

The Privatization of Justice: Where are we going?

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INTRODUCTION

Is the mediation of legal disputes consistent with the goals and needs of a public justice system based on the rule of law? The following analysis asserts that the mediation of legal disputes should be one of the central objectives of the administration of justice. Unfortunately, there has been a stew of misunderstanding over where dispute resolution short of a trial fits into our legal system. We will see that it is not a simple public versus private process debate. Courts and the private resolution of lawsuits are integrally related.

I. ACCESS TO COURTS

The impartial adjudication of legal claims is the cornerstone of any democratic society. The rule of law and effective dispute resolution provide the foundations for economic growth, physical and emotional well-being, and, ultimately, thriving communities. Canada's founders understood this reality when they enshrined an independent judiciary in the country's constitution. Indeed, the depth of Canada's ancestral commitment to effective dispute resolution can be seen today in the form of those impressive court houses which adorn our cities and towns.

It seems axiomatic that access to the enforcement of a right is fundamental to the very existence of that right. Thus, access to our courts is rightly seen as a central objective of our legal system. For centuries, the trial has been the most popular and visible forum for resolving disputes. Trials dominate media coverage. Television series and the cinema glorify the roles of lawyers, judges and juries. Most Canadian law schools continue to teach law by the case law method.

Courts, it can be convincingly argued, provide essential social services and are a key to public order. Any informal or so called private

dispute resolution development which might impair their functioning must be critically examined.

II. THE ADVERSARY METHOD

For any meaningful assessment, the adversarial method used in the courts of Canada, England and the United States must be understood. It is not good enough to demonize lawyers as costly, aggressive and deserving of any dispute resolution alternative that might decrease costs and increase collaboration. The traditional adversarial method of our courts is integrally related to our political philosophy. Parties control their own disputing by presenting evidence and reasoned argument to neutral persons or bodies. Judges and juries remain passive participants in the process. Parties pursue their claim as they see fit without fear of sanction. An emphasis on individual freedom and judicial impartiality lies at the heart of the adversary system of justice and fits our culture perfectly. Freedom of the individual diffuses power and suits a heterogeneous culture. To eliminate the adversary system because of its costs and fractiousness would likely require a reworking of our culture's entire conception of justice.

Nevertheless, our adversary based legal system comes with a price. While inter-party hostility is probably an inevitable feature of disputing, an adversary system of justice provides maximum opportunity for contentiousness and gamesmanship. Delay and expense are features of courts structured on the premise that the parties "own" their disputes. Increasing case loads, unchecked tactical manoeuvring by lawyers and a related increase in the costs of litigation have made courtrooms inaccessible to most citizens. Delay, in itself, increases costs, emotional strain and public cynicism in respect of rule by law

III. REFORM

One change in response has been to run courts more like businesses with managers and performance goals. Judges have been asked to step out of their traditional passive role and become litigation managers. However, some commentators argue that equipping judges with managerial powers undermines their impartiality. They argue the real problem is government reluctance to invest in court systems and, for example, to increase the number of judges. The worry over impartiality is

understandable but it must be balanced against doing nothing. Having impartial but inaccessible courts may be no more fair than employing judicial administrators armed with cost and case reduction goals. There must be some balance between these important values when considering any reform.

We could, as well, make disputing “free” the way we have with health care. While direct costs to individuals might no longer be a factor, public cost would escalate and delay certainly would continue to exist as our health system shows. Moreover, health care may not be the appropriate comparator for legal services, particularly in the context of disputing. This is because it may not be reasonable to relieve against the transaction costs of legal disputing. Trials involve more than just financial costs. Trials exact substantial economic and emotional costs and do not “solve” the sometimes complex human and social realities embedded in the underlying conflict. In short, the uniform application of a legal rule to modern life comes at a substantial cost. And if conflict is often too situationally varied and too morally or psychologically nuanced to be definitively resolved by applying one dominant rule, a financial disincentive to reflect this reality and encourage responsibility in disputants for resolving their own disputes seems sensible to many.

IV. SETTLEMENT AND THE COURTS

Fortunately, courts resolve only a small fraction of the disputes that are brought to their attention. And lawsuits constitute a minute percentage of all the disputing which might conceivably be brought before the courts. In North America, only 3% to 5% of all civil cases filed proceed to trial. The vast majority are withdrawn or resolved through negotiated settlements or as a result of other settlement procedures. If this activity is to be considered private, there is clearly a public interest in it taking place.

Looking at all the disputes which are turned into legal grievances, the principal contribution of our courts and tribunals may actually be in providing a background of norms and procedures against which negotiations conducted by lawyers take place. In effect, people sue others to force them to the bargaining table and to provide a context for their negotiations. Viewed from this perspective, settlement and adjudication are actually symbiotic processes, not mutually exclusive private/public ones. Legal rules provide bargaining chips or endowments to the

respective parties. The delay and other transactional costs associated with accessing the court system add further bargaining leverage. Court procedures or events provide real deadlines for negotiations and an incentive to settle.

V. LEGAL DISPUTE NEGOTIATIONS

While settlement options must be assessed against a backdrop of legal precedent, there is no need when bargaining to make definitive choices between competing norms the way a court must. Where principles conflict, a court characteristically treats one as dominant and therefore determinative of the outcome. In negotiations, parties may accord partial or full recognition to the entire range of contending standards. A negotiated settlement that accommodates colliding policies may be no less principled or arbitrary than a judge's decision which must select between contending standards. Indeed, a negotiated settlement may be more principled, tailoring the array of contending principles to the needs of the parties at hand in a manner that strikes those most knowledgeable of the dispute as fair and just.

Where the parties are interdependent and have an interest in an ongoing relationship, a negotiation may be able to better reconcile past differences with future consequences. Even a one shot relationship may have a situational and moral complexity better served by a weighting of principles than by a winner-take-all outcome. The transformation of differences into legal disputes by lawyers can cause the immediate parties to forget the real interests underlying their original conflicts and that they own these grievances, not the lawyers. They sometimes also need reminding by their lawyers that the judges who will decide their cases are human, have a limited range of tools and will never understand their problems as well as they do. Turning control over such nuanced conflict to strangers may actually be irresponsible as well as costly.

Legal dispute negotiations also offer more flexibility to deal with factual issues. For the purposes of the negotiations, facts can be determined by explicit or tacit agreement. Where specific knowledge is lacking, negotiators can simply agree on the truth of a particular factual proposition for the duration of their discussions. Alternatively, they can bypass a contested factual proposition altogether and determine whether a settlement can be reached if its truth or falsity is held in abeyance. Parties may make the terms of a settlement accommodate factual uncertainty by

financial discounts or by appropriately structured face-saving outcomes which explicitly provide that the allegations in issue are not admitted. Negotiations can adapt remedies in an equally flexible manner. The parties are free in bargaining to apply whichever remedies they wish, even those that may be logically unrelated or unavailable as far as the law is concerned.

Negotiations can also signal empowerment of the parties because they control the process, not lawyers and judges. They can be assured of having their full say whether or not a judge would consider the dialogue relevant. The related psychological satisfaction or catharsis of being heard and understood cannot be overestimated. The direct and informal nature of this participation is more likely to reveal the essence of a dispute and produce a balanced outcome which truly ends the conflict. The parties must as well treat each other with dignity or otherwise risk the talks breaking off.

VI. LAWYERS

Lawyers play a complex role in legal dispute negotiations. They must work alongside a client to put together a settlement solution motivated by the consequences of not settling and one which also makes personal and business sense. Acting as wise counselors and legal experts during these discussions, lawyers are able to make effective recommendations to their clients because they are trusted advisers who are more removed from the immediate dispute. Lawyers actually make legal dispute negotiations more rational by virtue of their knowledge of law and their close relationship with each other and their clients.

The concern today, however, is that the transactional costs of disputing may outweigh the very substantive rights that are the subject matter of a dispute. When settlements do occur because parties cannot afford access to the courts, there may remain a sense of injustice despite the aforementioned virtues of settlement. The fear is that the many court house steps settlements are representative of this reality. Furthermore, a lawyer's capacity for cooperation should not be exaggerated. The perspective of the lawyer and client relationship as a problem-solving one must constantly be reconciled with the lawyer's duty as zealous advocate. As the literature and experience reveals, the use of any agent introduces competitiveness, contending and exaggerated goal formation. Indeed,

visible competitive tactics by an agent may be necessary to assure the client that its interests are not being sold out.

This inherent contending is magnified in legal dispute negotiations not only by professional obligation but also because of the fundamental distributive or combative nature of these engagements. Lawsuits are usually about past alleged wrongs and center on the allocation of previous losses unlike deal-making negotiations which are about anticipating and allocating future surpluses. Economists call such bargaining a zero-sum game meaning my gain is your loss and vice-versa. The Prisoner's Dilemma matrix nicely captures how legal dispute bargaining is skewed to contending. Lawyers must also deal with one-shot clients demanding defection or with ruthless opponents. Moreover, every lawyer is vulnerable to the possibility of a lawsuit brought by her own client charging professional negligence. Mediation assists lawyers with all these challenges.

VII. MEDIATION

This is a very long preamble to get to the role of mediation but this is where it fits in. There is a substantial scholarly consensus that mediation makes legal dispute negotiations more rational, more systematic and more problem-solving. Effectively, mediators help attenuate distributive pressures, allowing integrative forces to become more salient. They enhance effective communications between negotiating parties and, thereby, create a climate in which joint problem-solving is possible. They also help send the message that disputes are to be "solved" not "won."

Commentators suggest that mediation accomplishes all these things by putting more reliable information on the table and by helping the parties perceive each other more fully and accurately than would be possible in the context of unassisted negotiations. Several studies evaluating the mediation process have revealed high party satisfaction and settlement compliance levels. Research has also shown that groups less empowered socially may prefer the mediation process. Generally parties tend to prefer mediation to adjudication because of the degree of participation in decision-making that it affords to them and this appears to be the case regardless of outcome.

Lawyers, too, seem to prefer mediation to unassisted negotiations. It enables them to reinforce their own "reality testing" with clients who

may have unrealistic expectations while maintaining client confidence in the solicitor and client relationship. By gathering everyone together in one place and at one time, mediation can accomplish in a single meeting what months of paper and telephone correspondence might otherwise produce. Mediation prompts direct contact between the lawyers and their client, ensuring that everyone understands what is happening and providing the opportunity for immediate decision-making. The direct involvement of client and lawyer combats any client perceptions of being left in the dark, excluded from lawyer-to-lawyer discussions, thereby improving client-lawyer relationships. Because it is a dignified process in the presence of an independent third party, mediation also gives the litigants a cost-effective opportunity to tell their story to or before someone “official.” Lawyers report that this often is a sufficient “justice” experience for their clients.

VIII. JUSTICE POLICY

From a justice policy perspective, there has been a tendency to view our legal system exclusively from a judicial perspective. However, courts directly resolve only a very small percentage of all lawsuits filed yet, until relatively recently, have received all of the public support in the form of courthouses, judges and administrative personnel. Our legal system, obviously depends on 90% of cases being resolved short of a trial and in a manner which reinforces the integrity of the rule of law. It is of course true that courts provide the background norms and deadlines that drive legal dispute negotiations so this percentage perspective is not a fair comparison of contributions. But timely cost effective settlement activity cannot be taken for granted and is an important component of our legal system.

Mediation provides valuable support to this peace-making role of the legal profession and in a manner consistent with legal system’s integrity. Public support of settlements in the form of mandatory mediation programs recognizes the central contribution of settlements to a well functioning justice system. Early mandatory mediation, in particular, forces serious preparation for and involvement in negotiation that might not otherwise happen so soon. It can as well moderate the initial aggressive tendencies of litigants and lawyers as parties seem to adapt their negotiation behaviours to the mediation process. Early resolution programs give parties “the excuse” they may need for early negotiations while outwardly remaining firm. Early settlements are beneficial to

parties for all the obvious reasons and should be seen as increasing the public's access to justice.

IX. SOME CRITICISMS

There does not appear to be empirical evidence demonstrating that the availability of mediation whatever its form removes from the courts cases needed to establish precedent. Growing case backlogs awaiting trial suggest there is no shortage of disputes to be tried. In fact, the availability of mediation may actually increase the number of lawsuits filed. But even if there was evidence of a decline in "needed trials," it might be difficult to explain to the public why litigants should be encouraged to engage in costly trials to make law instead of having access to more timely and cost effective settlements of their differences. Rather, it can be argued the ultimate responsibility of our legal system is dispute resolution in the broadest sense, and not simply the making of precedent.

Critics of mandatory mediation have been concerned about its fairness and lack of transparency. For example, they worry about unaccountable interest based mediators who may ignore legal rights or be biased in favour of certain outcomes. There is also the problem of imbalances in bargaining power. These are real concerns but the issue remains one of balance given available precautions.

Unassisted lawyer negotiations have always been subject to imbalances in bargaining power. An imbalance in resources can also affect the conduct of a trial. While there may be no easy answer to this concern, it is comforting to know that the presence of mediators creates incentives to make fair proposals. By requiring justifications, mediators heighten the prominence of the norms of reciprocity, equity and social responsibility. Independent legal advice and legal representation at a mediation are important responses to concerns over mediator neutrality and effectiveness. Proper training of mediators is another answer.

CONCLUSION

Mediating justice is a more holistic concept of conflict resolution than that administered by our judges. This other side of justice resolves most legal conflict but with pivotal assistance from our public courts and the legal profession. It is less visible because it occurs behind closed doors and, therefore, is easy to misunderstand or take for granted. In

informal settings, however, this conflict resolution process deals with both law and human nature—a nature that often conflates perceptions with reality and effect with cause. Mediating justice is a more personal and subjective conflict resolution process where perceptions, interests and entitlements are all given weight. Settlements produced in this manner are not a capitulation to the staggering costs of litigation and inconsistent with the rule of law. Rather, mediating justice showcases our legal system’s daily effort to integrate law with the needs and interests of real people. In doing so, it enhances the law’s integrity. Thus, in a well-designed legal system, mediating justice should be one of its central objectives.