Access to Justice v 3.0

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I should begin this blog with a reservation and a disclaimer: in using the now-familiar "v3.0" description here, I don't wish to suggest, as software or IT developers might, that what is involved here is a wholly new product and development. Indeed, as my colleagues Andrea Schneider and Howard Gadlin and I suggested in our chapter "Of Babies and Bathwater" in *Educating Negotiators for a Connected World* (Honeyman, Coben & Lee, eds; DRI Press, 2013; http://law.hamline.edu/dri/connectedworld/), that too much can be claimed by way of radical transition when we use such product-related signifiers. But here, my use is intended only as a kind of waymarker on what is otherwise a well-trodden path in the development of mediation. In fact, we'd be better off finding some way of signifying a return to origins rather than radical discontinuity, for which reason some of my favourite lines from TS Eliot's *Four Quartets*, with which we also began that chapter, do better:

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.
T.S. Eliot — "Little Gidding" (the last of the "Four Quartets")

The question I want to raise here involves the reconciliation or synthesis of a couple of threads of the history and idea of mediation. In the spirit of blogging, too, this entry is a bit of thinking out loud in order to see what my wise colleagues "out there" might also think.

It goes like this: The first phase of "access to justice" (typically with the word "movement" attached, to indicate that this was something more than just tinkering around the edges) involved improvements to institutional and systemic features, in order to improve the capacity the citizens might have in order to access the institutions of law and government. This reflected a concern that the mechanisms of law had become remote, expensive, elitist, incomprehensible, slow and by and large the preserve of a small sector of the population. The "movement" element of this lay in the intention to make the law accessible to those whose claims largely fell beyond the gates of the law. That was, and is, "v 1.0" of the access to justice thread of conversation – and it remains an important component of the discussion, especially to the extent that commentators of the status of Dame Hazel Genn, for example, still focus critically on issues of civil justice.

Version 2.0 of this access to justice development, continues the thread of concern about accessibility of law and more direct engagement of disputants – and this thread seems more informed by the line of thinking represented in early article titles such as "conflicts as property" (Christie) or "whose dispute is it anyway?" (Menkel-Meadow). As we're well aware, the governing values of this line of mediation thinking are those of autonomy, participation, choice, along with procedural values of mediator neutrality and the confidentiality of outcomes.

This, however, is where the tension begins and we have two parallel conversations about access to justice which aren't always – or even necessarily – about the same image of mediation or even of access to justice. This tension is perhaps best exemplified in the early critiques of "informal" justice from the political left in writers like Richard Abel (*The Politics of Informal Justice*), or from anthropologists like Laura Nader (concerned about the thin theory of conflict on which modern mediation was based), from philosophers like Hampshire (*Justice as Conflict*, on the centrality of principles of procedural justice to resolve our disagreements on substantive outcomes), or from lawyers like Owen Fiss (in his important article, "Against Settlement" and the more recent symposium on that article in the *Fordham Law Review*, 78: 2009). Equally, a strong line of reservation about mediation in German commentaries through the 1980s and 1990s was that mediation risked losing the conventional and constitutional protections of law and due process, and relied on unempirical experimentation with privatisation of law. [See, for example, D Jansen, "Parallelen in Sozial- und Rechtspolitik: Ein Vergleich der Diskussion zur Selbsthilfe und zu Alternativen zum Recht," *Zeitschrift für Rechtssoziol*, 9: 1 (1988); E Blankenburg, "Einstweiliger Rechtsschutz als Konfliktlösung: Kleine Aufweichungen der Zivilproess-Dogmatik mit möglichst grossen Folgen," *Z.f.Rsoz*, 12: 274 (1991)]

The consistent thread of this critique has been that private settlement risks the loss of the public and normative role of dispute resolution processes: resolving disputes also contributes to the wider and collective public realm. The problem here too appears to be that these conversations – one about the systemic attributes of justice, the other about the private virtues of settlement – rarely seem to engage with each other.

So here's where I speculate on v 3.0 and a possible reconciliation, even if it's a challenge to some of the core assumptions about **private** settlement. In his excellent book, *A Civil Tongue: Justice, Dialogue, and the Politics of Pluralism*, (1995), Canadian philosopher Mark Kingwell comments that, in recent political life, with the ideology of pluralism and engagement, we have all emerged less as rational choosers (apologies to the "rational actor" model of negotiation!) but rather as "talkers". This, for the more philosophically inclined, is seen as the discursive or hermeneutic turn in politics; but this matters less than the fact that, at the heart of this trend, is social dialogue. Leave aside for now the complexities of Habermas and public discourse: what's involved is the central (and ancient, foundational) idea of dialogue – and this, of course, is what underpins the early appeal of mediation-like process: they centre on the possibility of telling stories.

But – here's the rub – those stories have become valued as *private* stories; and what Kingwell and others are interested in is the public, constructive and normative role of stories or dialogue. The point of v 3.0 is that we retain this commitment to participation, engagement, dialogue and all such key values that have shaped modern mediation – but that we add one component that Kingwell emphasises: that our dialogue be constrained by what he calls our "civic commitments". This is not entirely new to the modern ADR style – indeed, one less-emphasised thread of the Fisher/Ury/Patton model is that the negotiated (or mediated) outcomes should satisfy public values of justice, and not merely private preferences. But the stress on the privacy and primacy of "interests" can crowd out this element.

The practical question – to which I hope to return: how can we balance private interests and our civic commitments so that justice is not only, but more than, "what the parties choose it to be"?