Book Review

Barbara Hamilton*

Helen Stacy & Michael Lavarch (eds), *Beyond the Adversarial System*, Federation Press Sydney, 1999, XXIII + 168 pp

Beyond the Adversarial System is a useful contribution to the jurisprudence relating to the need to reform the Australian civil justice system. It collects together in an accessible form the insights of major actors relating the recurring themes of the reform agenda, many of whom have written along the same lines in disparate publications. Thus it provides an excellent sourcebook, as well as a guidebook, for academic writers and teachers, lawyers, judges, students and policy makers in relation to the principal assertions for reform, such as:

- litigation is beyond the reach of the 'ordinary or reasonably prudent self-funded litigant';
- government funding for the legal system is a low priority;
- alternative dispute resolution should be encouraged for cost reasons and as a mechanism for self-empowerment and more durable outcomes;
- the legal aid cake needs to be preserved for those who need it most;
- radical reform is unlikely because the system represents the status quo;
- for change to be effective it needs to generated through 'insiders' ie judges and practitioners;
- reform must not compromise judicial independence;
- there needs to be a more interventionist role for judges to curb the excesses of and potential to oppress in the adversary system;
- there is a need to reward co-operative, not adversarial approaches and cost structures to reinforce this;
- that ability to fund adversarial tactics leads to unjust outcomes;
- the lawyer providing so-called impartial representation may be simply adopting an amoral role in relation to clients;
- there is a need for education to change the 'mercenary mind-set' of lawyers and to discourage 'the adversarial imperative';

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- there are problems also with 'soft non-adversarialism' (ie, case management and ADR), which may prevent just outcomes and not even save money, because public adjudication provides rules and precedents which encourage others to settle.

Voluminous literature is being generated through reports of commissions, investigative bodies of law societies, and academic writing. This book, which developed from a major conference[1], is a collection of essays from the some of the major 'players', judicial, academic and political, of the reform movement in Australia, together with some leading academic writers on similar issues in the United States. There is also a very interesting essay by Colleen Starkis from a 'grass-roots' indigenous perspective.

Works of popular journalism are appearing, which indict our legal system. One, *The Cartel*[2] by respected journalist Evan Whitton, appears from its sources to have drawn on the earlier conference papers, which formed the basis of the essays contained in *Beyond the Adversarial System.* Whitton treats the legal system as a joke, a repository of magic tricks only convincing to the 'initiated ie brainwashed' and whose logic in the main would seem flawed even to a child. His book, which attracted much press coverage, put the legal world on notice that outsiders are beginning to pierce the legal veil and expose some legal myths. *Beyond the Adversarial System* provides a scholarly, yet readable, counter-balance to such journalistic works, while essentially canvassing similar territory.

The book commences with a note on the contributors followed by an introduction by editors Helen Stacy and Michael Lavarch, which provides an overview of each author's contribution. Then follows three parts, each containing three essays.

Part I – The Dimensions of Change contains a chapter each from: current Commonwealth Attorney-General Daryl Williams 'Changing Roles and Skills for Courts, Tribunals and Practitioners'; former Commonwealth Attorney-General Michael Lavarch 'Fighting the Fiends from Finance'; and Indigenous author Colleen Starkis 'Civil Litigation: An Indigenous Perspective'.

Part II – What Changes are possible? has a chapter from leading judicial authors in this area: Ronald Sackville of the Federal Court of Australia (Sackville was Chairman of the Commonwealth Access to Justice Committee in 1993 and 1994 and responsible for its *Access to Justice Report*) 'Reforming the Civil Justice System: the Case for a Considered Approach' and Justice David Ipp of the Supreme Court of Western Australia (who has published many articles about adversarial process) 'Opportunities and Limitations for Change in the Australian Adversary System'; and chapter six from lawyer Bret Walker (a Past President of the Law Council of Australia) 'Judicial Time Limits and the Adversarial System'.

Part III – Issues of Justice and Ethics draws on eminent US academics Marc Galanter 'Dining at the Ritz: Visions of Justice for the Individual in the Changing Adversarial System' and David Luban 'Twenty Theses on Adversarial Ethics'; and a leading Australian judicial writer on legal reform Justice Geoffrey Davies of the Queensland Supreme Court 'Fairness in a Predominantly Adversarial System.'

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1 *Beyond the Adversarial System,* conference hosted by the National Institute for Law, Ethics and Public Affairs and the Australian Law Reform Commission, Brisbane, July 10-11 1997.

2 E Whitton *The Cartel: Lawyers and Their Nine Magic Tricks* (Herwick Pty Ltd, Glebe, 1998).

Part I – The Dimensions of Change focuses on government perceptions of the need for change (cost and user satisfaction) and an indigenous perspective (access to justice) of the system's shortcomings. Daryl Williams says litigation costs too much and extols ADR, as an empowering and viable alternative, and case management techniques, for improving client satisfaction with the process of litigation, if not the ultimate decision. Michael Lavarch warns of the timely need for internal reform or else the 'fiends from finance' will impose change motivated by budgetary concerns, not justice, in an era when the legal system ranks low in the government priority pyramid.

In Part II – What Changes are Possible? all authors agree that change needs to be insider driven to be effective. Justice Sackville is particularly keen on continuing the path of evolutionary change that has been a feature of the courts for some time, yet notes the courts' capacity for rapid and far reaching change. He believes individual courts can best address there own most pressing needs, without the uncertainty and dislocation of externally imposed solutions. Justice Ipp sees some crying needs – for judges to become more interventionist and for more training for prepare them for such role, and for lawyers to have incentives for co-operative behaviour. His Honour sees education as vital to change. He notes some in-built structural features that inhibit change, and need to be addressed to be overcome. For example, he points outs that despite research indicating witness demeanour is not a reliable indicator of the truthfulness of a witness (as against an overall weighing up of the objective circumstances), many barristers argue strongly against restricting oral evidence. As masters of the art of cross-examination, it is not in their interests to restrict their talents in these areas. Bret Walker concentrates on the possibilities of imposing time limits for judicial judgments to accelerate cases.

Part III – Issues of Justice and Ethics challenges the reader with thoughts about the underlying moral and ethical issues on which the legal system is based. Justice Davies (similar to Justice Ipp in the previous section) suggests the civil litigation system rewards adversarial behaviour. To redress this, he says there need to be far greater sanctions to force co-operation and candour between opposing lawyers. David Luban, in a very thought provoking essay, sees the legal system as morally flawed rather than economically flawed. He advocates similar reforms to Davis, but also questions the underlying basis of the lawyer-client relationship, which he calls non-accountable partisanship. He encourages lawyers to view themselves as the co-equal agents (and therefore equally accountable) of their clients. Such a relationship requires the lawyer to engage the client in a moral dialogue, should s/he find the ends or means involved in representing the client objectionable. Marc Galanter queries if a reduction in adversariness will equalise things (well resourced players being advantaged in adversarial adjudication), and points out the benefits of soft non-adversarialism (ie case management and ADR) need to be proved by hard empirical evidence.

There is much agreement on issues amongst the authors. All authors agree that it is impossible to categorise our legal system as purely 'adversarial' and compare it with the 'inquisitorial' civil system. Both systems are hybrids – in particular case management systems embraced by almost all Australian courts have taken the role of the judge far beyond the traditional 'passive' role. There seems acceptance of the existing framework of the system (it has been with us so long and is deeply embedded in our psyche), that reform has been occurring, and that the most effective reform will be generated through 'insiders'. Thus there is no move to abandon it and to embrace a

thoroughly inquisitorial civil system, which David Luban and Marc Galanter point out would involve a judicial plant ten times greater than our present system. Michael Lavarch makes clear in any event it is an impossibility given the government's funding imperatives:

> The reality is that the legal system is a very low priority when it comes to the overall responsibilities of the Federal Government. It does not rate compared to other government responsibilities such as health, education or defence.[3]

There is certainly uniformity on the need to move beyond theories, to have hard empirical data drive reform and that this is what is currently lacking. This may be hard to come by - David Luban notes even the most sophisticated attempts to find comparative advantage between adversarial and non-adversarial procedures have failed. There are some striking disparities as well. Bret Walker argues against the notion that compromise is morally or ethically superior to contested litigation. He sees a level playing field in a way others do not and protests against lawyers being portrayed as having an 'anti-social culture of mindless combativeness'.

The issue of funding disparity between parties is particularly taken up by Americans Galanter, who wrote a seminal article[4] illustrating the enormous advantages the 'one-shotter' has over the 'repeat-player' in litigation, and Luban, who points out the power to fund adversarial tactics influences outcomes. Galanter makes this clear in the chapter title 'Dining at the Ritz' and explains : "The courts are open to all – like the Ritz Hotel." Funding imbalance is also taken up strongly by Justice Davies in the Australian context.

> It advantages the richer litigant who can afford better lawyers and greater expenditure of labour and, by leaving the pace and shape of litigation substantially to the parties, it permits that advantage to be abused.[5]

The legal system is found most wanting and in need of radical change by Indigenous author, Colleen Starkis. The author explicitly notes that her writing is from her perspective as a Darkinong woman and of the group with whom she collaborated. It is written in an Aboriginal way from an oral tradition, which is used to reach consensus. She challenges strongly the picture painted by Bret Walker of a level playing field for the enjoyment of rights before a neutral umpire, which he sees as a 'defining characteristic of freedom'. Colleen Starkis' chapter expresses feelings of total disenfranchisement of Indigenous Australians from the legal system, but has many worthwhile suggestions for reform, such as development of more culturally sensitive dispute resolution processes.

Some of the points she makes include:

- that Indigenous Australians have lived with injustice for so long, they accept it as the normal course of things;
- there is little knowledge of what action can be taken;

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3 At 11.

4 M Gallanter 'Why the 'Haves' Come Out Ahead: Speculation on the Limits of Social Change' (1974) 9 *Law and Society Review* 95.

5 At 105.

- the waste of personal resources in pursuing civil litigation is important to Indigenous Australians - they would see such action as imposing an unfair burden on 'family' in the wider sense of community;
- decisions are made considering the good of the community not just the individual;
- many feel action will get them nowhere;
- Indigenous Australians prefer to deal with their own disputes - they see the involvement of outsiders as disempowering and often paternalistic;
- the language of the court is alien to Indigenous Australians;
- the court is seen as tyrannical and frightening.

Starkis' presentation of the feelings of Indigenous Australians reflect many of the same feelings of disenfranchisement that women have revealed to various investigating bodies.[6] Her view that Indigenous Australians would consider litigation (if it were an alternative at all) not just in terms of financial cost, but would weigh up 'costs' in the broadest sense and particularly consider the burden it might place on 'family'(defined in the indigenous tradition in a very wide sense involving relationships within the community), may strike a cord elsewhere. In particular Carol Gilligan's[7] research and follow-on writings suggest men reason from a rights or justice orientation, while women in general reason more from a care or contextual orientation, even though as women enter professions they reason equally with a justice orientation. A care or contextual reasoning process may approximate Starkis's notion of weighing 'cost' in a broad sense. Starkis particularly took issue with Daryl Williams' notion of the 'prudent self-funding litigant' for failing to consider cost in a more holistic way.

The book is a worthwhile contribution to the literature in this area. It provides a readily consultable guidebook of pitfalls and possibilities for the 'movers and shakers' of reform, as well as an educative sourcebook for teachers, lawyers, and the community. It seems clear from many authors that education is one key - education of judges, lawyers, law students and law students - to overcoming the problems which stem from a 'mercenary mind-set' and adversarial behaviour.

However the ideas presented within this book are mostly offerings from the elite. A greater representation of authors from a 'grass-roots' level could have provided a more balanced approach. There is a concern that reform of the legal system may reflect the same problems that have occurred in the past in the development of law. The law grew up in the eye of the white Anglo-Celtic male[8], because its almost exclusive actors were white, Anglo-Celtic males. Reform of the legal system must be broadly inclusive and avoid reflecting as Daniel Goleman aptly puts it, "..those with power are too comfortable to notice the pain of those who suffer, and those who suffer have no power."[9] Some contributions from a wider spectrum of society would have enhanced this book, which otherwise is very balanced in its insights from insiders (lawyers and judges), outsiders (leading US academics), government (current and former Federal Attorney-Generals from opposite sides of politics), and an Indigenous Australian.

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6 See for instance, ALRC 67 Interim: Equality before the Law: Women's Access to the Legal System, 1994.

7 C Gilligan *In a Different Voice* (Harvard University Press, Cambridge, 1982).

8 See R Graycar and J Morgan *The Hidden Gender of Law* (Federation Press, 1990).

9 Daniel Goleman *Vital Lies, Simple Truths: the Psychology of Self-Deception* (Bloomsbury, 1997).