In Search of Justice between Adjudication and Mediation

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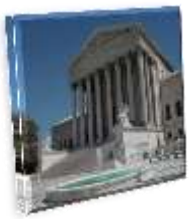
Luigi Cominelli

The demise of mediation



In modern age, with the formation of the westphalian state, **legal formalism** and **"legal statism" push** for the creation of monopolistic legal systems

Private means of dispute resolution are gradually absorbed by the state legal system (courts and tribunals)

The balance shifts towards **public adjudication :**

Justice = Law = Public Adjudication

Adjudication in crisis

- Increasing dissatisfaction with the **lenght**, the **costs** and the **remoteness** of legal proceedings
- *The basic pattern of Western societies consists of taking distance from reality, and refer exclusively to formality:* public adjudication is overburdened, setting the worst example of legal constructivism(Resta 1999)
- The **AGE OF RIGHTS** and the **LITIGATION EXPLOSION**
- In Italy, in the 50 postwar years, litigation has increased sevenfold (700%), while judges have increased in number only by 70% and population by 20%

The Alternative Dispute Resolution Movement

Arbitration and Mediation are embraced by lawyers and judges for their promise of efficient dispute resolution (Sander 1979)

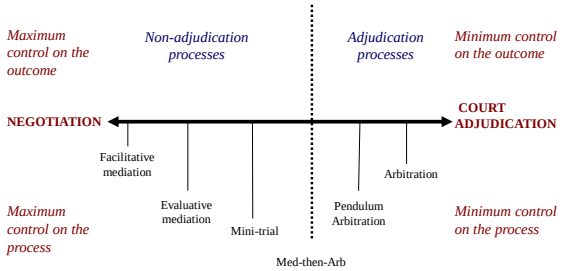
A "Multidoor Courthouse" is proposed at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference - 1976): Courts should be able to send disputants to the most appropriate method of dispute resolution, including non-adjudicatory/informal methods

The Legal Process Approach

Each dispute process has its own morality (Fuller 1978):

Mediation: deals with ongoing relationship in which parties need to be reoriented to each other
Arbitration: enforcement of private rules established by the parties (contracts, collective agreements)
Adjudication: authoritative and public decision of legal interpretation

The Dispute Resolution Continuum



The Alternative Dispute Resolution Movement

Mediation is revived by grass-root movements for its promise of informal community justice *(Zehr 1991, Umbreit 2001)*

The first restorative justice programmes, which include victim-offender mediation initiatives, begin in North America in the Seventies

ADR and informal justice

1. Promote **active participation** of the parties in the dispute
2. Increase **access to justice**:
   a) *deprofessionalize*
   b) *decentralize*
   c) *deregulate*
3. Minimize **stigmatization** and **coercion** (especially in criminal proceedings)

(Abel 1982)

The Alternative Dispute Resolution Movement

- Civil and commercial mediation
- Family mediation
- Labor and employment
- Online dispute resolution
- Victim offender mediation
- Truth and Reconciliation Commissions
- Ombudsman programs in the public and private sector
- Consensus building procedures
- Negotiated rule making

Institutionalizing ADR

Adr processes are becoming so common that "A" could now stand for "appropriate"

EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters (2008/52/EC):

- light-touch regulation, reflecting existing guidelines and best practice;
- encouraging the wider use of mediation across the EU;
- implementing the area of "freedom, security and justice".

Problems

- **Use of mediation is limited**:
  - 40% of companies surveyed in Italy have never used mediation to resolve business disputes
  - 73% of registered mediators in the Netherlands never conducted a mediation
- **"No strong statistical evidence"** has been found that in-court mediation programs brought significant reduction in **costs**, in the **time of disposition**, or significant improvement in **attorneys views of fairness** (RAND 1996)
- But the methodology was questioned (Stipanowich 2004)
- On the other hand: **higher satisfaction of the parties** in mediation(Kressel and Pruitt 1985) - (with some exceptions, e.g. women involved in family mediation)

«Whose dispute is it?»

- The **mediation revival** is part of that movement back and forth between **justice without law** and **justice according to law**
- **Litigation romanticism** is based on empirically unverified assumptions that **power imbalances** do not occur at trial (Menkel-Meadow 1995)
- A lot of time and resources are needed due to the formality of the procedure
- Mediated settlements generally occurs **"in the shadow of the law"** (Mnookin 1979)
- The **"vanishing trial"** (Galanter 2004)

«Whose dispute is it?»

JUSTICE WITHOUT LAW (Auerbach 1984)
JUSTICE IN THE SHADOW OF THE LAW (Mnookin 1979)
JUSTICE DOUCE, AUTRE JUSTICE (Bonafé-Schmitt 1992)
… are to be considered as «**justice of proximity**» rather than «**private justice**»

The renewed interest in non-adjudicative methods signals the rebalancing between conflict and remedies: there is a need to find the technical option which leaves open the communication between the parties, while ensuring that adjudication remains possible (Resta 1999)

There is continuity between micro-individual conflicts, and macro-social conflicts: economic interest cannot be the only explanation for the complex world of conflict

Procedural Justice

Individual satisfaction with the proceedings is influenced by :

- outcome favorability
- outcome fairness
- procedural fairness

Across cultures, what people seem to value most is **procedural fairness** (control of the process, chance to voice one's opinion, respect).

Disputants pay attention to the slightest evidence of **unfair treatment**, and tend to respond with **extremely negative reactions**

(Thibaut 1974, Tyler & Lind 1988)

Psychological barriers to settlement

People use a variety of **shortcuts** and **heuristics** to deal with the flow of social information: (Arrow et al. 1995)

1. *Bias in assimilation or construal*
2. *Reactive devaluation of compromises and concessions*
3. *Loss aversion*
4. *Judgemental overconfidence*
5. *Dissonance reduction and avoidance*
6. *Anchoring and Primacy effect*

1. Biases in Assimilation or Construal

Individuals often engage in a **confirmatory information search**:

- they seek out what confirms their **preexisting theories, beliefs and expectations**
- they ignore or forget what disconfirms their beliefs

2. Reactive Devaluation

- When an **offer is accepted immediately** by the counterpart, it is natural to wonder if we could have asked for more.
- The evaluation of specific compromises or deals may change as a consequence of knowing that they have been offered by an adversary
- People **devalue** what is **readily available**: this may lead to reject or question a reasonable solution
- Proposals are rated more **positively** if coming from a **neutral party**

3. Loss aversion

Decision makers tend to attach **greater weight to prospective losses** than to **prospective gains** of equivalent magnitude

- tendency **to risk large but uncertain losses** rather than accept smaller but certain ones (inability to cut losses)
- parties in a dispute will be **reluctant to trade concessions**

4. Judgemental overconfidence

Disputants tend to **overestimate their possibility of success**: we assume unconsciously that our **performance or assessment** of the situation is always **better** than those of the **ordinary individual**

- In a situation of uncertainty, individuals assume that their **preferences and opinions** are widely **shared by others**.
- In **organizations**, where overconfidence might be tempered by peers or counselors, the **group** generally does not temper judgmental overconfidence

5. Dissonance Reduction/Avoidance

People involved in protracted dispute try to **minimize psychic regret**: disputants **rationalize and justify past failures to settle** and the costs of continuing in the struggle

6. Anchoring / Primacy Effect

Making the **first offer** gives a **strategic advantage**: the negotiation can be anchored to values more favorable to the offerer

Primacy effect: objects presented repeatedly create a **positive preference**, even if no substantive information supports this opinion.

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