

Alternative Dispute Resolution or Legalism?

Beyond The Schism!

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Summary

Under the umbrella term *Alternative Dispute Resolution* (ADR), discourses around mediation and other non-judicial approaches to conflict resolution have been constrained by a predominantly legal narrative ultimately founded on an ‘either-or’ dichotomy between status quos instead of allowing a third way resting on a ‘both-and’ approach. The highly influential ADR critic Owen M. Fiss rejected ADR as a threat to human rights, public values and justice. He argued that the legal script is the only reliable bulwark against demoralization under the spread of capitalism, and a yardstick by which public values can be maintained. Given the increasing commodification of justice and the law’s blindness for complex processes and structures, it is apparent that the legal tradition by itself has proven to be incapable of defending these values effectively. An approach to conflict transformation — which goes beyond being an Alternative Dispute Resolution to the judicial process, and transcends the dualism of either-or — may offer a more adequate response to address the challenges Fiss was justifiably concerned about. Multi-disciplinary problem-solving teams, deep reconciliation and dialogue approaches are needed to address underlying conflicts the symptoms of which may become salient as legal breaches.

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1 Introduction

In his highly influential paper *Against Settlement* published in 1984, Sterling Professor Emeritus of Law of Yale University Owen M. Fiss took a clear stance against the promotion of *Alternative Dispute Resolution* (ADR) thus producing a cornerstone for later academic discourses evolving around the topic (Cohen, 2009). His position is grounded on a dualistic argumentation assuming that adjudication and ADR relate to each other as adversary, mutually exclusive approaches; either-or, *tertium non datur*. Fiss' polemic for the former is a bargaining over these two positions, the latter of which is recommended by influential supporters of mediation who in turn argue in favor of exploring underlying interests and developing creative both-and solutions (Fisher, 1992; Galtung, 2011; Monk and Winslade, 2012). Following this approach, this paper does not aim to be a critique of Fiss' critique of ADR but rather explores the difficulty of his dichotomous approach as such and why it impedes creative both-and dialogues urgently needed to secure the very legitimate interests that undergird his paper.

In applying the medical triad of diagnosis, prognosis and therapy, which Johan Galtung proposes as the key method for solution-indicative conflict transformation (Galtung, 2008, pp.10-19; Galtung, 2010, pp.23-115) the first chapter will contain a mapping of the actual conflict presented by Fiss (1984) and focus on the underlying fears and interests leading to his polemic articulated in *Against Settlement*. The second chapter will undertake a prognosis of where the adversarial discourse treating adjudication and ADR as mutually exclusive alternatives will take us *ceteris paribus*, and how, paradoxically, this could negatively affect Fiss' underlying concerns. This prognosis will then be followed by a creative effort presenting both-and solutions which embrace the 'rule of law' and the 'rule of mediation' and thereby corroborate Fiss' underlying interest in securing democratic dialogue, public values like justice and the respect for human rights which he sees threatened under the increasing deregulation and privatization of laissez-faire capitalist policies (Cohen, 2009).

2 Key diagnosis: Risk of commodified justice

Considering the wide range of approaches 'hiding' behind the term ADR, it might be helpful to characterize the mediation culture which prevailed in North America at the time of Fiss' publication in 1984. Lederach (1986) described the predominant model as a task oriented, linear process with the primary goal of reaching an agreement based on the decision making of autonomous individuals - irrespective of their responsibility to a wider social network -while neglecting reconciliation between parties. Mistakenly, he reasons, the ongoing professionalization of the field applied a rational-legal authoritative logic to ADR although it is inherently different from judicial processes.

Assuming that the mediator should aspire to the same ends as the judge, namely legal justice and public values inscribed in authoritative texts, Fiss (1984) also adopted a purely legalistic position and neglected that the underlying visions and values of law and

mediation are not opposed but simply different, while interdependent and reinforcing: “The law is a floor beneath which you don’t want to fall but that says nothing about the ceiling. And what we [the mediators] want to aim for is the ceiling, the highest that we can get” (Cloke, 2012, 4:01 min). Fiss (1984), however, is concerned that the conflict resolution story made settlement appear as a perfect substitute for this floor by trivializing the remedial dimensions of a lawsuit.

What are his underlying concerns grounded on? According to Fiss, the informality and privacy of ADR supports the exploitation of existing distributional inequalities as part of the process. He fears the “capitulation to the [unfair] conditions of mass society” (ibid., p.1075) through ongoing privatization and the withdrawal of the state into its night watchman role permitting private actors to pursue their interests in a deregulated society driven by individual desires and interests. Scrutinizing his argument, it becomes clear that his rejection of ADR which empowers “subjective preference as a legitimate standard to resolve conflict” (Cohen, 2009, p.1153) is largely built on his dislike of the expansion of neoliberal inequities and respective values. In his view, adjudication is the only reliable bulwark against the moral decay accompanying laissez-faire capitalism spreading in the United States, threatening human rights and justice. In *Against Settlement*, a tone deeply skeptical of civil society and politicians as the bearers of said values predominates. Fiss therefore emphasizes the importance of authoritative codified legal texts to ensure that markets yield to human rights and the law of justice not vice versa (Fiss, 1984, p.1158).

Given that “instead of Human Rights-Democracy controlling States controlling Capital, Capital now controls States through privatization” (Galtung, 2016), Fiss’ underlying concerns were perfectly justified: *Against Settlement* was published in 1984, when the rollbacks of Reaganomics were unfolding in the US. Looking back however, it is questionable, whether his suggested solution to reinforce adjudication can be an effective remedy to the challenges presented by the unbridled expansion of market rationality. In our day and age, legal bodies seem incapable of regulating rapidly growing inequality (Oxfam, 2017) and the legal systems inherently allow justice to be bought and sold. Legal services are distributed through the market and the adversaries assume that the competitive, individual pursuit of self-interest results in the most just outcome (Pearce, 2004). Fiss’ argumentation in *Against Settlement* leaves this commodification of legal services widely untouched and his idealization of traditional adjudication overlooks how the legal system increasingly protects corporate power; a case in point being corporations acquiring personhood in US constitutional conditions (Totenberg, 2014). Corporations are entitled to enjoy certain rights under law, but are widely exempted from the societal duties and responsibilities ascribed to a legal personality (Clapham, 2006); at least when it comes to the traditional legal relationship between the state and its individual subjects.

3 Key Prognosis: Capital subverts the ‘rule of law’

Fiss (1984) argued that the amount of litigation is evidence of the “combative and quarrelsome character of Americans” (ibid., p.1089). This statement may be interpreted

as an outcome of a legal system which is designed for detecting individual wrongdoers while neglecting permanent underlying structures, which in turn conditions combative and quarrelsome behavior. Moreover, the time-cosmology of the law-paradigm is focused on events rather than on processes (Galtung, 1994, p.28ff). To some extent, this may explain its limited capacity to keep in check the alarmingly rapid increase of economic inequality and the impacts of privatization which Fiss was so legitimately concerned about. To be able to respond to these challenges, the legal discourse has to depart from the current *status quo* of static institutions and norms and make use of our “moral imagination” (Lederach, 2005) to explore new possibilities which transcend the seeming antinomies that are pitting the prevailing mechanisms and procedures available against each other. On this journey, a continuation of dualistic academic disputes between the ‘rule of law’ and the ‘rule of mediation’ would be a counterproductive, making it difficult to step forward and respond dynamically and creatively. Caught in the assumption of competition and exclusiveness, the legal community neglects to ask, “is there a different, better way to do this?” (Kaye, 1996, p.865) and makes it hard for the mediation community to communicate what procedural innovations it has to offer.

In Bush’s (1989) fictive conversation, the mediator hesitantly articulates to the judge what his work is grounded on: reconciliation, social harmony, community, interconnection, and a non-adversarial process which are all less traumatic to the parties than the courts institutionalized decisionism. Refusing to think outside the jargon of the legal discourse, the judge responds: “Your argument is incomprehensible!” (R. A. B. Bush, 1989, p.6) However, the creation of alternative visions requires diverse voices communicating with each other (Cohn, 1987) in an empathetic, respectful dialogue allowing eclectic solutions through the parties’ willingness to learn from each other. Our institutionalized law, however, carries the deep cultural assumptions of dualism, singularism, and non-contradictoriness whose combination promotes confrontation and debate *against* the ‘other’ rather than dialectic dialogue based on mutual learning *with* the other (Galtung, 2014). Accordingly, the judge, aided by the Jury, is commissioned with the task of drawing clear lines between right and wrong, guilty and non-guilty, winner and loser after the lawyers have ‘defended’ their legal position. Fiss’ (1984) legal background, one could also call it a bias, may explain the stance and the discourse he chose in *Against Settlement*.

Human nature however is more ‘messy’ and cannot be reduced to such preferential dichotomous perspectives. We need to sustain a paradoxical curiosity accepting complexity rather than restoring dualistic polarities carried by the legal discourse (Lederach, 2005). Therefore, a sole use of adjudication without any elements of mediation might not even be capable of comprehending the nature of the very human beings it is entitled to judge and rule over (Galtung, 2011) let alone to provide platforms which are responsive to the non-codified needs, physiological, psychological, spiritual, metaphysical, relational and what not of human beings. Rather than responding to these challenges, the courts are isolated from these civil society, working on their “lonely task of balancing the need for order and stability with the goal of liberty and due process, seeking to preserve a heritage of individualism in a hierarchy of pervasive institutionalism” (Tobriner, 1968, p.23). As long as the vantage point is imprisoned in dualistic thinking, ‘other’ approaches

like ADR can easily be conceived as a threat to the status quo and are therefore likely to be rejected by the economic and political elites (Galtung, 2014).

Moreover, traditional adjudication widely neglects communitarian and relational visions of society (R. A. B. Bush, 1989) thereby appeasing the spread of neoliberal values feared by Fiss. Its architecture builds on a dualistic, competitive, and individualistic visions going hand-in-hand with neoliberal ideas. However, its closeness to the economy is not limited to cultural and epistemological similarities. Within the last decades corporate lobbying has increased immensely and widely suppressed the voices of civil activists possessing less financial power (Drutman, 2015). Narrowly framed narratives between businessmen and politicians take place behind closed doors and exclude the public physically and verbally (Cave, 2014). Hence, the promotion of the rule of law as suggested by Fiss (1984) with its dichotomous culture (of conflict resolution) which excludes the “Both-And” option, both between the law and ADR and within the legal logic itself, may ironically support the very concern he is arguing against: the increasing influence of capital accompanied by a decay of democratic dialogue and of the purported impartiality of the state, whose role Fiss considers crucial for the preservation of normative public values (Cohen, 2009). Presently, the ‘rule of law’ in its traditional form is rather alienated from civil society and too close to capital holders, thus allowing the latter’s key players to increasingly influence legislative decision-making at the expense of justice and human rights.

To address and overcome Fiss’ fears and interests, one needs to opt for more creative and future-oriented solutions based on dialogue between governments, economic actors, and civil society; facilitating the empowerment of the latter. The traditional ‘rule of law’ approach alone might be too rigid and reactive to respond to these challenges while in ‘cooperation’ with “mediation [it] might [...] identify a new social reality that brings society forward, also inspiring politics” (Galtung, 2011). When emphasizing the state’s judicial role as a bulwark against the injustices of neoliberalism, Fiss forgot to ask an essential question: Is the state impartial enough to mediate between the interests of the people and the interests of capital?

4 Therapy: Conflict Transformation conciles legalism and ADR

What could such creative Both-And Solutions between the ‘rule of law’ and the ‘rule of mediation’ look like? Necessarily something beyond the often suggested compromises suggesting sending only some light or personal cases to mediation, while reserving grave crimes to the court or to the use of ADR to reduce court caseloads and the financial burden of the parties (R. A. B. Bush, 1989, p.8). To meet the described challenges, adjudication needs to leave its overbearing institutions, podiums and the secretive bargaining rooms of powerful corporations. Rather it should provide space for constructive problem-solving dialogues granting a say and weight to all parties, not only those with the financial power to hire a competent lawyer. Recognizing these shortcomings of judicial processes in the private sector, the *Guiding Principles on Business and Human Rights* (UN, 2011, p.30ff.)

call for the use of non-judicial grievance mechanisms like mediation to promote respect for human rights. Given its voluntary character, however, corporations are reluctant to give up the safe legal ground of the law which they can navigate confidently towards clear cut authoritative outcomes with experienced lawyers at their side.

An either-or approach is not capable of transcending the challenges faced. What could a both-and approach on the micro-level look like? Courts may provide round tables with the judge as a process supervisor “strong like a mountain and spacious like the air” (Wilson, 2008, p.35); firm in providing procedural justice (Welsh, 2001) and checking the legitimacy of suggested solutions, as suggested by the United Nations (2011, p.34.). Acknowledging that the solution to the conflict lies in the hands of the parties (Dietrich, 2014), the judge encourages and empowers the parties to find their way through the conflict (Folger and R. Bush, 2005). Hence, the law provides a framework, while mediation, with its core principles of “empathy, non-violence, joint creativity” (Galtung, 2017) shapes the process of reaching a solution acceptable to all parties. The lawyers, sitting at the table with the judge and the parties, provide legal assistance as requested, supporting a collaborative, option-generating, and client-centered attitude instead of zealously advocating for their own client (Clark, 2012). Such a setting would be a constructive response to Fiss’ concern that the informality of mediation could weaken the legal foundation of public values and counteract the presence of the market-rationality in the court. On the societal level, such a ‘bottom-up’ process empowers and encourages civil society to develop creative solutions and counteracts the tendency of the economic and political elites to sustain unjust conditions by convincing the public with legal and economic terms, means and figures that a “moral resolution to a moral conflict is not possible” (Wilson, 2008, p.17).

Fiss was worried that the privacy of mediation would not ‘reinform’ institutions whose development depends on individual cases. Various approaches to mediation, however, suggest not only the possibility but the necessity of linking individual conflict resolution to cultural and systemic change (Sturm and Gadlin, 2007; Monk and Winslade, 2012). Learning from an inspiring project in Italy (Tamanza, Gozzoli, and Gennari, 2016), civil courts may establish “problem solving teams” (Pearce, 2004, p.977) composed of experts from different disciplines tasked with transforming underlying conflicts of which the crime itself may only be a symptom. These multi-disciplinary mediation bodies are not only trained in developing creative future-oriented solutions but also in reconciling traumas caused by the crime (Galtung, 2011). Another pioneering project is the Midtown Community Court in Manhattan which responds creatively to low-level offenses, favoring sentences that are restorative to the victim, defendant, and the wider community (Court Innovation, 2017). The Hawaiian reconciliation process *ho’o ponopono* — another inspiring approach — invites each person, central and peripheral to the case to express their respective contributions to the causation & unfolding of the problem and thereby facilitates the inclusion and understanding of a complex web of causalities (Santa Barbara, Galtung, and Perlman, 2012, p.63). The Western jurisprudence has a long way to go in considering the important link between violence and reconciliation. The Apologies Act, recently adopted in various Commonwealth legislation (CMS, 2017)

may be considered as a first step in the right direction. However, it still falls short as it subjugates the value of reconciliation to the quest for liability. These are only a few examples demonstrating how mediation does not threaten but supports the ‘public values’ so strongly advocated for by Fiss. Such processes do not reward those hiring, and possibly hiding behind the most experienced lawyer, but those willing to enter a respectful, empathetic dialogue with their perceived adversaries and showing an openness for mutual learning.

If the conflict-solver’s perspective (possibly consisting of a team) is not restricted to direct interpersonal violence, but also explores underlying cultural and structural violence (Galtung, 2017), individual cases can even provide useful knowledge for systemic conflict analysis (Sturm and Gadlin, 2007). For instance, we may consider cases of medical negligence which are increasingly referred to mediators. The cultural narrative around modern healthcare systems is that hospitals are places where tirelessly working doctors and nurses do everything, if necessary even miracles to cure those who are sick. Such discourses do not just prepare the grounds for the boundless anger of patients in cases where the doctor failed to provide a cure, but leads medical professionals who are trained to be perfectionists to profound self-doubt and deep feelings of guilt in cases of (very human) failure (Monk and Winslade, 2012). This narrative comes along with increasing work-pressure and expenditure-cuts caused by the commodification and privatization of healthcare services (Cordery, 2017).

Hence, to sustainably address medical negligence cases, we need multi-disciplinary problem-solving teams that “look at court operations [...] from the perspective of the public it is trying to serve” and try to find solutions outside the court (Kaye, 1996, p.854). Voices from psychology, sociology, anthropology, law, economy, peace studies and other fields need to come together and learn a new common language called ‘conflict transformation’. This task requires the deconstructive process of dismantling isolated, uni-disciplinary discourses and the reconstructive process of creating more multi-disciplinary discourses held in a language understood by all (Cohn, 1987).

To facilitate this ‘unlearning’ of the existing fragmenting discourses and the ‘relearning’ of a new discourse towards overlapping outcomes, a wider academic community could be invited to deal with legal cases and to introduce epistemological methods beyond the traditional legal logic of dualism, atomism and deductionism. Modern ADR, even though promoting new forms of conflict resolution, is a birth child of lawyers and preferentially draws on the language and values of the legal tradition (Clark, 2012). Compulsory mediation training for law students should therefore involve approaches from other faculties, while mediation professionals need to receive legal training. For instance, Wolfgang Dietrich’s (2014) approach of elicitive conflict transformation and his transrational research perspective taught in Innsbruck-Austria give an idea of what can be discovered pertaining to the complexity of human conflict, if we dare to leave the seemingly secure legal shore of ‘either-or’ and the Galtung-Institut’s Conflict Transformation Specialist course offers training in which both the epistemological-intellectual modes of thought and technical skills towards such outcomes are taught.

However, to make the promise of mediation and its role in counteracting the decay of ‘public values’ feared by Fiss more compelling, conflict transformation skills should

not be promoted only for professionals in the court or mediation room. The methods generated must be inscribed in a culture of deep democracy' (Wilson, 2008), providing dynamic platforms for deep, both horizontal and vertical, dialogue, bringing together judicial authorities, NGOs, local agencies etc. to collaboratively work on solutions for ever-present conflicts. Mediation "neither privileges the individual [as feared by Fiss] nor imposes collective values" (ibid., p.34) but aims to identify the product of individual goals as a departure for the developments of overarching collective goals acceptable to all parties (Galtung, 2017). This deeply democratic process uses the potential of conflict to create a more peaceful and just reality based on the combination of legitimate aspirations, instead of restoring the reality written in legal codes by the elites.

5 Conclusion

This essay has demonstrated why Fiss' solution of rejecting ADR does not solve the underlying conflicts which lead him to take this position in the first place. His aspiration to secure democratic dialogue, justice, and respect for human rights under laissez-faire capitalism has not been fulfilled by the legal tradition which he defends against ADR on those grounds. The main shortcomings of the legal tradition are the ineffectiveness in detecting and addressing underlying forms of cultural and structural violence, the neglect of deeper reconciliation and broader basic human needs, and the lack of independence from the economic sector. Mediation and conflict transformation — which goes beyond being an *Alternative Dispute Resolution* to the judicial process, and transcends the dualism of either-or — may offer a more adequate response to address the challenges Fiss' was justifiably concerned about. Therefore

“[it] is of some irony that the mediation debate has become infused with such polarity, dogmatism and disagreement. By taking a leaf out of mediation's book, exploring mutual interests, making appropriate concessions, listening, and fostering mutual respect, lawyers and others can together chart growth of the process for the benefit of all in society.” (Clark, 2012, p.182)

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