Kluwer Mediation Blog

Spreading the word

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Monday, October 27th, 2014

This brief comment arises from genuine curiosity and contains a question for my co-authors and anyone else who happens to read this blog. The situation is this: I've recently finished reading the first instalment of the learning journals for my Negotiation and Mediation class, which is a device I've used for the more than 20 years I've been teaching such a course. I'll usually acknowledge at the outset to the class that this is probably an unusual component for a law school, but it is well-established in comparable courses and is probably something many professionals do as a way of maintaining their own reflective practice. The format has certainly changed over the years, from hand written notes in – typically – A5 notebooks, handed in at several points in the semester, to journals kept on laptops and submitted by email to – now – journals uploaded to a "journals" tab on our class teaching platform. In the interests of my self-preservation, the requirement has also changed with this new mode of keeping journals: what began as a continuous journal is now contained and constrained as a 2000 word submission twice in the semester. And with a class of 45, that's plenty. It has begun to get out of hand when I realised, in the last iteration of continuous submissions, that I'd read over 650 entries. Further, while some of the students find the reflection an alien experience, others took to it with such enthusiasm that one student alone ended up writing over 25, 000 words. This had to change.

However, it's not the structure that's the issue here, but just one aspect of the content. This semester, as in previous years, a high percentage of the students began with a comment reflecting their surprise at what they discovered about negotiation in the first session which, as always, covered both administrative details and a couple of small but quite intense "interactions" that were not presented initially as "negotiations". The comment from students was, in varying forms, a suggestion that the idea of negotiation conveyed here was something wholly new. The comments included at least these elements and assumptions:

– the perception that negotiation was primarily, if not exclusively, transactional;
– thus the view that negotiation was what older people did, and usually in big ticket commercial cases;
– what goes on at a relational, social, familial level is not, therefore, "negotiation";
– and it's a surprise to realise that "negotiation" is what we do all the time – and often when we least expect it, which is why I suggest that we often find ourselves "ambushed" by a negotiation and we're part way through the interaction when it dawns on us that this might actually be a negotiation;
– the sense that negotiations are essentially zero-sum and competitive; and therefore

– the view of negotiation as wholly strategic; and with the result that
– deception is not only an expected but also a legitimate part of negotiations (the "game" is elevated to the norm of negotiation);
– any mutual gains notion of negotiation – introduced at an early stage – is simply naive, unrealistic and doomed to failure (bear in mind this is "out of the mouths of babes", so to speak).

These are powerful messages and they create a particular challenge in seeking to convey, through practice, not only the core elements of a process of negotiation but also the ethos of modern negotiation and mediation.

My question is this: how is it, some 40 years into the development of modern dispute resolution, with its powerful messages of the efficacy and imperatives of collaboration and cooperation, has this not trickled down? Cynically, one might suggest that the trickle-down model hasn't worked in other fields so there's no reason to imagine it's going to be any more likely here. But the real issue is that we still seem to swim against a tide. There has, of course, been significant and ground-shifting lateral adoption of the ethos of dispute resolution across a range of professions, including – gradually – the legal profession. And there is now a strong tide of acceptance from those higher on the totem pole, whether we're talking of those in the C-suite of large corporations (see Joel Lee's summary of the recent mediation lecture at SMU on this Kluwer blog, and the lecture itself at http://www.mediation.com.sg/workshops-and-events/singapore-mediation-lecture/), or the upper echelons of the judiciary in many jurisdictions.

I suspect, however, it remains a widespread phenomenon that the received wisdom about negotiation is largely along the lines expressed by my classes. It might be tempting to suggest that there's a cultural element in this, to the extent that these views of negotiation reflect embedded norms of autonomy (or lack of it), authority, hierarchy, power and communication. But, as this is not a response that is unique to my students here in Singapore, and I would not be surprised to hear that colleagues across a range of legal and cultural contexts have comparable responses, the cultural explanation won't suffice: it may be one part of how this group of students articulates their view of negotiation, but it's just a variant on something more general.

I raised the question in a slightly different way a couple of years ago on another blog here: http://mediasian.wordpress.com/2012/05/20/establishing-mediations-legitimacy/ – but this was concerned more with establishing the legitimacy of mediation as part of legal and institutional systems, and identifying the characteristics of mediation that needed to be articulated. The question here, however, looks in a different direction, at the public and popular image of negotiation and dispute resolution. There are, of course, a number of excellent initiatives to spread the word about dialogue and conversation, and even in the more etherial fastnesses of academic writing there's a strong current in the direction of dialogue, public participation, democratic deliberation and so on – though the risk of this latter contribution is that it remains, ironically, a somewhat closed conversation amongst those who share these views, and Habermas is not exactly bedtime reading for most of us. If, however, this recent revival of the long traditions of dialogue – from the Greek philosophers to the contemporary practice of "public conversations" – is to take root, there's a next step that still seems to be missing. As Bohm, Factor and Garrett suggest, there remains something missing in the ways in which we interact and choose to solve our differences, and part of that at least must be in the way we retain powerful, yet limited, views of negotiation:

"Dialogue, as we are choosing to use the word, is a way of exploring the roots of the many crises that face humanity today. It enables inquiry into, and understanding of, the sorts of processes that

fragment and interfere with real communication between individuals, nations and even different parts of the same organization. In our modern culture men and women are able to interact with one another in many ways: they can sing dance or play together with little difficulty but their ability to talk together about subjects that matter deeply to them seems invariably to lead to dispute, division and often to violence. In our view this condition points to a deep and pervasive defect in the process of human thought." D Bohm, D Factor, and P Garrett, (1991) 'Dialogue – a proposal' http://www.infed.org/archives/e-texts/bohm_dialogue.htm

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