

Carole YOUNES

CONFLICT RESOLUTION, REINFORCEMENT OF SOCIAL LINK AND SUBSTANTIVE JUSTICE

INTRODUCTION

The increasing use of alternative disputes resolution (ADR) is an opportunity to reflect upon our conceptions of justice.

It cannot be denied that ADR is mostly concerned with individual satisfaction and the reinforcement of social link rather than with substantive justice. Substantive justice will be broadly defined here as opposed to procedural justice; its purpose is to change the balance of power, to redress imbalance between persons and groups.

Moreover, some scholars have argued that ADR was reinforcing the unequal balance of power between the parties and that the development of mediation and of the harmony model was used as a tool of control and domination (I). The question is whether ADR could be reduced to a legitimating discourse or do they, in fact, reflect a more profound change in society, a needed adaptation to the difficulty to cope with diversity and complexity through the judicial system? (II) Considering the benefits of mediation, we shall look into ways to accommodate this pluralism and complexity without jeopardizing values of substantive justice. On that occasion, we shall discuss the role of the State and of the judicial system to ensure values of substantive justice (III).

I. THE CRITICS OF ADR AND OF THE IDEOLOGY OF HARMONY

A number of scholars have pointed out the danger lying in an ideology of harmony related to ADR whereas agreement is seen as the panacea in every conflict¹.

They have argued that mediation was essentially supported by middle upper class and social scientists whereas people at large involved in conflicts and among them working class were expecting law and rights to protect them².

“ Emphasizing free choice, individualism, autonomy and advantage, and assuming instrumental rather than normative and religious orientations of social action, the concept seems to describe the culture of professional elites rather than of residents of these urban/ethnic neighborhoods.”

¹ Jean de Munck. *Le pluralisme des modèles de justice*, 1994, p. 115 “ L’effusion de l’accord n’est pas visée par certains médiateurs comme leur objectif supreme, au detriment de toute considération de justice ou de droit... Une idéologie consensualiste se substitue au patient travail de distinction des droits et des devoirs, à l’exigente revendication de la justice et de l’égalité.”

² Merry and Silbey. 1984. *What do plaintiffs want? Reexamining the concept of dispute*. Jus. Sys. J. 151. Engle Merry, Sally. 1990. *Getting Justice and Getting even, Legal Consciousness among Working-class Americans*. Chicago: The University of Chicago Press.

As Abel has stated, “there is considerable evidence that people want authority rather than informality. They want the leverage of state power to obtain the redress they believe is theirs by right, not a compromise that purports to restore a social peace that never existed³.”

According to those scholars, ADR could serve as a mean of control and domination in keeping and reinforcing power relations. For instance, Milner Ball has defined ADR as “another form of the deregulation movement, one that permits private actors with powerful economic interests to pursue self-interest free of community norms⁴.”

They argue that in traditional societies, away from the stereotype of harmonious societies, mediation is used in case there is no danger of retaliation from the weaker party⁵.

They showed how the focus on relationships drives away from consideration for justice and how individual satisfaction has become the main purpose of conflict resolution.

Although they are conscious of the paradoxes of Law which can either “symbolize justice or conceal repression, reduce exploitation or facilitate it, prohibit the abuse of power or disguise abuse in procedural forms, promote equality, or sustain inequality, they argue that “Without legal power, the imbalance between aggrieved individuals and corporations or government agencies cannot be redressed⁶”.

According to this scholarship, there is no substitute to litigation when dealing with public values; “It is a fact of political life that many disputes reflect sharply contrasting views about fundamental public values that can never be eliminated by techniques that encourage disputants to “understand “ each other...One essential function of law is to reflect the public resolution of irreconcilable differences; lawmakers are forced to choose among the differing visions of the public good. A potential danger of ADR is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by or lawmakers and may, as a result, ignore public values reflected in law⁷.”

Those arguments are very convincing and it cannot be deny that State Law and rights seem the best way to ensure that the law of the strongest will not rule the relationship.

³ Abel, R 1982. *The politics of informal justice*. p. 11.

⁴ Ball, Milner cited in Fiss. *Out of Eden*. 94 Yale Law Journal, 1669.

⁵ Nader, Laura. 1998. Harmony models and the construction of law in *Conflict resolution, Cross-Cultural Perspectives*, edited by Kevin Avruch, Peter W Black, Joseph A Scimecca, Wesport, Connecticut: Prager. First edition 1991.

⁶ Auerbach, J. 1983. *Justice Without Law*. London: Oxford University Press

⁷ Edwards. 1986. *Alternative Dispute Resolution Panacea or Anathema?* Harvard Law Review 668.

However, we do not think that mediation can be reduced to another legitimating legal discourse to preserve existing social order. We think that ADR reflects, in the field of conflict resolution, the spirit of time and especially the difficulty to cope with diversity and complexity through the rule-centered legal model of imposition of norms and values (II).

MEDIATION: THE SPIRIT OF TIME

It seems that those scholars had undermined the need to reflect, in the solving of conflicts, the radical change that was taking place in legal rationality, which replaced the modernism paradigm by the postmodernism paradigm⁸. We cannot fail to ignore the reality of the changes associated with this new paradigm and among them: diversity, relativism, de-centering of the subject, pluralism of rationalities, polycentricity, exploded logics, complexity⁹ ...

The ideologies have been replaced by world's views and the diversity of values had led to question the possibility of a common conception of the good.

The problems and the conflicts themselves are increasingly complex and cannot be resolved through predetermined norms of action.

The increasing mobility in social roles had allowed parties themselves to be able to consider the interests of the other side and to consider a different rationality than theirs. The acknowledgment of our belonging to a plurality of worlds has emphasized the complexity of the conflict and the existence of a set of different values according to the world of reference we find ourselves in.

Conflicts are not seen only as the result of domination or exploitation. They are considered as part of social life especially in a diverse society and they are more and more acknowledged as such. The existence of different interests in societies is accepted as a fact and the search for justice has become more explicitly a search for a better balance between those interests instead of the establishment of a new social order based on a substantive, ideological model of justice.

The consideration for the future of the relationship seems to characterize this new rationality whereas the sanction of the past is not the main issue. The idea of project is closely related to this new relation to time¹⁰.

Moreover, post modernism challenges the gap between thought and action; it proposes a permanent dialectics between them.¹¹. Mediation allows for a continuum between agreement and enforcement.

⁸ Arnaud, A-J. *Challenges to Law at the end of the XXth Century*.

⁹ Ibid.

¹⁰ Ibid. Leroy, Etienne. 1999. *Le jeu des lois, une anthropologie "dynamique" du droit*. Paris: L.G.D.J.

¹¹ Ibid. "... As to legal regulation, this means a negotiated legal order instead of the enforced legal order."

It represents the moving away from the win/lose, right/wrong litigation logic by a negotiated logic of the most adequate plan of action¹².

The idea of strategy is closely link to this change of epistemology: it links thought and action, and is oriented toward the future.

Therefore, negotiated order is closely related to the move from industrial to post industrial society as regard to the change in the conception of social roles, norms and controls¹³. This change has brought also the need to reinforce the social link in a much more fragmented, diverse and complex society. It seems to us a necessary and desirable evolution but it cannot replace or dismiss considerations for justice.

It is worth it to consider here some of the critics towards ADR as a necessary voice in the concert of consensus heard concerning mediation

It does not however and should not lead to a disqualification of mediation as regard to substantive justice. We think that there is a possible conciliation between the benefits of post-modernity and those of modernity as regard to the issue of substantive justice. As Arnaud has written, the real question is how could we live without falling in the trap of throwing out the “modern” with its inadequacy but also its benefits or refusing the venture of a “post-modern” legal order despite its fascinating interest and convenience¹⁴.

III. A POSSIBLE CONCILIATION

If we consider that one of the conquests of modernity is the partial and imperfect attempt, through state law, to reduce imbalance and inequality between persons and groups¹⁵, then, we will see that, for the most part, mediation does not endanger this conquest.

However we will also point out the need to ensure that mediation will be not be transformed into another ideology and will be used in a way congruent with fundamental public values and in situations where the parties are, in terms of power and information, able to enter into an equitable agreement.

1. First of all, mediation and more generally negotiated order do not function in a vacuum.

Legal rights are not put aside as a result of a mediation process especially in mediation process linked to a judicial process. “Dispute mechanisms do not exist in isolation, but in close proximity to one another. Thus, for example, many mechanisms that work by agreement depend on the threat of resort to institutions with coercive

¹² Ibid.

¹³ De Munck. Supra note 1.

¹⁴ Arnaud, J-A. Supra note 8.

¹⁵ Ibid. “At the same time, this change of paradigm drains with it numerous paradoxes. To begin with, the fact that the best protection against injustice and inequality remains the state”.

powers. And much of what coercive institutions do, in fact, is to induce and ratify agreements between disputants¹⁶.

Sally Falk Moore has shown, through the concept of semi-autonomous social fields, the existence of different normative orders and the relationship of mutual influence between those orders. For instance, she showed through the example of the garnishment industry that the negotiated norms in that industry were agreed upon on the basis of the existing state legal norms as regard to changing the balance of power between employees and employers, but were accommodate to respond to the special needs of this industry¹⁷.

Some legal rights are so much part of the legal culture that they are reflected in mediation as common values without even the need of threat of resort to judicial power. In that regard, it could be said that, some of the values and norms are internalized and that individual satisfaction often results from the fact that those values are reflected in the mediation agreement.

2. Rights are usually associated with imposed order. However, if it can be affirmed that the resistance to abuse of power needs state intervention, it doesn't imply the need for judicial intervention.

We believe that most of the critics about ADR tend to neglect the distinction between legal rights and legal enforcement through courts and are not enough specific as regard to the possible differences between substantive justice and legal rights.

Among the legal profession and legal scholarship, substantive justice has been increasingly considered through the judicial institutions in charge of solving conflicts¹⁸. This has led to many confusions as regard to the kind of justice that was at stake; for instance, through the access to justice movement, questions of substantive justice has been redefined as questions of access to the courts¹⁹. Therefore, one of the important question that ADR brings to the fore is the following: is substantive justice going to be hurt by the increasing use of ADR or in other words, is the judicial system the best way to ensure protection against domination and inequality?

The search for justice and equality is not so obviously ensured by judicial system in terms of dealing with structural and collective problems. Most of the collective conflicts do not fit into the judicial structure and logics; they call for imaginative solutions able to conciliate different interests²⁰.

¹⁶ National Institute for Dispute Resolution. 1983. Report of the Ad Hoc Panel on Dispute Resolution and Public Policy. Appendix 1.

¹⁷ Falk Moore, Sally. 1978. *Law as Process: an Anthropological Approach*. London: Routledge and K Paul.

¹⁸ In France for example, the courts and the judicial institution at large are called Justice.

¹⁹ Macdonald, Roderick. *Accessibilité pour qui? Selon quelle conception de la justice*. 1992. 33 Les Cahiers de droit 457.

As for the individual manifestations of those collective problems, which cannot be handled on a collective level, individual rights seems to be the best way to change the imbalance of power and to solve the conflict in a way congruent with the public values of justice. However, the existence of rights does not mean that the best way to achieve justice is to litigate those rights. Litigation of rights introduces the logic of procedural justice, which is not always at odds with principles of substantive justice. For instance, some rights could be expressed in a way that the remedy is given by law to the weaker party without the need to turn to Courts²¹.

Moreover, we believe that a distinction shall be made between justice, norms and resolution of conflicts; Justice does not have to be expressed in norms; if we define justice as aiming to redress imbalance of power, it could be achieved by forcing the stronger party to negotiate. Although, legal rights are the expression of collective values, they are not the only way to express those values. The example of collective bargaining in labor law is significant of the replacement of the mediation of the legal norm by a more direct intervention of social actors²².

3. The possible conditions to conciliation

It seems that the state remains the legitimate forum to decide collective values and among them substantive justice. As de Munck has stated, state law is more than a coercive power; it is what makes sense; it cannot be given to the exclusive discretion of the parties dealing with their conflicts whether they are individuals or groups.

However, we have seen that the defense and the development of substantive justice were not only to be achieved through the state legal system and the litigation of rights. We have seen also that, in the resolution of individual conflicts, mediation does not take place in a vacuum and that often it is based on the existence of legal rights or on the alternative of resort to litigation.

In the case parties are informed and aware of their rights, conflict resolution through mediation can be a way to allow other interests to be considered and among them the organization of the relationship between the parties in a way that answer to their needs.

This is not to say that, in any case, mediation should be preferred to adjudication. The relationship can be, at some occasion, a cage in which one party is trapped under the control of the other and in that case, the principle of a negotiate agreement is ill adapted. Sometimes there is a need to separate between the parties before they can be conciliated and the parties are not always able, because lack of power or information, to operate themselves this separation²³.

Some scholars call for some kind of court supervision in order to ensure that the mediation agreement does not hurt fundamental public values.

²⁰ We think here especially about environmental conflicts but also about consumer problems.

²¹ Ibid

²² Younes, Carole. 1998. *Le recours collectif Québécois*: Montreal: McGill University.

²³ Ibid. 2000. *De la proximité dans le conflit a la proximité dans la relation: a propos du conflit israelo-palestinien*. Bulletin de liaison du Laboratoire d'anthropologie juridique.

In any case, it is important that mediation remains voluntary. Legal information should be developed as to avoid that the lack of information on their rights will lead them to accept a bad compromise.

An imposed peace is another face of injustice. In that sense, the warnings of those who critics the harmony ideology of mediation should be taken seriously.

CONCLUSION

Post modernity has done a great deal to help us to see law as a cultural production, a discourse aiming at the representation of reality. However, none of the law discourses about reality contains it all. Law discourse about the fact that justice cannot be achieved without litigation of individual legal rights does not in itself define justice. On the other hand, we cannot pretend that harmony can be ordered. Sometimes the relationship cannot be improved and is so much ruled by the domination of one party on the other that it isn't worth it to try to maintain it.

Injustice can be found in every human enterprise so does domination and inequality. The consciousness of those discourses can enable us, in a more pragmatic way, to think about the best ways to fight injustice far from the ideological debate. In that perspective, a projective perspective is needed. There is not anymore one model of society we aspire to, nor one model of family that society as a whole can impose. The idea is to find, according to the circumstances, the more adequate strategies to fight domination, injustice and inequality. Mediation and negotiation can be one of those strategies.