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Justice outside the Law

1. Aim ad question at issue: justice without law

The aim of this essay is to raise the following question: in order to achieve dispute resolution should we place our trust in an explicit body of pre-determined law or should we instead move to extra-legal resolution methods, such as mediation and conciliation?

2. Introduction: mediation as an alternative to legal proceeding

One response to the dissatisfaction with court-centered dispute resolution method has been the promotion of mediation as an alternative to legal proceeding. This alternative grew out of concern about the effectiveness of regular contested trial as institutional model of conflict resolution. In other words, mediation outside the court room seems to be a quick and cheap form of dispute settlement within a system which is under pressure in the must of solving an increasing volume of cases with limited funds. Consequently, the establishment of non-judicial resolution procedures essentially lies on the idea according to which the cooperation rather than the litigation between parties is the best way to insure justice in the vast majority of cases.

In order to get a better structure I will divide the analysis in four parts. The first part (A.) of the essay seeks to provide an overview on various models of dispute resolution procedures such as mediation, arbitration and adjudication. The second part (B.) will be divided in two sections. The first one (B.I.) will deal with the causes for norms and laws

to promote mediation and pre-trial settlements. The second section (B.II) aims to explore the reasons that motivate the disputants to submit the conflict to a mediator. The third part (C.) will explore some of criticisms usually be leveled against mediation-based resolution. Finally the last part (D.) will be focused on the topic of justice without law[1].

3. A. Preliminary definitions

The terms mediation, arbitration and adjudication are commonly used interchangeably. The purpose of this section is to elucidate the crucial distinction among those alternative forms of dispute resolution (ADR). With the term mediation is correctly indicated a process for resolving conflicts in which the third part promotes a constructive dialogue among parties. The mediator leaves the responsibility for the decision to the disputants. In other words, the mediator does not impose a solution to the conflict. The role of the mediator is to assist the parties in their efforts to formulate a solution of their own. The term arbitration refers to the procedure in which parties submit their dispute to an arbitrator by whose judgment they agree to be bound. Finally, the adjudication is a judicial procedure implying an imposition of a legally enforced judgment upon parties. What follows is that mediation and adjudication differ "dramatically and categorically"[2] especially on their aims. On one hand, the mediation purpose is to enable the disputants to explore the problem and to find a suitable solution. On the other hand, the adjudication process concerns the liability determination and it is mainly directed to the law application. It is noteworthy that the maximum degree of coercion is allocated in the adjudication process since it implies an imposition of a legally enforced judgment upon parties. Moreover, mediation, arbitration and adjudication are characterized by a crescent degree of formality. Mediation is an informal procedure while adjudication characterized by the employment of considerable degree of regulation and bureaucracy.

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[1] AUERBACH JEROLD S., *Justice without law? Resolving disputes without law* (1983)

[2] KRESSEL, HOROLD H. & DEAN G. PRUITT, *Interpersonal relations: A theory of interdependence* (1985)

3. B. I. causes for norms and laws to promote mediation

The previously drawn distinction between mediation and adjudication "does not preclude the judge from mediating"[3] . As matter of fact, the law may dictate the judge to play the role of the mediator in the pre-trial conference. When the judge believes that the case is appropriate for mediation he makes a referral to the parties in order to induce them to submit the dispute to mediation[4]. The causes for the law to incentive mediation can be identified on different grounds. First of all, pre-trial compromises provide a pragmatic mechanism to save the significant amount of resources that a trial usually takes up. In other words, it allows the system to speedily face a great deal of cases with finite founds. The reason of the proliferation of pre-trial mediation manly lies, as consequence, in their court cost saving effect[5]. Secondly, the mediation process informality determines a relevant time saving for both the parties in conflict. Moreover, statistics show that mediated outcomes are by far more likely to be complied than sentences after adjudications[6]. As a consequence, compromise-oriented procedures produce solutions which are more durable and appropriate to prevent future conflicts. What follows is that norms and laws to promote mediation in order to reduce re-litigation.

3. B.II. causes that motive disputant to seek mediation

Mediation is becoming a substitute for traditional trail, mainly because of heavy demand of informal methods of resolving disputes. The mediation process is mainly

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[3] CRAIG A. MCEWEN AND RICHARD J. MAIMAN, *Mediation in Small Claims Court: Achieving Compliance through Consent* (1984).

[4] FELSTINER WILLIAM, *Law Mediation as an Alternative to Criminal Prosecution: Ideology and Limitations* (1978)

[5] ASHWORTH & REDMAYNE, *The Criminal Process* (2005)

[6] CRAIG A. MCEWEN AND RICHARD J. MAIMAN, *Mediation in Small Claims Court: Achieving Compliance through Consent* (1984).

based on informal and unwritten rules[7]. Likely both parties are moved by the aim of settle a mutually satisfactory compromise avoiding the considerable degree of regulation and formality that the trail usually implies. During the mediation process, essentially through verbal exchanges and implicit dialogue, both sides sacrifice their demands in order to accommodate their reciprocal needs. The mediation outcome, as consequence, usually mirrors the different evaluation made by each part on the basis of variables such as the expected trial outcome and the cost to meet in holding a trial. The informal nature of mediation setting is one of the most common reasons to move the dispute resolution outside the formal court system. Legal formalism has determined spread dissatisfaction with the court-centered resolution method. The excess of formalism within the adversarial setting fails to promote dialogue between parties and prevent the achievement of agreements based on shared values. Furthermore, disputants may be induced to choose mediation rather than litigation because mediation is privately held and, as a consequence, it ensures the decision making process low visibility. In other words, the lack of publicity may be seen as advantage for the parties. Disputants in mediated cases are allowed to play an active role in order to achieve a restorative resolution of the case while within an adversarial setting the judge usually speaks with the attorney without taking into consideration the disputants' willingness to participate. Moreover, the spread of mediation as a conflict resolution method can be ascribable to sociological reasons. It has been pointed out that national characters may affect the legal system[8]. Characteristics such as self-restraint and attitude to understand others within a multicultural society have lead Anglo-Americas to prefer cooperative and informal resolution methods rather than court-centered resolution processes. In addition to this, mediation is often seen as a means to overcome the depersonalization and the objectification that usually affect court-based adjudication.

3. C. Causes of resistance to non-legal forms of dispute settlement

[7] BALDWIN, J. *Pre-trial justice : a study of case settlement in magistrates' courts* Oxford (1985)
[8] POUND ROSCOE, *The causes of Popular Dissatisfaction with the Administration of Justice* (1906)

The purpose of the following part of the analysis is to underline that arguments in favor of mediation should be treated with caution. More than one criticism can be leveled against mediation-based resolutions. First of all, the assumed cost and time saving effect of mediation seems to be objectionable considering that parties are not bounded by the outcome reached at the end of the mediation. The fact that mediation has been attempted does not exclude the disputants' right to a fair and public hearing by an independent and impartial tribunal established by the law[9]. What is evincible is that in those circumstances, trial costs are not avoided even if mediation has been attempted. Secondly, the physiological informality and the flexibility of out of the court mediation can turn in pathological lack of public control on the decision making process. Consequently, the mediation process low visibility invalidates the monitor of the public which characterized the open trial. Furthermore, the mediator is not called to apply general norms. As a consequence, the mediation outcomes are generally characterized by a high degree of unpredictability. Moreover, moral pressure, situational contingencies, power imbalance may affect the decision. Aside the previously described reasons of resistance to non-legal forms of dispute settlement, it is noteworthy that mediation procedure can be considered appropriate only under certain conditions. First of all the disputing parties should be open to a constructive dialogue, secondly there must be a reciprocal interest to achieve a consensus based decision.

3. D. Justice without law

Besides those criticisms, the success of non-legal disputes settlement shows that litigation is not the exclusive way to achieve justice. At this point it seems to be necessary to clarifying the notion of justice. The term justice has not a singular meaning. Some has defined justice as the outcome generated by the uniform and

[9] The right to a fair and public trail is stated in The European Convention on Human Rights (Art. 6) and within the Sixth Amendment (Amendment VI) to the United States Constitution " [...] right to a speedy and public trial, by an impartial jury of the State […]

predictable application of known rules (retributive justice or backward-looking justice). The success of extralegal conflict settlements is based on an alternative definition of forward-looking justice. According to the notion of forward-looking justice how to resolve conflict is not just a matter of rules application. As Auerbach has pointed out "how to resolve conflict, inversely stated, is how to preserve community"[10]. This notion of justice opens to the possibility of resolving disputes outside the law on the base of goals of community. What follows is that mediation-based disputes settlements can be seen as a form of "community self-government".

4. Conclusion

In conclusion, what this essay has aimed to prove is that, even if every society must provide efficient institutional forms of conflict settlement, it does not means that disputes can exclusively be solved by legal procedure. As a consequence, litigation should be seen as one choice among may possible alternatives. Among those alternatives mediation seems to be the most appropriate especially when the disputants, besides the mere dispute resolution, are aimed to report an improvement to their relationship and communication.

[10] AUERBACH JEROLD S, *Justice without law? Resolving disputes without law*. (1983)