Kluwer Mediation Blog

Selling mediation: context & legitimacy

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Monday, August 26th, 2013

"Conflict resolution governs. From international dialogues and problem-solving workshops to training programs, community mediations, and local restorative justice initiatives, conflict resolution (re-)instals order. It does so by encouraging parties in conflict to reconfigure their orientation to their selves and their institutions, to others, and to the conflict in which they are involved."
(Morgan Brigg, The New Politics of Conflict Resolution: Responding to Difference, New York: Palgrave Macmillan: 2008, 50)

This blog entry has its origins in conversations with various groups of 'stakeholders' in the mediation world in several jurisdictions. At the heart of these conversations has been the question as to ways in which mediation might be promoted and given greater visibility. Reflecting on this desire to expand the visibility of mediation, and on the apparent resistance, led me first to think that this was a question and challenge that had been faced in a number of jurisdictions over the past three decades, and that this resistance would surely fade. But further reflection led me to realise that this was the wrong answer and that the resistance had less to do with the familiar "turf wars" of professionals than with the more fundamental questions of legitimacy. And that, in turn, is a question as to the commitments – social, moral, legal and cultural – that appear to be embedded in any claims about the benefits of dispute resolution options.

"Legitimacy" is by no means a new concern in the life of mediation: indeed, any discussion in which the relative advantages and disadvantages of the various forms of dispute resolution are up for consideration is, unavoidably, a discussion about the legitimating claims that can be made for each process, even if that is not expressly articulated. As I'll suggest later, there is also strong and critical thread throughout the literature on dispute resolution that is specifically about legitimacy – and here I think of the commentary from the earliest days of "alternative" dispute resolution by writers like Richard Abel; or the concern about the settlement ethos eclipsing public justice (Fiss, Luban); or more recently the concerns with the potential costs to civil justice and the loss of publicly-articulated legal norms (Genn). My concern here is not to rehearse that discussion, but rather to acknowledge a different angle on the same discussion – an angle which seemed to explain to me where some of the resistance to, or at least caution about, mediation may come from.

The point, briefly put, is this: much of the defence of mediation has been is terms of the norms of a process that values autonomy, choice, decision-making, disputant engagement and agency, and a relative freedom from regular rules and hierarchies. Indeed, the claimed beauty of mediation is just

that: disputant autonomy in decision-making (with side-effects of efficiency, confidentiality and, in the best of all possible worlds, repaired relationships and future competence in dispute resolution). But that's also the problem and it is a view of mediation that fails to sell the process in cultural or political settings where those norms are not self-evidently true or primary.

At the heart of this question, then, is a tension – and a legitimation issue – concerning the relationship between norms of the legal or political system (public norms) and norms that, in modern versions of mediation theory, turn on the identity and autonomy claims of the disputant. The predominant language of mediation theory in the last couple of decades – and it is the marketing language of those who would sell the virtues of mediation across cultural and jurisdictional boundaries – is that of individualism, privacy, autonomy, and decision-making competence (and, in a variant on that language, the rights to all of those claims). It is, too, a language of both positive and negative legitimacy: positive, in the sense of claimed values of decision-making autonomy; negative, in the sense that there is an undercurrent of anti-litigation rhetoric that also informs this conversation. The risk is that neither of these qualities is necessarily a selling-point in the supposed new markets for mediation; but the irony is that even mediation's supporters within those new markets may already have adopted the language and now puzzle as to what's not working in the sales campaign.

So, two linked points: first, that any discussion of the nature, benefits, desirability and efficacy of mediation is also, expressly or *sotto voce*, a comment on the legitimacy of dispute resolution options; and second, that there are two parallel conversations about legitimacy that run to different agendas – one about system and institution-based legitimacy; the other about actor-centered legitimacy. Thus, when we extol the virtues of mediation in terms of what it represents for the autonomy of disputants and their independence of legal systems, we probably will contradict institutional values of legitimacy. The cultural-contextual point, too, is that the actor-centered values do not translate readily to acceptable norms of authority and ordering in more hierarchical societies. In the apparently straightforward arguments and assumptions about the merits of mediation there are a number of embedded normative claims about the legitimacy of autonomous and private dispute resolution which do not necessarily sit well with the worlds of those to whom the claims are presented.

"Conflict resolution struggles to come to terms with its part in the operation of power and governance because it shares many problematic assumptions about power, governance, and conflict with traditional Western political and social theory. At the centre of these assumption is the belief that the 'informal' or civil realm, the sphere of social life and interaction where people are not subject to direct state sanctions, is a 'zone of freedom' populated by pre-constituted and natural human subjects. This informal realm is set against a 'formal' sphere of sovereignty, law, and power." (Brigg, 53)

This entry was posted on Monday, August 26th, 2013 at 1:39 am and is filed under Cross-cultural, Developing the Field, Growth of the Field (Challenges, New Sectors, etc.)
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.