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Book Review: Civil Justice, Privatization, and Democracy by Trevor C. W. Farrow

Barbara A. Billingsley
University of Alberta Faculty of Law, bab@ualberta.ca

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Abstract

This is a book review of *Civil Justice, Privatization, and Democracy* by Trevor C. W. Farrow.

Book Review

Civil Justice, Privatization, and Democracy, by Trevor C.W. Farrow[1]

BARBARA BILLINGSLEY[2]

RECENTLY, I WAS INVOLVED IN A CASUAL DISCUSSION with a group of lawyers, one of whom was complaining that he was having trouble booking dates for an upcoming trial. He explained that, although the lawsuit was ready for trial, the earliest available court dates were over fourteen months away. One of the group suggested resolving the case by means of Judicial Dispute Resolution (JDR),[3] which could be scheduled to take place within a matter of weeks. This proposal instantly met with the approval of the others and the conversation turned to other topics. Although JDR might have been a fit solution for the scheduling problem that was presented, I was nevertheless struck by how seamlessly an alternate dispute resolution (ADR)[4] mechanism was accepted in place of a public trial.

The shift from a public trial to a private alternate dispute resolution mechanism like JDR involves more than just a change in venue; it engages a completely different process for ending a civil dispute. At trial, particular elements

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1. (Toronto, Ontario: University of Toronto Press, 2014) [Farrow].
2. Barbara Billingsley is a Professor at the University of Alberta Faculty of Law. Her work focuses on civil litigation (including class actions) and insurance law.
3. JDR is a private meeting between the litigants and a judge who assists the parties in resolving the dispute without the need for a trial. In this context, the judge is not serving the traditional role of a trial judge, which is to issue a public and binding judgment that ends the dispute, subject to appeal. Rather, in a JDR, the judge is facilitating a non-public, non-appealable conclusion to the case.
4. ADR includes any process for resolving a private lawsuit other than by means of a court ruling. For a description of the various processes that may fall within the ADR title, see the text accompanying note 11.

are guaranteed. For instance, evidentiary and other established rules apply to ensure procedural fairness; judicial decisions rely on established legal principles and precedents; and both the procedures and the outcome are subject to public scrutiny. Moreover, the findings at trial may be appealed to another publicly scrutinized court. None of these elements are necessarily present in the context of a private resolution mechanism, and, by definition, public scrutiny of both the process and the outcome is barred. In short, while a public trial and JDR are both directed at ending a civil lawsuit, they are not equivalent procedures.

Of course, notwithstanding these differences, the parties to a specific dispute might reasonably choose private resolution over a public trial, particularly if there is reason to believe that the former will be faster and less expensive. Further, regardless of the reasonability of their choice, the litigants in a given case should be entitled to make this procedural decision for themselves, hopefully after being fully informed about the pros and cons of each option. Weighing the benefits and burdens of a public trial against those of private forms of dispute resolution is more difficult and far more significant, however, when the decision to substitute private resolution mechanisms for public trials is encouraged or mandated on an institutional or systemic level.[5]

In Canada, the institutional preference for private dispute resolution methods over a public trial is not hypothetical; it has immediate and practical relevance. Over the past few decades, longstanding concerns about cost and delay in Canada's civil justice system have prompted widespread procedural reforms that either require parties to utilize a private resolution mechanism in place of a trial or press them to seek private, out of court resolutions before proceeding to trial.[6] This trend raises a vital question: should Canada's civil justice system be championing private dispute resolution over public trials? This critical issue is comprehensively addressed in *Civil Justice, Privatization and Democracy*, by Trevor C.W. Farrow.

At its core, Farrow's treatise is a warning and a call to action for the players in Canada's civil justice system. Reflecting on the pronounced and purposeful trend toward privatizing civil dispute resolution that has been taking place

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5. For instance, in managing litigation cases, judges may encourage the parties to participate in ADR. Such participation can be mandated by statute or procedural rules.
6. For an overview of these reforms, see Farrow, *supra* note 1 at ch 3-4. See also Barbara Billingsley & Masood Ahmed, "Evolution, Revolution & Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada" Comm L World Rev [forthcoming in 2016]; and Barbara Billingsley & Joel Franz, "Revolution on the Path to Access to Justice? A Closer Look at the 2009 and 2010 Reforms to the Rules of Civil Procedure in Alberta, Nova Scotia, Ontario and British Columbia" (2015) 44:2 Adv Q 246.

in Canada and elsewhere over the past few decades, Farrow cautions that the systemic removal of civil disputes from public courts can significantly and negatively impact fundamental elements of democratic governance. Farrow's central concern is that, by focusing exclusively on improving the efficiency and accessibility of the civil justice system, recent reforms have promoted alternative resolution mechanisms without due consideration of the broader societal costs that may be associated with a civil justice system increasingly operating behind closed doors. Among others, these costs include a growing deficiency in the development of the common law and the potential for procedural unfairness and power imbalances in dispute resolution processes. Even more significant for Farrow is an overall negative impact on democratic governance, attributable mainly to the inherent lack of public scrutiny and oversight of both the processes and outcomes of private decision-making mechanisms.

Concerned that these costs will grow to irreversible proportions if the prevailing privatization trend continues unchecked, Farrow advocates for the pursuit of a civil justice system that, while not necessarily completely dispensing with privatized dispute resolution, consciously seeks to balance litigants' concerns for efficiency and access with society's interest in ensuring that, from both a procedural and a substantive standpoint, civil disputes are justly resolved. On a practical level, Farrow's stated reasons for considering these privatization mechanisms in the context of the civil justice system are: (1) to "bear witness to the modern and wide-ranging privatization initiatives that are currently defining the way we think about and resolve almost all non-criminal disputes";[7] (2) to "articulate the benefits and costs of these privatizing initiatives, particularly including their potential negative impacts on the way we publicly regulate ourselves in modern democratic societies";[8] and (3) to make "recommendations for future thinking about, and approaches to, these initiatives."[9] On a more aspirational level, however, Farrow's book is intended to motivate "academics, jurists, civil justice reformers, elected representatives, practitioners, and citizens to engage in a robust debate about all aspects of the privatization of civil justice, the future of which will have a fundamental impact on our public processes of democracy."[10]

Farrow makes his case in a methodical and compelling fashion, beginning with an introduction that clearly establishes the parameters of his thesis and

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7. Farrow, *supra* note 1 at 10.
8. *Ibid*.
9. *Ibid*.
10. *Ibid*.

outlines his motivations and objectives for writing this book. Here, he deliberately confines his treatment of the civil justice system to "the general civil justice terrain" (deliberately excluding disputes involving family law, Aboriginal law, or ethno-cultural dispute resolution processes).[11] He also purposely casts a wide net with regard to the types of private dispute mechanisms under review, encompassing virtually all non-trial resolution processes, but signals his intention to focus most closely on ADR processes. These are processes that involve a third party who is selected by the disputants to facilitate compromise or to act in place of a trial court for the purposes of directing an outcome.[12] They include voluntary, mandatory, binding, and non-binding forms of mediation and arbitration.[13]

The next four chapters of Farrow's treatise build the foundation of his argument. He explains the institutional role served by public courts in a democracy, describes the prevailing systemic movement toward the privatization of civil disputes, and summarizes the main rationales behind this movement. In discussing these matters, Farrow makes several key points (though not in the order I am presenting them). First, private dispute mechanisms are increasingly being utilized to resolve civil disputes in place of public courts.[14] This use is increasingly being encouraged and required at a systemic level through legislation or rules of civil procedure. Second, the growing reliance on private dispute resolution processes in Canada and in other jurisdictions has been and continues to be fueled primarily by efficiency concerns, commonly phrased in terms of reducing cost and delay and, more generally and fundamentally, increasing access to justice.[15] Third, public courts serve both a retrospective and a prospective function.[16] Retrospectively, courts bring to an end the dispute at bar by applying established legal principles to determine what went wrong in that case and how it can best be put right. Prospectively, by resolving the specific dispute public courts "create norms by interpreting and applying existing laws, in the form of precedential judgments, for regulating the future behaviour and future outcome of similarly situated parties in similarly situated cases or negotiated

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11. *Ibid* at 9. From Farrow's perspective, while the excluded contexts are "clearly important" and "there are, at times, significant points of commonality" between these contexts and general civil justice, "in the end—from a procedural perspective—they are sufficiently distinct to warrant separate treatment" (*ibid* at 8-9).
12. *Ibid* at 71-75.
13. JDR is a form of ADR. See *supra* note 3.
14. See generally Farrow, *supra* note 1 at ch 3-4.
15. See generally *ibid* at ch 5.
16. See generally *ibid* at ch 2.

settlements."[17] In other words, in the course of deciding a private dispute, public courts both establish and reflect legal and societal standards. Farrow contends that, in this prospective role, which involves creating legal doctrine, preserving constitutionalism and upholding the Rule of Law, public courts serve an essential democratic function.[18]

Relying on these foundational points, the last two chapters of the book detail Farrow's concerns about the threat that the privatization of civil justice poses for democratic governance and provide suggestions for moving forward in light of this concern. Although Farrow's position about the privatization movement is clear throughout the book, these last chapters are the focal point of his argument. He contends that the prospective role of courts cannot be served by private dispute resolution processes, which, by definition, are not open to public scrutiny. Further, he argues that, because public courts play a prospective role when they decide civil disputes, all civil disputes have the potential, via a public court resolution, to make a valuable contribution to the establishment of societal norms and standards. In this sense, no civil dispute is entirely private.[19]

In the penultimate chapter, Farrow breaks down his concern about the systemic privatization of civil dispute resolution into five parts: (1) that the efficiency benefits of ADR can be overstated; (2) that privatization restricts the development of the common law; (3) that privatized processes may lack procedural protections; (4) that privatization negatively impacts on democracy; and (5) that the negative aspects of privatization are aggravated by globalization. Then, in the final chapter, Farrow suggests that, to date, these matters have not been adequately considered because the discourse regarding privatization has been dominated by worries about cost, delay, and access to justice. Farrow contends that, when it comes to structuring our civil justice system, democratic values regarding procedural and substantive justice should take precedence over efficiency considerations.

Throughout, Farrow's treatise is meticulously footnoted, with citations drawn from a wide range of sources covering a broad swath of time. He references political theorists, court judgments, reform reports, academic commentators, and his own original survey of the civil justice community. He draws examples from events as disparate as the Peloponnesian War and the collapse of Enron.

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17. *Ibid* at 22.
18. See generally *ibid* at ch 2.
19. *Ibid* at 204. Farrow expressly rejects the suggestion of Gillian Hadfield and others that civil disputes can be divided into those triggering matters of public interest and those involving only private economic interests (*e.g.*, commercial law disputes).

The thoroughness of Farrow's research (as evidenced by the inclusion of a 43 page bibliography) makes this book an essential source for anyone studying the operation or reform of Canada's civil justice system. Equally, if not more importantly, however, Farrow has captured this plethora of research in prose that is both accessible and interesting. His unaffected writing is peppered with practical examples and personal anecdotes, including a recurring discussion of his own involvement as a practising lawyer with what he calls the "Dealership" case, an arbitration that triggered many of Farrow's concerns about the limitations and pitfalls of privatized dispute resolution. These stories both illustrate and focus the reader on Farrow's fundamental admonition that the civil resolution practices we employ day to day and case by case inevitably reflect upon the institutional values sanctioned by our justice system, and vice versa.

Farrow acknowledges that his thesis relies on a liberal democratic view of the justice system. Those who disagree with Farrow's ideological perspective, however, may not be persuaded. For them, his basic conclusion may seem tautological: That is, if democratic justice requires civil disputes to be resolved by an adjudicator who serves a prospective function and whose decisions are subject to public scrutiny, then a system that relies on private dispute resolution will, by definition, have a diminished level of democratic justice. This is not so much a challenge to Farrow's conclusions about the threat of privatization, however, as much as it is a debate about political ideology and the role of the judiciary in a democracy. More importantly, this argument overlooks the fundamental point of this book, which is to promote a dialogue about the best way to achieve the efficient and cost effective resolution of private disputes in a democracy.

Farrow's treatise points out the need for a serious discussion about the direction in which privatization reforms are moving our civil justice system. Obviously, the primary function of the civil justice system is to resolve disputes between private parties and it is in the interests of those parties, and the system in general, to ensure that such resolution is achieved as quickly and as cost effectively as possible. With this in mind, Farrow's book poses the deceptively simple, but absolutely critical, question of whether private dispute resolution is necessarily the best method of achieving these goals in a democratic society given the other, non-efficiency based costs associated with a privatized system of justice.

Farrow's tracking of the privatization movement clearly establishes that the institutional support of private dispute resolution mechanisms in Canada over the last few decades marks a fundamental change in the means by which civil disputes are being resolved in this country. Logically, such an elemental change must have an impact on how our justice system operates and on the

values reflected and protected by that system.[20] So, by articulating his view of liberal democratic justice and asking if the current privatization movement serves that view, Farrow demonstrates the need for all players in the civil justice system to actively consider whether a privatized civil justice system reflects the values that they want to see. Thus, whether or not readers agree with Farrow's concept of democratic justice and the court's role in it, this treatise opens the door for a necessary dialogue about what civil justice means, on a systemic level. This discussion should focus "not on individual cases, but rather on collective policy choices about civil justice process and reform and how much those choices should be influenced by efficiency-driven principles as opposed to justice-driven principles."[21] By prompting this essential policy discussion, Farrow's book provides an invaluable service for the future development of Canada's civil justice system.

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20. An example is the shift in judicial thinking from the traditional belief that disputants have a right to a public civil trial to current thinking that trial should not necessarily govern or be the objective of civil litigation. See *Hryniak v Mauldin*, 2014 SCC 7 at para 43, [2014] 1 SCR 87; and *Windsor v Canadian Pacific Railway*, 2014 ABCA 108, 371 DLR (4th) 339.
21. Farrow, *supra* note 1 at 285.