Beyond the Letter of the Law

"Western society has chosen for itself the organization best suited to its purposes and one I might call legalistic. The limits of human rights and rightness are determined by a system of laws; such limits are very broad. People in the West have acquired considerable skill in using, interpreting, and manipulating law (though laws tend to be too complicated for an average person to understand without the help of an expert). Every conflict is solved according to the letter of the law and this is considered to be the ultimate solution.

If one is right from a legal point of view, nothing more is required, nobody may mention that one could still not be right, and urge self-restraint or a renunciation of these rights, call for sacrifice and selfless risk: this would simply sound absurd. Voluntary self-restraint is almost unheard of: everybody strives toward further expansion to the extreme limit of the legal frames. (An oil company is legally blameless when it buys up an invention of a new type of energy in order to prevent its use. A food product manufacturer is legally blameless when he poisons his produce to make it last longer: after all, people are free not to purchase it.)

I have spent all my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is not quite worthy of man either. A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man's noblest impulses."

Alexander Solzhenitsyn, 'A World Split Apart' – Commencement Address delivered at Harvard University, 8/6/78 (http://www.columbia.edu/cu/augustine/arch/solzhenitsyn/harvard1978.html)

We talk about "going to law" or "going legal" (or perhaps more specifically "going to court") when somebody else is doing something we do not want, or is not doing something we do want.

Why is this?

First of all, it is because we are in the fortunate position that right and wrong are not determined simply by how powerful we are in relation to our opponent. If we have done work for someone and he has not paid us, the law says that he cannot simply walk away without paying. The court will apply this law, and the bailiffs or the sheriffs are available to enforce it if necessary.

Secondly, however, it is because we believe that our opponent is wrong and that we are right. We may not be able to explain ourselves in legal language why this is the case, but the lawyers we appoint to act on our behalf will be able to do so. The court will vindicate our position, and we will get the full benefit of being right, whilst our opponent is penalised for being wrong.

But will we always get what we want when the law finds that we are "right"?

The answer to this is a resounding, "No".

Firstly, the law may also find that our opponent is right to an extent. We may not be owed as much as we have claimed, or our opponent may have a valid counterclaim.

Second, the cost of going to law, not just in fees for hiring lawyers, but in lost time that could have been used more productively, may be disproportionate to the value of the dispute. Sometimes these can be recovered at least in part from an opponent, but not all courts and tribunals have the power to order this, especially for low value disputes where the costs are most likely to be disproportionate.

Third, even where the law fully upholds our case and orders our opponent to pay our legal costs, there is a chance that this will force our opponent into bankruptcy. We will then be an unsecured creditor behind our opponent's mortgage lender, and may ultimately receive little or nothing; and in the meantime, we have to settle our own legal bills.

It follows that whilst the law is a vital safeguard in providing a standard of right and wrong and the means to enforce our rights and other people's obligations, it is not a panacea which delivers the right outcome for us in every case.

But is the alternative only the sacrifice of our rights?

No. The alternative is a different process where the law remains relevant, but we and our opponent retain enough control to arrive at a result that is "right for us".

This process may involve sacrifice, or compromise, by us and by our opponent, but more often than not, it leads to a result which is agreed between the two (or more) of us.

The process is known today as mediation, but it is in fact a far more ancient method of applying the law and administering justice between parties in dispute than our present court system. Professor Derek Roebuck has written a short paper entitled the "*Myth of Modern Mediation*" in which he traces in outline the use of mediation through many centuries and in many parts of the world. In the teachings of Christ, believers are told that peacemakers are blessed, and they are warned not to judge others lest they too be judged. King Solomon in the Jewish tradition is described as a wise judge for giving a judgment he knew that neither party would accept, and which would lead them to find their own solution to the dispute that they had brought before him.

It may seem naive to speak of "the high level of human possibilities" and "man's noblest impulses" in the context of disputes that have gone or are heading "to law". But how else does one characterise the statement of a director of a building contractor towards the end of a four-hour mediation session to the effect that: "I am the professional: it is not right that two householders should have to pay for this; I shall pay." Or the offer to advance a payment not yet due to a contractor already in default of his obligations to avert an insolvency which would serve nobody's interests?

One thing is quite certain: these outcomes would not be delivered by the courts applying the letter of the law.

There is a further significant shortcoming to the process that applies only the letter of the law. This can work to our advantage if we are in the wrong, but can be an immense source of frustration if we are (or believe ourselves to be) in the right. This is the requirement to prove by admissible evidence

the true facts to which the letter of the law will be applied, or to present an expert opinion which will stand up to scrutiny by the court and an opposing expert and legal team.

Even if we assume that our opponent does not tell outright lies in his evidence to the court, and present documents which have been forged, it may not be easy for us to convince a third party (the judge or tribunal) that our evidence is to be accepted on the balance of probabilities. Our opponent may have the documents, or the witnesses, that can prove the rightness of our position, under his control. The court may never get to see or hear this evidence.

Opponents who find themselves in this position (often, but not always, defendants or respondents to claims) are amongst the most reluctant to engage in "mediation". This is basically because they see the application of the letter of the law as likely to lead to the most advantageous outcome for them. They may not be (or consider themselves to be) ignoble or immoral people, but on entirely valid and legitimate legal advice, they wait for their opponent to put forward evidence that would be more likely than not to persuade a judge of their case, or to succeed in using the often very slow and unreliable processes of forcing disclosure of specific documents or compelling the attendance of witnesses. They will hold their cards as close to their chest as they can, and hope that the other party, its advisors, and any third-party funders, will be put off by the speculative nature of the case, and the cost and risk associated with pursuing it. And in the meantime, if they are insurers, they will be making profits through their investment arms on the funds the slow legal process allows them to retain.

This approach, however, can fairly be described as "manipulating law" in "an atmosphere of moral mediocrity."

It also illustrates why "mediation" is actually something of a misnomer for the process which today carries the name.

It is precisely because contact with their opponents is "mediated" through the law, the legal process, and legal representatives that these parties view their conduct as legitimate. If, on the other hand, they had to sit opposite their opponents for four hours in a "mediation" and account for their position and conduct directly to them, they might well feel differently, despite all the reassurances of their legal team. "Mediation" so-called actually removes one mediator which resolves the dispute according to its own rules and substitutes another one that helps the parties use their own creativity in the resolution of their dispute.

This does not mean, however, that the modern "mediator" has a purely passive role as a catalyst for the parties to settle their dispute.

The situation criticised by Solzhenitsyn was one where the choice was between the absence of law, or the tyranny of law.

The ideal situation has the law present, and exercising a degree of influence and control, whilst leaving room for the parties to make subjective choices and see if these can form the basis of an agreement between them.

The judge in the conventional courtroom is akin to the priest in his robes at the high altar of the church. He represents the law that is written by a sovereign authority – a human authority,

however, rather than a divine one. But the law that he represents may not, in its detailed articulation, keep pace with a period of profound and rapid social change: parliamentary time is limited; the judge him/herself is likely to be in the second half of his/her life and career; vested commercial and cultural interests will use modern media to take off the agenda any change that may be disadvantageous for them. The spirit of the law meanwhile blows forward apace, and outstrips the letter of the law.

The judge in his courtroom and his robes, and the law which he applies, in its procedure and its substance, together constitute a mediator.

The human agent, the law, and the process, mediate an outcome to the dispute that the parties bring to this mediation.

Just like the priest or vicar, who represents Christ and his teachings and ceremonies in mediating between man and God, so the judge represents the State, and its laws and processes, in mediating between parties in dispute.

But there is no obligation upon the parties to use the judge, the court, and the law to mediate a resolution to their dispute, unless the dispute involves a crime against the State.

They can choose another person, another process, and another set of laws as the mediator of their dispute.

The mediator so chosen is just as actively involved in applying the laws and managing the process as the judges.

In fact, the judge is applying a law and a process which is already set down, and which he is likely to be more familiar than the parties. The mediator however will need to find the shared values of the disputants which will underpin the legitimacy of any settlement. He will also need to use his imagination and judgment to tailor the process towards a consensual outcome.

Solzhenitsyn lamented that no call is made to those seeking legal rights to sacrifice and selfless risk. The mediator is able to make such a call, and to make it to the parties in dispute together, and separately. The mediator cannot require this of any of the parties, but if offers of settlement are to be made, and ultimately accepted, then almost inevitably one and probably all of the parties will have sacrificed what they perceive to be their rights if they were to mediate the dispute through the courts.

An arbitrator is a mediator of sorts too, but very close in nature to a conventional judge in that the law and process with which he combines to mediate the dispute are fixed in advance by outsiders to the dispute. Arbitration statutes do allow latitude to the arbitrators and the parties to choose their own substantive law and rules of procedure, but often the default options are used. As the counsel and arbitrators may only recently have come into contact with the subject matter of the dispute, they are likely to be more comfortable sticking with familiar procedure rather than attempting to tailor that too.

In mediation as we know it today, although the principals in the dispute are centre stage, there is still a strong drag towards the established legal position. This may of course come from the

principals themselves, but it may also come from the outside culture, and the expectations of third parties. It is fundamental to the process of mediation by facilitation that the parties in the dispute are represented by someone who has authority to settle: for practical purposes, this means the freedom to take decisions unfettered by the need for approval by a third party. Nevertheless, the corporate world does in practice fetter the discretion of those in whom it invests authority. They are not free to sacrifice "solid" legal rights, or to engage in processes where they and not some impartial third party take final decisions, without risking the wrath of shareholders or auditors. Even at a personal level, individual parties may be paralysed by the expectations of some "significant other", despite the fact that their discretion to reach compromises is legally unfettered.

It is surely this fundamental challenge which facilitative mediation needs to overcome in order to thrive, and allow parties the freedom to be guided by the spirit of the law in a creative process towards a solution of their own making.

A representative may technically have authority to settle, and the freedom to use whatever means he chooses to arrive at a settlement, but once outside the mediation room, any law or procedure which may have reigned supreme for a few hours gives way again to the letter of the law, the judge and counsel in their long black robes, and the answers that they can be expected to deliver.

The logical response to this challenge is to regard the judge, counsel, and solicitors – all the officers of the court – as competitors. This is certainly how some of them regard facilitative mediation. They would sooner cast this as a poor man's option, to be used for low value disputes which that the traditional, expensive process cannot deal with at a proportionate cost. The more complex cases which can bear the cost of being exhaustively investigated, analysed and tested by the traditional process they would wish to keep. Why should one man or woman in the space of a day facilitate a conclusion to a dispute which could keep tens if not hundreds of men and women (not just lawyers) gainfully employed for months or even years?

Anyone who has dealt with pleaded disputes before courts or tribunals will know how maddening the rules circumscribing what the court or tribunal will consider can be. The details and the background to the case become clearer, but one is still stuck with the black letters that were pleaded months earlier. Yet one can also sympathise with the party for whom this structure is a haven from a stream of contentious issues that his opponent might try to throw at him piecemeal.

Can we move beyond the letter of the law?

What is required for this to happen seems to be something much more profound than the promotion of a new process. If we are being asked to take decisions ourselves in legal matters when (in Solzhenitsyn's words) "laws tend to be too complicated for an average person to understand without the help of an expert", then either a better level of understanding of the existing laws is required, or an ability to formulate and apply the laws that we wish to live by, and to persuade others that these laws are valid for them too. Perhaps judges and courts will be in business for some time yet.

Peter Webster, 13th September 2012