of unrelated disciplines such as chemistry, biology, physics, geology and medicine, in addition to economics".63

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61. Marshall, Law and Psychology in Conflict (1966)
62. Idem, 104.
63. Crampton and Boyer "Citizen Suits in the Environmental Field: Peril or Promise?" (1972) 2 Ecology Law Quarterly, 407 at 413.

THE LEGAL MODEL AT WORK

In this section a relatively recent New Zealand case will be analysed to demonstrate some of the distinctions between legal and scientific thinking and the transformation of a real conflict to a normative dissensus.

Bognuda v. Upton & Shearer Ltd /1971/ N.Z.L.R. 618

The Plaintiff in this case owned a garage, one wall of which ran along the north boundary of his property. The wall was constructed of brick and built in 1929. In 1969, the owner of the adjoining property employed the defendant to construct a building on that property for him. The defendant in carrying out the foundation work excavated a trench between 4 and 5 feet deep and 68 feet long immediately adjacent the plaintiff's boundary. The following night the plaintiff's wall collapsed and fell into the trench. The plaintiff contended that the defendant was liable for the damage caused to his wall and garage. Expert evidence was given on the cause of the collapse of the garage wall. The following are excerpts from the evidence given by the first expert witness, a consulting civil engineer:-

> "Looking at the cause of the collapse, why did this wall come down in your opinion? It seems quite obvious to me that the sub-soil was poor and in fact should be described as muck. Without adequate precautions being taken it seems to me most obvious that any sort of similar structure would fall down if a deep trench had been dug beside it for the full length of it. How in the trade does one avoid this? You could underpin if suitable. You could trench pile rather than sheet pile ... Or you could dig it in small sections if this was practical in the construction of the adjacent building but you might have to use a combination of the whole three. In the building trade when excavating close to another construction are such precautions taken? Very common".

The following are excerpts taken from the evidence given by a second expert witness, a consulting civil engineer specializing in soil mechanics and foundation engineering:-

> "From the results of those tests and the details about the trench and the wall, what did your calculations show? My calculations showed that under the applied load of the wall the soil supporting the foundation would fail resulting in a downward movement of the wall foundation ... At what depth of excavation would this failure occur? The failure would be imminent as soon as any excavation alongside the wall extended below the level of the underside of the wall footing.

It would definitely have occured as soon as the excavation was more than 12 inches below the underside of the footing".

In his judgment Quillam J. in reviewing the evidence stated as follows:-

> "It was admitted that the evidence established that the soil underlying the brick wall was of a poor type. The evidence of Mr Gillespie, an expert in foundation engineering and soil mechanics, was that the load applied to the soil by the weight of the wall caused the subsidence and collapse of the wall. I think it is clear that but for the pressure of the wall there was no reason for the plaintiffs land to subside. This means that it was not the excavation of the trench which caused the plaintiff's land to collapse, but the pressure of the wall on the soil".

The judge then turned to the law and noted that it was long established at common law that while an owner of land had a natural right to the lateral support of that land by neighbouring land, he had no right of lateral support for any building on that land from the neighbouring land: Dalton v. Angus (1881) 6 App. Cas.740. Since it was the weight of the building which caused the land to subside the plaintiff had no cause of action based on the right of lateral support. Furthermore, since the plaintiff had no right neither the defendant or his agent were under any co-relative duty of care when developing the adjoining land. Thus the second cause of action, negligence, also failed. This judgment caused considerable consternation both within and without the engineering profession.

In the Evening Post of 25 March 1971, it was reported that a memorandum had been circulated to members of the Wellington City Council from Councillor W.G. Morrison, Chairman of the Town Planning Committee, urging that if the judgment in Bognuda was the law then a statute should be passed which would give building owners adequate protection against their neighbours. Councillor Morrison asked how in the light of Bognuda could a building owner protect his building - although he could carry his foundations deep the question of "how deep" would remain. If he laid his foundations to 40 feet, what if his neighbour was to construct an underground parking building requiring an excavation of 50 feet? Even if he set his building back from the boundary, similar questions would arise.

In an April issue of the Evening Post, an editorial supported the stand taken by Councillor Morrison and noted that his viewpoint received support from the New Zealand Institution of Engineers and the New Zealand Institute of Architects. The editorial reported

that the Wellington City Council had before it a recommendation that the Council seek from Government changes or clarifications in the law to provide property owners with protection for their buildings against damage caused by excavations on adjacent sites.

The New Zealand Geomechanical Society at its meeting on 31 March 1971 passed a motion reading:-

> "that an appropriately worded letter be sent to the N.Z.I.E. expressing extreme concern at the implications consequent on the decision on this ... case and urging that this be pursued at the highest level".65

It is now history that the Court of Appeal[66] reversed the decision of the Supreme Court and notwithstanding the House of Lords authority to the contrary, held that a cause of action could lie in negligence - a clear case of "priestly" manipulation of the norms to achieve a result compatible with common sense, scientific principle and commercial reality.[67]

In the context of the present study the Supreme Court decision can be analysed in the following terms. The norm which was relevant to the facts of the case was a legal rule of high authority stating that an owner of land with buildings upon it had no right of support for his buildings from an owner of adjoining land, although he did have such a right in respect of the land itself. It was in the context of this rule that the trial judge analysed the evidence. The evidence could show one of two things. First, that the land collapsed following the boundary excavation because the sub-soil was unable to sustain the stresses created by the weight of the wall, and second, that because of the nature of the sub-soil the land would have collapsed even in the absence of the wall. Only if the latter was shown could the trial judge say that the second part of the norm applied and that then the defendant or his agent owed the plaintiff a duty, the breach of which might found an action for negligence. The evidence in fact showed, bearing in mind the nature

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65. New Zealand Geomechanics News No. 2 (June 1971), 5.
66. Bognuda v. Upton & Shearer Ltd [1972] N.Z.L.R. 741.
67. The Court of Appeal used almost the full range of devices available to achieve the desired result: distinguishing; latin maxims; House of Lords decisions not technically binding; no need to look to see whether cause of action covered by old authority but whether it fell within recognized principles: Dorsett Yacht Co. Ltd v. Home Office [1970] A.C. 1004. (Lord Diplock's judgment in this latter case is surely unsurpassed in its attainment of the symbol of Reason in the common law model of judicial decision making.)

of the sub-soil and the weight of the wall, that the sub-soil immediately under the wall could not sustain the stresses imposed in the absence of lateral support. To the judge, this meant that collapse of the soil and the wall following the removal of lateral support was caused by the weight of the wall. To the expert witnesses, and no doubt to the man in the street, the cause of the collapse was the removal of the lateral support. The apparent function of the expert evidence was that it established that the defendant caused the damage suffered by the plaintiff, whereas the real function of this evidence was that it removed the case from the ambit of the norm which the plaintiff sought to invoke.

THE REALITY OF TRANSFORMATION

The requirement that a conflict must be transformed to a normative and/or factual dissensus before the conflict can be effectively dealt with by a court has been clearly demonstrated in the Bognuda analysis. The realisation that this transformation process exists is probably more difficult for a lawyer to grasp than a layman. In fact it is no doubt painfully obvious to a layman, who probably sees the process as equivalent to a translation from a familiar language to one that he does not understand. The process of transforming a client's narrative of a conflict into a form whereby legal answers can sensibly be given, does not come naturally, and must be learnt through repeated practice. Before one can be a lawyer one must learn how to think like a lawyer.

The transformation process essentially involves the following steps.

(1) "Irrelevant" material must be rejected. Irrelevant material includes the parties' emotions, motives, desires, their non-legal reasons for their acts, and other colour which characterises reality.

(2) The restatement of the facts which remain after rejection into their generalised legal form. In this form they are at the level of abstraction on which legal rules are formulated. That is, "vendor" is substituted for "Joseph Brown", etc.

(3) The framing of the legal issues. In a simple problem the restated facts themselves may form the legal issue but where there is more than one issue, some disentanglement and

reassembly of the restated facts is required. It is only when the legal issues have been framed that the store of legal norms can be drawn upon to provide the legal answers or decisions. These norms exist at at least three levels of abstraction, the lowest being specific rules of law, which may provide a direct answer to the legal issue or issues. However, if there is no relevant rule of law a search must be made at a higher level of abstraction among the general legal principles. In the few cases where there is no appropriate general legal principle, or where there are two apparently conflicting principles, an appropriate norm must be sought amongst the fundamental social policies underlying the law. These latter norms are not purely legal norms, but are hybrids including aspects of politics, sociology, economics and ethics.[68]

A transformation process as outlined above becomes second nature to most practising lawyers, although even persons of considerable experience will from time to time notice the transformation process, although they might not bother to think about its significance. An example is the formulation of pleadings.

In theory the transformation process which the modern lawyer is required to implement is not as drastic as it once was. Prior to 1873,[69] a person could obtain from the court a remedy against another only by fitting his fact situation into specific legal categories or "forms of action". That form of action constituted the cause of action. Observations relevant to this point were made by Diplock L.J. in Letang v. Cooper /1964/2 All E.R. 929 at 934.

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person ... If A, by failing to exercise reasonable care, inflicts direct personal injury on B, those facts constitute a cause of action on the part of B against A for damages in respect of such personal injuries. The remedy for this cause of action could, before 1873, have been obtained by alternative forms of action, namely, originally either trespass vi et armis or trespass on the case, later either trespass to the person or negligence ... But it is essential to realise that when, since 1873, the name of a form of action is used to identify a cause of action, it is used as a convenient and succinct description of a particular category of factual

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68. See Wilkin, "Analysis of Legal Problems in Law Examinations" (Source unknown).
69. In England, Supreme Court of Judicature Act, 1873.

situation which enables one person to obtain from the court a remedy against another person. To forget this will indeed encourage the old forms of action to rule us from their graves".

PROVIDING THE COURT WITH TECHNICAL ASSISTANCE

(a) The Common Law Way

In the common law non-legal expertise is normally injected into the proceedings as evidence, and the court receives expert evidence in the same way as it receives any other evidence - from witnesses called by the parties to give evidence on their behalf. The expert witness is treated in the same way as other witnesses and is examined and cross-examined like any other member of his side in the symbolic battle. "And so, when in a trial in the courts a medical man is summoned to give evidence, he steps into something which is not designed for the pursuit of abstract justice, but into a contest which is being fought according to certain rules, where success depends so often on the man, on the skill with which the battle is fought. In this contest counsel's duty is to fight his client's case with all the vigour at his command. He must not let his personal sympathy with other professional men blunt his attack. He can be no respector of persons".[70]

As has been noted in an earlier section, the scientist in this sort of atmosphere is like a fish out of water. In the case of expert witnesses the traditional procedure, which is designed to ensure the credibility and veracity of evidence given by witnesses, is in many repsects unnecessary and unsuitable. "Cross-examination moreover, frequently converts an expert who is trying to be impartial into one who is partisan when he finds himself attacked and his authority challenged."[71] Given this atmosphere it is probably not surprising that experts and the courts have not combined well. "hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked".[72] New Zealand courts have much the same opinion:

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70. M^{C}Carthy J., "The Expert Witness", [1966] N.Z.L.J. 8 at 9
71. Hammelmann, "Expert Evidence", (1947) 10 M.L.R. 32 at 34,
72. per Lord Campbell in Tracy Peerage (1843) 10, Cl. and Fin. 154 at 191.

"... this class of evidence has, I regret to say, become suspect in the eyes of some of the judicial office-holders - not all, by any means, but some."[73]

The worth of expert evidence has even been doubted by experts. At a time when the courts and their procedure would have been accepted without question as blameless the following comment was made in a medical journal in 1863. "Medical evidence delivered in our courts of law has of late become a public scandal and a professinal dishonour. The bar delights to sneer and ricicule it; the judge on the bench solemnly rebukes it; and the public stand by in amazement; and honourably minded members of our profession are ashamed of it".[74] Nowadays the experts' criticism is no longer directed against themselves, it is against the courts lack of appreciation of scientific fundamentals, and against the adversary system.

> "Science and the law shared a landable aim in their unstinting search for truth and it must therefore be a matter of considerable concern to New Zealanders to discover that decisions taken in law could so often be based on complex scientific evidence that brought the specialists themselves into conflict as to its meaning... It is surely a weakness of our system if specialists' evidence purportedly introduced to clarify in facts ends in obscuring truth".[75]

Experts fees they have to suffer unjustifiable personal attacks which add insult to the injury already suffered sinply as a result of having to deal with the twentieth century in a nineteen century setting. They are most concerned at being thrown against their colleagues in contest situations where the reputation

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73. M^{C}Carthy J., ibid (Note 70), 11.

74. The British Medical Journal, 2 May 1863, quoted in Myers, "The Battle of the Experts", 44 Nebraska Law Review, 539

75. Statement by the president of the New Zealand Institute of Chemists following the Thomas case retrial and reported in The Evening Post, 23 April 1975.

of their professions is bound to suffer in the minds of people who do not appreciate the complexities of science.[76]

In view of the doubts expressed by both the courts and the experts on the value of expert evidence obtained in an adversery setting it might have been expected that reforms would have been instituted many years ago. Unfortunately the reforms have been too timid, not utilised, ot have not got beyond the draft stage.[77] In some instances it is possible for the court to appoint an expert assessor,[78] but even in these situations assessors are rarely appointed,[79] and are not apparently regarded as officers of the court, but instruments of proof which the court may disregard if it feels so inclined.[80] Fairly far reaching proposals were made in the Banks Report where it was recommended that judges in patent cases should have qualifications in science.[81] However, the use of assessors or specialist judges will not overcome many of the problems referred to since these will persist so long as the parties are free to call their own experts.

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76. Poimts made at a meeting of the New Zealand Insitituion of Engineers and the New Zealand Geomechanical Society on "Legal Problems arising from Geotechnical Works", 17 April 1975, and by Ron Locker and Guy Salmon on the Concert Programme in "Topic", 10 May 1977.

77. For an account of the repeated failures to institute changes in the United States see Travis, "Impartial Testimony under the Federal Rules of Evidence: A French Perspective", 8 The International Lawyer, 492

78. For example in patent cases: The Patent Rules, rule 5.

79. In patent cases which are notoriously the most technical, the court in Valensi v. British Radio Corporation [1973] R.P.C. 337, appointed a scientific advisor for the first time since 1935. This case dealt with a patent for a colour television system.

80. per Lord Summer in Australis v. Nautilus [1927] A.C. 153. In this case the penalty for the courts failure to understand scientific evidence was made evident - The loss lay with the party on whom the burden of proof rested for the issue in question.

81. The British System, Report of the Committee to Examine the Patent System and Patent Law (1970, cmnd. 4407).

It is tentatively suggested that the legal system has not expedieted the changes needed if the courts are to receive assistance from experts in a rational way, and thereby come to grips with the technological world not to mention a more accurate ascertainment of truth, for two reasons. First, because of the natural inertia of the legal system which seems anchored to bygone eras where the position of the courts was unchallenged, and second, because of the reluctance of the courts to share their role with persons having expertise outside the field of law. A patent, and some would say shocking, demonstration of this latter element was given in Epperson v. Dampney.[82], by the Court of Appeal of the Supreme Court of New South Wales. The case concerned the conpeting claims of mother and father for the custody of their two children. A psychiatrist and a psychologist had given evidence for the respective sides and there had been substantial agreement between them on what action would be the most beneficial as far as the interests of the children were concerned. All other factors being equal the judge at first instance decided on the basis of the expert evidence to grant custody to the father in preference to following the "mother principle". Two appeal judges (the majority) were scandalised. Per Glass J.A.:

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82. (1976) 10 A.L.R. 227 - There are numerous examples both judicial and extra-judicial. In an extra-judicial comment Lord Justice Harman is reported as saying in 1966 that "when he was young psychiatrists had not been invented, and no one was any worse for it." (Quoted in Abel-Smith and Steven, In Search of Justice (1968), 184.)

"But I am satisfied that the trial judge in giving the expert evidence such a decisive operation misapprehended its tenor and accorded to it disproportionate weight... No witness, however expert, may be asked in whose custody the welfare of the child will best be served. Since the answer to that question depends on the application of a legal standard, it can be given only by the judge... I am directed by authority to apply the common knowledge possessed by all citizens of the ordinary human nature of mothers".[83]

Per Street C.J.:

"The topic is to evaluated against the background that our system of jurispredence does not, generally speaking, remit the determination of disputes to experts... Our Society has selected a curial tribunal as that which in the greatest number of cases will come nearer to the best answer... But the antiseptic philisophy of Huxley's Brave New World has not yet rendered obsolete a human evaluation of the complex web of parental and filial emotions that entangle all the persons concerned in disputed custody cases. It is ultimately the conventional and human wisdom of the judge, experienced as he is in matters of this sort, that must be applied in resolution of the contest."[84]

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83. Idem, 240, 241

84. Idem 228.

The Civil Law Way

The courts of France, for example, receive expert assistance not from a witness for one of the parties, but from an expert appointed by the court. The expert makes an investigation and presents a report of his finding to the court in a proceeding known as an expertise. In the expertise the experts' role is that of an investigator - he may conduct experiments, make on-the-spot enquiries, and even examine witnesses who do not testify under oath as they would before a judge, but whose statements neverhteless are accpeted as inferences under the relaxed rules of evidence typical of the civil law. The expert presents his report in written form at the final hearing in the case, the audience, where counsel for the parties may question it as being in conflict with recognised authority or inconsistent, for example. Notwithstanding any criticism the report will usually be accepted by the court, if only as inference As with all evidence the court will usually admit everything and give to individual items of evidence whatever weight they see fit. There is no question of a party being penalised if the court cannot understand the experts' report - it will be ordered to be clarified, or a new expertise set down. In general, however, the court and the parties will usually accept the experts' findings.

The response of the civil law to the increasing need for the court to receive expert assistance was to establish a position for the appropriate expert or experts in the tribunal itself.[86]

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85. Full information on the expertise, a proceeding designed for civil suits (the criminal proceedings broadly follows the same pattern) may be found in Herzog, Civil Procedure in France, Chapter 7. A description is also given in Travis (Note 77), and additional comments and criticism may be fo-nd in Schlesinger, Comparitive Law.

86. It seems accepted in France that the expert is part of the tribunal and not simply an instrument of proof who is not a witness: Hammelann (Note 71).

To adopt this course was, it is only fair to point out, much easier for the civil law than it would have been for the common law since the statements of witnesses were always presented to the full court in documentary form following investigations made by one of the judges in an enquette. The expertise is no doubt a more "scientific" approach to that taken by the common law, and certainly in France experts are highly regarded, but "some French practitioners are... of the opinion that the French Courts are inclined to accept the expert evidence too lightly at its face value, and assert the courts have fallen into the 'bad habit' of throwing their responsibility too often, and unnecessarily, upon experts".[87,88]

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87. Idem, 38.

88. The relation with the Arnold/Frankenberg analysis (p.44) is interesting.

Frankenberg [89] in a study of how responsibility is attributed and what social action follows has analysed the role played by scientific advisors to the Chiefs of Staff, a British wartime Cabinet sub-sommittee. The study is effectively a re-interpretation of the conflict within the Chiefs of Staff sub-committee as chronicled by C.P. Snow [90], who Frankenberg believes gave undue weight to the influence of personalities.

The conflict was one that occured in 1942 between the Chiefs of Air Staff, who advocated the strategic bombing of the German civilian population in order to destroy morale, and the Chiefs of Naval Staff, who advocated the use of bombers in a tactical commitment to the actual zones of military conflict. The scientists in the controversy were Professor Lindemann, later Lord Cherwell, a friend of Churchill's who supported the airforce policy, and Sir Henry Tizard who supported the navy policy. Lord Cherwell presented calculations demonstrating the catastrophic damage which would result from bombing built-up areas with the sort of air force which should be available. Tizard produced calculations which indicated fallacies in Lord Cherwell's. Both sets of calculations were however based on factors "which could not be measured and scarcely guessed." The crux of Frankenberg's analysis is where the committee conflict comes out into the open,

> "Sir Dudley Pound, representing the Admiralty, and Lord Portal, representing the Air Ministry, used 'stranger' scientists and mathematical myths to express viewpoints and legitimate decisions which in fact are largely affected by the relative political power of Air Ministry and Admiralty and by external events ... the scientits are being manipulated by events and institutions more than they are influencing them [91].

89. Frankenberg, "Taking the Blame and Passing the Buck", in Gluckman (ed), The Allocation of Responsibility (1972), 257
90. Snow, Science and Government (1961)
91. Idem, 266

A pure scientific decision was not possible in view of the grossly approximate nature of the calculations which were really only intended to make the cases presented more graphic.

> " .... it was impossible to calculate the size and duration of attack which would be necessary to reduce Germany to the point of capitulation. It was only possible to guess .... The difference of opinion between Lord Cherwell and Sir Henry Tizard was, therefore, really no more than an illustrative reflection, in somewhat more scientific terms, of the issues which divided the counsels of the Air and Naval Staffs."[92]

It is interesting to note that at one stage a different category of "stranger" was called in. This "stranger" was a judge, Singleton J, who managed not only to support both sides at different times but "went one better and supported both sides at once". This served to exacerbate the dispute and it was easy to draw quotations to illustrate almost any argument.[93] However as the official historians noted

> "....the Singleton Report did perform one valuable service. It showed that a decision about bombing policy could not be arrived at on the basis of academic investigations into the prospects of the strategic bombing offensive. Whether these investigations were statistical or juridical they could, because of the nature of the evidence, prove nothing."[94]

Two hypotheses arise from Frankenberg's analysis which have particular relevance to the aspects of conflict management of special interest in the present paper. They are, (1) that experts may be used by a decision making tribunal merely as a less obvious component in the ceremony and ritual which traditionally accompanies such decision making, (2) that because of the inadequacy of the facts many decisions are not decisions which can be made any better by scientific experts. One does not need to look far, either in or outside the courtroom to test these hypotheses.

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92. Idem, 268
93. Webster and Frankland, The Strategic Air Offensive Against Germany (1961), 338 quoted in Frankenberg, idem, 270
94. Ibid.

The New Zealand Royal Commission on Contraception, Sterilisation and Abortion is surely an excellent illustration of their truth.

Of the other examples given by Frankenberg to demonstrate his thesis, that attribution of responsibility to a "stranger" has the effect of shifting outside the system the consequence in social action in the attribution of responsibility within the system, two are of special interest in the present context. The first is the role of the psychiatrist in the legal defence of insanity. Despite the fact that psychiatrists are not experts in individual responsibility [95] they can be used by the courts as outside experts to enable a finding of insanity or diminished responsibility so that the accused may be "spared" yet the law still be upheld. The psychiatrist's role was of course somewhat more vital before capital punishment for murder was abolished. Frankenberg cites the Challenor affair as an illustration outside the murder context, where Challenor a detective sergeant, had been planting offensive weapons on his suspects and was subsequently found to be insane. An earlier case where two men had been convicted on evidence given by Challenor was resurrected and the Court of Criminal Appeal seized on flimsy evidence given by one psychiatrist out of three that Challenor may have been insane at the relevant time in the instant case (two years before this time he was found insane), and quashed the convications.

The second example is the role played by the common law jury, a group whch exists for only a short time "and when they have carried out their impossible and irrational task they disappear back into the people from which they came, impervious to criticism and too evanescent for revenge". In both these examples the "strangers" may also clearly be seen as means by which Thurman Arnold's incompatible symbols are accommodated (see pp 24 and 25, ante)

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95. cf treatment

B - EXTRA-LECAL INSTITUTIONS OF CONFLICT MANAGEMENT

> "At the turn of the century it seemed to many that the English courts and English lawyers were at the heart of affairs; but as the Welfare State expanded most new and vital issues were left either completely in the hands of the increasingly powerful Civil Service, or if some adversary procedure were deemed necessary, governments came to prefer flexible policy-conscious administrative tribunals to the more cumbrous and formalistic courts of law...Meanwhile even former patrons of the courts, such as the commercial and industrial interests, gradually turned to arbitration rather than settle their disputes in the courts. The result was that a relatively smaller number of the major problems of modern society were coming before the courts of law."96

Administrative bodies set up in New Zealand are legion, encompassing a wide spectrum of interests - Rent Appeal Boards, Race Relations Concilator, Human Rights Commission, Town and Country Planning Appeal Boards, the Office of Ombudsman, Regional Water Boards and the Clean Air Council - to name a few of those established in more recent times. Many require expertise of a non-legal character. The number of cases heard by administrative tribunals in comparison with the number of cases heard by the courts is not known for New Zealand, but it presumably does not differ greatly from the situation in Britain where such bodies hear more cases than all the courts combined.97

Many administrative tribunals are essentially adjudicative institutions like the courts, and it is possibly more interesting to examine more patently extra-legal institutions of conflict management such as arbitration, and mediation, albeit that these institutions may well be partially or wholly integrated into the administrative system.

INSTITUTIONALISED MEDIATION AND CONCILATION

It is very much the trend for administrative bodies

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96. Abel-Smith and Stevens, "Lawyers and the Courts", in Aubert (ed.) Sociology of Law (1969), 279 at 280, 281

97. Idem, 285.

set up to deal with disputes to be given conciliative rather than adjudicative powers. An example of this approach is found in the Human Rights Commission Bill 1977, where among other functions the Commission is given the function, in relation to complaints about industrial unions and professional and trade associations, "

> "to investigate any complaint made to it...and to act as conciliator in relation to such complaint."98 If "the Commission is of the opinion that the complaint has substance, it shall use its best endeavours to secure a settlement between the parties concerned."99

Why has conciliation as a means for managing disputes been seen as "the answer"? Is it because it has been recognised that the sort of disputes envisaged will all be Aubert's interest conflicts? This is hardly likely bearing in mind the subject matter - is a racial conflict in the New Zealand context really going to be a conflict of interest? It is suggested that the real reason for this trend is a recognition of the shortcomings of the adversary system as a means of resolving disputes. The adversary procedure implicit in adjudicative proceedings in New Zealand serves to exaggerate conflict and is inclined to leave permanent scars on those who participate. The conciliative approach has found such favour with legislators that it may even be found in the Small Claims Tribunals (No.2) Bill 1976 - "The primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement."100

An early example in the trend to conciliation may be found in the Domestic Proceedings Act 1968. Section 13 creates a duty on solicitors to give consideration to the possibility of a reconciliation of the parties. More importantly persons having expertise in marital conciliation or marriage guidance

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98. clause 60(1)(a)
99. clause 61(1)
100. clause 15(1)

counselling are given statutory recognition. The courts must refer the case to such persons upon receiving an application for a separation order and adjourn legal proceedings.101 Upon receiving applications for maintenance or custody orders the court may similarly refer such cases to a conciliator.102 There is even provision for an ex parte request to the court to have a failing marriage referred to a conciliator.103 Thus purely legal machinery has been considered as inadequate in the area of marriage breakdown. But is a marital conflict a conflict of interest to which, from Part I, conciliation is an appropriate managing device? In Aubert's terms it probably is not, but in Boulding's terms conciliation may possibly law to an alteration of self-image and a reconciliation of images. Certainly the accepted settlement upon a couple parting is a separation agreement, a contract which establishes the respective rights of the parties in terms of an allocation of interests. Maybe conciliators in this field would be more effective in negotiating an amicable agreement to separate, than "reconciling" the parties.

ARBITRATION

> "There has been an almost continuous dissatisfaction with the courts as a means of settling disputes registered by businessmen over a period of more than a century. The costs, delays, formalities and publicity of court proceedings, and also the personal antagonisms engendered by the English approach to litigation, have led a large segment of the industrial and commercial community to abandon the courts and establish their own tribunals for settling disputes."104

Many contracts in the commercial field contain "arbitration clauses" which bind the parties to refer any dispute arising from the contract, to an arbitrator named in the contract, to be determined by agreement, or to be named by some third party. Contracts customarily including arbitration clauses extend from property leases and patent licences to construction

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101. Domestic Proceedings Act 1968, s.15(1)
102. Ibid, s.15(2)
103. Ibid, s.14
104. Abel-Smith and Stevens, idem, (note 96), 282

contracts. Arbitration is facilitated by the Arbitration Act 1908 which prescribes procedure, and contains as a schedule an international protocol under which the signatory countries recognise arbitration awards issued in other countries. As well as the factors of speed, informality, expense, and interantional certainty arbitration possesses two other advantages attractive to the commercial and technical community,

> "In the first place, an arbitration is a private meeting; the only record is the arbitrator's award handed to the parties. In the second place, the arbitrator will almost invariably have first-hand knowledge of the practicalities of the problems involved, and because of the flexibility and informality that is possible in arbitration proceedings the parties get the benefit of this knowledge and are not necessarily faced with the "yes or no, black or white" type of decision that Courts tend to make".105

The possibility of having an adjudicator who has an understanding of the subject involved is very attractive to parties involved in contracts of technology and is possibly the most important reason why arbitration is popular in these spheres.106

There are some aspects of arbitration which may be disadvantageous in some circumstances.

> "Unless...'Short cut' procedures are specified in the submission, the arbitrator is bound to proceed by the adversary system, and to make his award on the evidence presented to him. He may apply his own expertise and observation, but he may not himself call evidence unless both parties agree"107

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105. Brickell, Arbitration of Civil and Engineering Contracts", 29 New Zealand Engineering, 352 at 353 (15 December 1974).
106. See Brickell, Ibid, and also Turner, Contracts and Contract Administration (1967)
107. Brickell, Idem, 354.

Also commercial and professional organisations often insist on arbitration clauses in contracts with lay clients with the result that a client finds himself governed by trade customs or professional practices which he had no hand in creating.108 In this sense the basic foundation of arbitration, the agreement to arbitrate may only exist in the letter but not the spirit.

Many commercial disputes do not even go as far as arbitration. They may be solved by direct negotiation 108a or under the guidance of an ad hoc mediator or conciliator who may in fact be the arbitrator. Whatever mode is chosen the courts seem the least popular.

THE THERAPEUTIC STATE

There are many who belive that technological society has met the challenge of convincing deviants of the error of their ways in a way for more effective than the application simple coercive power (see P.16, ante). The basic notion is that authority, including the law, has embraced the concept that deviants are sick and therefore need to be treated by the state rather than punished by the state.109

> "Within this system (the 'therapeutic state'), little or no emphasis is placed upon an individual's guilt or a particular crime; but much weight is given to his physical, mental, or social shortcomings. In dealing with the deviant, under the new system, society is said to be acting in a parental roll (parens patriae) - seeking not to punish but to change or socialise the non-conformist through treatment and therapy."110

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108. Abel-Smith and Stevens, In Search of Justice (1968), 88.
108a. Macaulay, "Non-Contractual Relations in Business" in Aubert(ed.), Sociology of Law (1969),194
109. This tendency is a characteristic of modern as opposed to primitive societies according to Gluckman. In primitive societies individual responsibility is emphasised or even exaggerated, whereas in modern societies individual responsibility is diminished and structural causes emphasised "Moral Crises: Magical and Secular Decisions", in Gluckman(ed.), The Allocation of Responsibility (1972)
110. Kittrie, The Right to be Different (1971), 3.

More succinctly: "Social control through legal psychiatry"111 While broadening the committment standards for entry into pychiatric hospitals has delighted psychiatrists, "the decision about compulsory admission is now largely in the hands of those experts in psychiatric illness, and in this way patients may, if necessary, be admitted in order to forestall inevitable permanent deterioration..."112, it has disturbed others who would advocate that the same procedural safeguards available to a person being dealt with under the criminal justice system should be available to persons being dealt with by the therapeutic state.

If it is accepted that the therapeutic state is concerned with social control as well as individual welfare, this is a field where science has outstripped the law, not for the benefit of society but rather to its detriment, conjuring up images of Huxley's Brave New World.

CONCLUSION

There has been a decline in the importance of the courts as conflict managing agencies accompanied by a growth in extra-legal conflict managing agencies. This trend has been noted by a number of writers, some of whom have been referred to in this paper. It is submitted that this situation is primarily due to the inability or unwillingness of the legal system to undergo change. The courts have failed to adjust to the needs of technological society. The reform needed to enable the courts to acquire the non-legal expertise necessary to successfully cope with the growth in dispute subject matter beyond the understanding of intelligent laymen has been resisted.

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111. Szasz, Ideology and Insanity Penguin (ed.) 1974, 13.
112. Hays, New Horizons in Psychiatry (2nd ed., 1971), 337

Given this situation it is hardly surprising that many conflicts have been steered wilfully, and by legislation, away from the courts to mediation, arbitration and other extra-legal adjudicative bodies, where the necessary expertise could be more easily found, and where, for some cases, a more appropriate compromise decision could be obtained.

However this is not to say the legal system is becoming irrelevant. It has already been noted that some decisions connot, because of inadequate information, be made by experts alone. Furthermore the challenge to the courts' role in criminal law by the abuse of technology by society is to be resisted. Where civil liberties are concerned the courts are the most appropriate forum, and are tolerably effective, since in such conflicts there is no necessity for the transformation process required when the conflict is one of interest.