Kluwer Mediation Blog

Private Settlement, Public Justice?

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Sunday, January 26th, 2014

This blog entry has its immediate origins in a passing comment by a mediation and university colleague. That colleague had just returned from a mediation and I – perhaps somewhat flippantly – asked whether justice had been done (the area of his work was employment mediation). His reply was simply to the effect that "the parties agreed, they're happy with the agreement; that's justice". This was not, I'm sure, dismissive of my inquiry; we know each other well enough to talk regularly and seriously about mediation. We took it no further, in part as we were literally passing in the halls; in part too as the assumed subtext was that we were agreed on this core principle of the justice of mediated outcomes. In hearing this, I also heard my own comments to the same effect over the years I've been involved in mediation, whether to new batches of would-be mediators, policy-makers or the parties to mediation. It has become a kind of received truth that the core virtue of mediation is that the parties' autonomy in deciding their outcomes is also the measure of the justice of those outcomes.

The question remains, however, as to whether private settlement – with the emphasis on the autonomy of decision-making and confidentiality of outcomes – has contributed to or eroded the most public and shared of the political virtues: justice.

This comment is a first step in what I hope will be a continuing conversation through the pages and comments sections of this blog, not least because the writers and readers of the blog are a repository of practice, experience and reflection on what it is we do by way of mediation. It is also the continuation of a conversation that has run in tandem with the more practice-oriented literature on mediation, and yet which seems not to have had the impact that it deserves. That parallel discussion about mediation is one that reflects less on the virtues and processes of private settlement than on the social, political and jurisprudential impact of private – rather than public – dispute resolution. There is, at the same time, one clear point at which these conversations merge in both theory and practice, and that is in the area of public issue mediation, consensus building, and policy-oriented fact finding.

It may seem heretical, then, to have a question mark at the end of this title to this blog. That heresy, if such it is, has nevertheless accompanied the lifespan of modern mediation, not least as it became clear early in this new history of dispute processing (as Laura Nader preferred and prefers to call it) there was a shift from mediation as a tool and resource of community dispute resolution to it being a widely acknowledged and accepted resource for individuals, corporations and legal systems. In the process of shifting from being marginal to mainstream, mediation and mediators have

emphasised the three key virtues of confidentiality of process, impartiality of mediators, and the autonomy of disputant decision-making (with variations in style rather than substance to reflect cultural differences). It is as though the guiding mantra of mediation was set by Norwegian criminologist Nils Christie in his 1977 article, "Conflicts as Property" [Br J Criminol (1977) 17 (1): 1-15], lamenting the loss of any rights of participation by either victims or offenders. That thread of thinking has surfaced from time to time in the form of claims – or the received truth – that disputes are "owned" by the disputants; from which it follows that the outcomes lie equally and properly in their hands.

Clearly, the "reinsertion" of the parties into their disputes has had a transformative effect on legal systems and especially on judicial processes – we need think only of the success story of restorative justice, or community justice programmes, or the recognition of faith-based and indigenous processes to get some idea of how far we've come. Indeed, for those of us Baby Boomers who went to Law School some time ago, it's an utterly different and exciting landscape to be living and working in today.

There has been, however, a voice of nagging doubt about the insistence on the connection between private settlement and public justice. If we think of the early inspirations for "informal" justice, even before mediation took hold and ADR became a "movement", we looked, with the help of ethnographers and legal anthropologists, at non-judicial or quasi-judicial processes in non-Western and small scale societies. While the social relations and conditions in those societies could not and should not be replicated in late-industrial societies, there was and is something inherently appealing to both the communitarian and the critic about informal and essentially dialogue-based processes. If we remember, some of the earliest leaders in informal non-judicial, participant-based dispute resolution were also community activists – for example, the readers of Saul Alinsky, the colleagues of Raymond Shonholtz in creating community boards and others.

At the same time, one critical theme emerged, with perhaps two threads. One thread of this, exemplified in the avowedly left-leaning work of Richard Abel and colleagues, was to challenge the marginalisation of small disputants into the emerging community-based or, increasingly, privately-run mediation systems. This, it was argued had the effect of leaving the courts for the "important", commercial disputes, while sidelining the others. There is some irony in this as the primary promoters of mediation now are the commercial users.

The other thread is an insistent and important concern with the values of civil justice and a question as to what happens to both the institutions and outcomes of civil justice when "cases" – the essential ethnographic data for lawyers – disappear behind closed doors.

That second thread has remained out of the sight of most mediators. This discussion of settlement is about the costs to civil justice, raised by Owen Fiss in his important article "Against Settlement" [93 YALE L.J. 1073, 1089 (1984), and picked up 25 years later in a Symposium on that argument [78 Fordham Law Rev. 2009]. It's not too strong a claim, I think, to say that we are able to practise our profession largely untroubled by the concerns about "disappearing cases" or the "erosion of the public realm" (as David Luban argued in 1995), or as Dame Hazel Genn has more recently and trenchantly discussed.

This is not to say, of course, that we abandon the current course. But it is to raise the question as to whether it is uniquely correct to claim, as we tend to, that "justice" is what is attained through the implementation of private processes. Space constrains further development here, but I do go back

to the core claim by John Rawls in his Theory of Justice that “Justice is the first virtue of social institutions, as truth is of systems of thought.” And the emphasis is, and needs to be, on the social, civic, and collaborative dimensions of justice.

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