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Privatizing our Public Civil Justice System

Trevor C. W. Farrow
Osgoode Hall Law School of York University, tfarrow@osgoode.yorku.ca

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At every level of the system – starting with the federal government itself[2] - a strong preference is being voiced for getting cases out of the public stream and into a typically private, or at least confidential, alternative stream. Small claims courts[3], provincial superior courts[4], the Federal Court[5], and provincial and federal administrative tribunals[6] have all developed alternatives to traditional, more formal investigation and hearing processes. These are in addition to the already available informal private tools of negotiation, mediation and arbitration typically available outside of a formal court or tribunal setting.[7]

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There are many stated benefits to this trend of privatization. In terms of the formal court or tribunal-connected tools, the overwhelming justification for their promotion is system efficiency: backlog reduction and savings of time, money and other resources. In terms of Alternative Dispute Resolution (ADR) tools generally, proponents point to advantages including reduced costs and delays,[8] the ability to choose laws, procedures and judges and the potential to maintain relationships. Typically the most important advantage, however, is the ability to avoid public scrutiny. When a dispute involves the private rights of A v. B, and further, when two "consenting adults" (including corporations) have chosen to move their dispute off the busy docket of our public court system and into the private boardroom of an arbitrator or mediator, current views suggest that justice is being served. The argument is that the resolution of disputes – like other goods and services – should not be deprived of the benefits of freedom of movement and contract in an efficiency-seeking, innovative and expanding market economy.

These purported benefits, however, do not come without costs. Without public scrutiny – through open court processes, the publication of precedents and the application of case law to the facts to be adjudicated – there is a real danger that parties, particularly those with power, will increasingly use this privatizing system in order to circumvent public policies, accountability and notions of basic procedural fairness.

These procedural concerns are clearly significant. In addition, however, there is a more fundamental concern at issue: democracy - and in particular, the way in which we regulate ourselves in democratic, common law communities.

Law Making in a Democracy

Law in a democratic society is primarily made through the tools of legislation and adjudication. Recognizing that adjudication plays an ordering role in society both in terms of resolving individual disputes and, more broadly, modifying societal behaviour, both public and private processes of adjudication count as lawmaking tools.[9]

There is normally no issue as to the democratic legitimacy of the typical legislative process. Further, in terms of adjudication, contrary to the concerns of "judicial activism" critics, decisions made in open court, by appointed judges, pursuant to fair procedural regimes, also, in my view, usually accord with constitutional principles characterized by democratic notions of transparency, accountability and the rule of law. Where a democracy deficit comes into play, however, is not in open court with "activist" judges, but rather when the important societal ordering tool of adjudication goes underground to private arenas, without the guarantee of the rule of law badges of procedural fairness, transparency and independence of the decision maker. When decisions are made in these private circumstances, we often do not know what they are. And in any event, to the extent that we do know, (which knowledge brings the broader behaviour modification element of adjudication into play) we typically have no record or guarantee of the fairness of the procedural or substantive legal regimes that were employed to reach a given result. What we are doing with our increasing reliance on ADR, then, is privatizing a significant way in which we make law and order our public and private affairs.

So why are we so acquiescent and even seemingly disinterested in the current move to privatize the adjudicative aspects of our law-making tools? That, in my view, is the democracy deficit with which we should be concerned. With limited exceptions, we expect public hearings, precedent and transparency in traditional court proceedings. Why then – other than for efficiency and privacy interest preferences – are we so deferential to the concern of privacy when it comes to the use of alternative dispute resolution tools?

Reclaiming The Rule Of Law In Dispute Resolution Practices

In opposition to those who relegate public procedures honouring basic rule of law values to the background in favour of modern, consensually-based private dispute resolution regimes, I argue for increased transparency and accountability in current and emerging approaches to dispute resolution. The potential strengths of dispute resolution alternatives, particularly in free market economies must, of course, be recognized. When carefully crafted, however, such mechanisms can effectively secure rule of law values,

while still facilitating many of the efficiency and accessibility goals of more privatized dispute resolution processes. But when it comes to a conflict between cost saving and efficiency on the one hand and transparent procedural justice on the other – particularly in cases involving issues of public interest – the latter must always trump.[10]

There is no more important topic in law than the procedural rules by which our democratic system operates. Important parts of that system are the processes by which disputes are resolved. Without sound, accountable, yet creative dispute resolution processes, we potentially jeopardize individual rights, together with underlying collective democratic values. In my view, current trends of privatization in the context of dispute resolution processes, are potentially putting those rights and values at risk. As such, we need to question our current trend of privileging the private over the public. And in any event, if we are going to continue experimenting with privatized civil justice – and it is likely that we will (and is some cases should) – we should only do so with full disclosure to the public regarding the rationalizations for, and implications of, these tools. To date, the public is largely unaware of the aggressive and systematic privatization of its public civil justice system. The resulting democratic deficit jeopardizes one of the foundational tenets of our civil justice system and our common law system of governance as a whole.

Trevor C.W. Farrow, AB (Princeton), MA (Oxon), LLB (Dalhousie), LLM (Harvard) is an Assistant Professor of Law at the University of Alberta. Professor Farrow was previously a litigator at the Torys law firm in Toronto, the Ames Fellow at Harvard Law School and a teaching fellow at Harvard College. His research and teaching focus primarily on the administration of civil justice, including civil procedure, dispute resolution, professional ethics and globalization.

Endnotes

1 Faculty of Law, University of Alberta, tfarrow@law.ualberta.ca This article is an edited, condensed version of a longer paper on the same topic. I am grateful to Kim Taylor, Program Director of the Canadian Forum on Civil Justice for helpful substantive comments and significant editing assistance.

2 See for example the Dispute Resolution Centre for Excellence ("DRCE") established by the Department of Justice in 1992. The DRCE – "devoted to the prevention and management of disputes" in Canada – has a mandate "to serve as a leading centre of DR excellence in Canada." DRCE, "DRS Programs and Services", online: Government of Canada http://canada.justice.gc.ca/en/ps/drs/drs_programs.html. The DRCE's stated role is "to promote a greater understanding of DR and assist in the integration of DR into the policies, operations and practices of departments and agencies of the Government of Canada, Crown Corporations, federal tribunals and administrative agencies, and federally constituted courts."

3 For example, the mediation program in Alberta's Provincial Court: "Mediation and the Provincial Court", online: Alberta Courts http://www.albertacourts.ab.ca/pc/civil/publication/mediation_and_the_provincial_court.htm.

4 See, for example, Ontario's mandatory mediation programs: Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, R. 24.1; Superior Court of Justice, Toronto Region, "Practice Direction – Backlog Reduction/Best Practices Initiative" (in effect 31 December 2004), online: Ontario Courts http://www.ontariocourts.on.ca/superior_court_justice/notices/casemanagement.htm. In Alberta, see Court of Queen's Bench of Alberta, Civil Practice Note No. 11, "Court Annexed Mediation" (effective 1 September 2004), online: Alberta Courts http://www.albertacourts.ab.ca/qb/practicenotes/civil/pn11CourtAnnexedMediation.pdf. For a discussion of the Judicial Dispute Resolution program in Alberta's Court of Queen's Bench, see, for example, The Honourable Justice John A. Agrios, "A Handbook on Judicial Dispute Resolution for Canadian Lawyers", Version 1.1 (January 2004), online: Canadian Bar Association – Alberta http://www.cba.org/alberta/PDF/JDR%20Handbook.pdf.

5 See Federal Court Rules, 1998, SOR/98-106, pt. 9, rules 386-391, online: Government of Canada http://laws.justice.gc.ca/en/F-7/SOR-98-106/105374.html.

6 See for example Alberta Energy and Utilities Board ("AEUB"), "What about Appropriate Dispute Resolution?" online: AEUB http://www.eub.gov.ab.ca/bbs/public/adr/ADRPamphlet.pdf . See also the Canadian Human Rights Commission ("CHRC"), "Alternative Dispute Resolution", online: CHRC http://www.chrc-ccdp.ca/adr/what_is_it-en.asp.

7 For a general discussion of some of these ADR trends, see Trevor C.W. Farrow, "Dispute Resolution, Access to Civil Justice, and Legal Education" (2005) 42 Alta. L. Rev. 741-754.

8 There is a lack empirical research, however, supporting the existence of these purported time and cost saving benefits.

9 Here I am defining "adjudication" broadly to include court-based, tribunal-based, arbitration-based and potentially mediation-based dispute resolution processes, particularly – with respect to the latter – when such traditionally non-adjudicative processes are directly connected with the results of otherwise adjudicative procedures (like mandatory court-annexed mediation or mediation through judicial dispute resolution).

10 An attempt at this balance – although still very problematic from the perspectives of transparency and procedural fairness – is the ADR process that is being used by the Immigration Appeal Division of the Immigration and Refugee Board of Canada. Under that process, while allowing for confidentiality at pre-hearing ADR sessions, an "agreement to resolve is not confidential". Allowing for the public knowledge of outcomes is certainly better than blanket confidentiality on both process and result. Immigration and Refugee Board of Canada, Immigration Appeal Division, "Alternative Dispute Resolution (ADR) Program Protocols" (amended 13 January 2003), online: Government of Canada http://www.irb-cisr.gc.ca/en/about/tribunals/iad/adr/protoc_e.htm.