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Conflict Resolution – Applying Non-Adversarial and Therapeutic Justice

Introduction

Toward the end of the 20th century, real changes began to take place in the trial system customary practiced in the United States and other Anglo-American countries, as well as in Israel. The principal change involved the transition from an adversarial approach to managing and resolving disputes to systematically advancing a non-adversarial, or cooperative, approach to clarifying disputes and resolving them.

The weakening power of the adversarial approach and the rise in status of the cooperative approach to managing and settling disputes are manifested in substantive changes that occurred in law, in the court systems, and in the role of judges and lawyers in the legal system. These changes testify to the existence of competing theories and express a process of paradigmatic change in the sense that Kuhn proposed.¹ The adversarial paradigm in trials has been giving way to a non-adversarial paradigm that is cooperative in nature and at times also therapeutic. The cooperative paradigm embodies a new perception of the proper way of clarifying and settling disputes. It offers up-to-date observation of the potential inherent in the judicial procedure, as well as changes in the roles of judges as dispute resolvers and of lawyers as representing clients in the present era of the 21st century.

The adversarial approach views a dispute as a struggle between parties competing for a limited resource. Thus, the entitlement of one party to some of this resource necessarily leads to a loss for the other side. This approach is manifested in the traditional adversarial judging procedure, in which discussion focuses on an examination of the rights and obligations claimed by the parties to the dispute, and the disagreement is concluded in a judicial verdict that decides between the opposing positions. This approach lay at the basis of

¹ A paradigm in the sense of a full complex of opinions, values, and techniques shared by the members of a known community. See S. Kuhn, *The Structure of Scientific Revolutions*, trans. Yehuda Melzer, 1962. Kuhn describes the manner in which scientific revolutions and paradigmatic changes are created. A paradigm is not suddenly replaced in a rapid procedure but in a long-range process that begins with opposition and criticism voiced by members of the community against the accepted conception, which arouses opposition, generates a struggle, and in the end brings about a rejection of the previous paradigm and replaces it with a new one.

the development of the adversarial judicial model in which the judge² manages, albeit passively and at a distance, as it were, from the litigants, the procedure of clarifying their dispute and settling it through handing down a compulsory decision. This approach also lay at the base of the development of a client-representation model, in which the adversarial attorney (also termed the gladiator³ attorney) sees every disagreement as a struggle and makes it an objective that the side he or she represents emerges victorious.

According to the cooperative, non-adversarial approach, in contrast, all disputes have several layers that should properly be related to and examined. In the top-most, overt layer are the positions of the parties. Planted in a deeper layer, necessitating exposure, are their interests, their needs, emotions, and desires. Often, an examination of the layer of needs and interests shows that the positions of the parties to the dispute may be disparate, but their needs and interests, lying at the base of these positions, are not contradictory but complementary or even mutual. According to the cooperative approach, a discourse that deals with all layers of the dispute will enable a deeper discussion of the disagreement and open the door to settling the dispute in a qualitative and efficient manner. A solution to the dispute ending in an agreement in a way that responds to most of the needs and interests of each side will maximize mutual welfare and produce a settlement that goes to the depth of the dispute.

Several practical-ideological movements included in modern jurisprudence today favor the cooperative approach. This is manifested in new procedures for clarifying disputes that have become customary in the trial system. The alternative procedures are proposed outside the walls of the courtroom and even within its framework. Moreover, judging itself has undergone change. The prevailing models of judging offer the managing of the proceedings of clarifying disputes by an active and involved judge, who strives to reach an agreed solution to the disagreement. Judging whose objective is to encourage procedures of striving for an agreement, guiding the proceedings, and bringing about a solution that does

² The description of judges and those who occupy other positions is made using the male gender for reasons of language convenience only; however, everything pertains in equal measure to female judges and women who fill the other roles mentioned.

³ Carrie Menkel-Meadow, *The Lawyer as Problem-Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (1999).

not involve a judicial verdict is termed judicial dispute resolution.⁴ This type of judging seeks the attaining of an agreement (which will be termed Settlement Judging in the pages to follow); at times it implements the cooperative approach, using it with the intention of reaching positive, sensitive, and rehabilitative results for the litigants (to be termed Therapeutic Judging below).

An alternative to the adversarial client-representation model is customary today; this receives expression in the function of the “problem-solver lawyer,” who represents clients in the cooperative approach and acts in this way to achieve the best for the client and to attain the client’s aims. Other aspects of the problem-solver lawyer are revealed in the “therapeutic lawyer” model, which applies a cooperative approach to representing clients in both civil and criminal procedures, while placing special stress on the client’s psychological welfare and achieving constructive and rehabilitative results for the client.

A change in the trial paradigm emerges, too, from factual data. Some 95% of all litigation in U.S. and Israeli courts does not end in a detailed, reasoned verdict, the product of the multi-stage adversarial judging procedure.⁵ The intention is not to claim that all this litigation is clarified and concluded in procedures that adopt the cooperative approach; rather, it testifies to the weakening power of the adversarial approach and to a reduction in the use of the classic adversarial judging procedure.

The significance of the change that is being claimed is its broad scope. In the United States, this factual data has been cited to indicate that it is the “deepest change in jurisprudence in the history of the United States.”⁶ In Israel, too, a former president of the

⁴ The Multi-Tasking Judge, Comparative Judicial Dispute Resolution, 2 (Tania Sourdin and Archie Zariski eds., 2013). The articles in this book are based on extensive international research that dealt comparatively with the subject of judicial dispute resolution in several countries, among them Holland, Canada, the United States, China, and Australia. The work is known as IRC—International Research Collaborative in Comparative Judicial Dispute Resolution.

⁵ On data in the United States, see Frank A. Sander & Lukasz Rozdeiczner, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1 (2006); Peggy F. Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717 (2008). For Australian data, see Marilayn Scott, *Collaborative Law: Dispute Resolution Competencies for the New Advocacy*, 8(1) QUT L. & JUST J. 213 (2008). On data in Israel, see Ministry of Justice, Report of the Committee Investigating the Structure of the Department of Judicial Management (Revivi Report), 6 (1999), and Appendix B there; also, Keren Weinschall-Margal, Inbal Galon, and Yifat Tarbulus, “Creating a File Weight Measure for Evaluating the Judicial Burden in Israel,” *Mishpatim* 44 (2), 2015 (Hebrew).

⁶ William G. Young, *An Open Letter to U.S. District Judges*, in THE FEDERAL LAWYER 1 (2003); Nathan L. Hecht, *Judge and Jury Symposium: The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2005).

Supreme Court, Aharon Barak, used the term “revolutionary” to describe the mediation process, the procedure that most clearly represents the management of disputes by a cooperative approach.⁷

This book, which deals with the deep change that has occurred in trial law, discusses the theoretical, systems, and professional changes that have occurred in the legal system in the United States and other countries, Israel among them. It will describe the process of the change in the paradigm of court pleadings, which is manifested in new perceptions of jurisprudence, in new procedures of managing disputes, and in new content characterizing the work of both judges and attorneys at law.⁸

The book is the product of research and teaching in the field of law and its affinity to dispute resolution.⁹ In the course of this activity, I was able to explore in depth the multifaceted theory of dispute resolution and also to assist in its local development and to circulate the idea.¹⁰ My research and teaching in the area were accompanied by practical management of dispute-resolution procedures, especially mediation. In the course of this work, I gained knowledge of several styles of client representation by lawyers in procedures in which the cooperative approach was taken, as well as of qualitative and efficient systems of managing these procedures.

The content of this book, therefore, lies on the seam between the field of research and that of professional activity. It is intended to serve as a helpful tool for academics and practitioners (lawyers, judges, mediators, etc.) alike. Each of the issues raised here can be

⁷ “It would be befitting that this social change—“the mediation revolution”—exhaust its full potential.” Aharon Barak, “On Mediation,” *Shaarei Mishpat* C 9, 11 (5762) (Hebrew).

⁸ Parts of this book are based, among others, on my doctoral dissertation, which dealt, for the first time in Israel, with judicial dispute resolution, therapeutic legal theory, and problem-solving courts. See Karni Perlman, *The New Judge? Changes and Challenges in the Judicial Function at the Start of the 21st Century in Light of the ADR Movement (Alternative Dispute Resolution) and the TJ Movement (Therapeutic Law Theory)*, Ph.D. dissertation, Faculty of Law, Bar-Ilan University, 2010.

⁹ Teaching and research were carried out mainly in the Striks School of Law, the College of Management Academic Studies (and at the School of Behavioral Science there) at Bar-Ilan University (Faculty of Law and in the Dispute Resolution and Bargaining Program); and at Tel-Aviv University (in the Evans Dispute Resolution and Mediation Program).

¹⁰ I was privileged to set up, with the help of my colleagues, the academic-practical mediation center, the first in Israel, and to administer it in the initial years of its existence (On-Campus Mediation Center, Bar-Ilan University), to coordinate (in partnership) advanced study courses, conferences, and symposia in the area of dispute resolution, to train students, and to head student delegations from Israel that participated in international competitions on representation clients in mediation procedures in commercial disputes. (at ICC)

discussed at length and in depth; however, the aim is principally to point to a paradigmatic change that is developing in the field of law and to impart to the reader an updated look into what is happening in the area of managing and settling disputes. This look may help to familiarize readers with the field of “dispute management and settling” in general and in Israel in particular, as well as with its being a practical, efficient tool when working with it on a practical level.

Each of the five sections of the book deals with another aspect of the paradigmatic change in the trial system, from adversarial trials to a cooperative approach. Every section ends with a chapter devoted to what is taking place in Israeli law in the area of the subject surveyed in the section.

Section One deals with cooperative law and with theoretical changes in the law. The section revolves around the theoretical changes that law has undergone and the growth of ideological movements that favor a cooperative approach and work to advance it.

Section Two is divided into chapters. The first chapter clarifies the nature of the adversarial approach and of the cooperative approach. Similarly, key terms are defined that will assist the discussion in the next chapters. An explanation is offered for the transition from one approach to the other toward the end of the 20th century. The second chapter details briefly the foundations of the formalist perception that prevailed in the United States in the early 20th century and that helped in shaping the function of the traditional judge. Also described is the critique that the realist school raised against this formalist outlook. The third chapter presents the Alternative/Adequate Dispute Resolution (ADR) movement. Surveyed briefly are the development of the movement, its theoretical principles, and their assimilation by the American legal system.

The fourth chapter in Section One presents another ideological movement, Therapeutic Jurisprudence (TJ), and discusses the assimilation of its ideas by the legal system. The fifth chapter presents the Adequate Dispute Resolution movement and the theory of Therapeutic Jurisprudence as part of a general trend, “comprehensive law,” in the law of the future. The common foundation lines of this trend are surveyed, and two other ideological movements are mentioned that are included in this trend, the Preventive Law movement and the Restorative Justice movement. The last chapter, which is devoted to Israeli law, gives a general survey of the absorption of the ADR ideas and those of the TJ movement into the law as practiced in Israel.

Section Two discusses cooperative law and the procedures of managing and settling disputes. The changes that occurred in the variety of procedures for mediating disputes that are customary in the legal system and in the nature of these procedures are presented. Among others, is the transition of the court system from adopting one central procedure for resolving disputes, the adversarial approach, to implementing a wide range of dispute-resolution procedures, many of which are conducted with the cooperative approach.

The first chapter in this section cites several criteria that enable a comparison of the types of dispute-resolution procedures and what differentiates them. Similarly, criteria enabling characterization of the type of different disputes are presented so as to enable adjusting the appropriate kind of procedure to them. The second chapter presents a variety of procedures for clarifying and solving legal disputes. Among this list are alternative judging procedures to the classic one, the cooperative approach being implemented in them, such as the Settlement Conference procedure and Problem-Solving courts.

The last chapter in Section Two deals with Israeli law. In the first part of this chapter, there is a brief description of the procedures for managing disputes that are customarily practiced in Israel today. The second part of the chapter surveys the relevant verdict dealing with the mediation procedure and its implementation, now prevalent. The third part suggests a draft for planning and implementing a dispute-resolution system in the courts that might serve as a helpful tool for policy drafts and aid in implementing programs of this sort of system in the courts.

Section Three of the book deals with cooperative law and the change in the paradigm of the role of the judge in the court system. The changes that occurred in the perception of the judging function are described, and the new judicial functions that embody the cooperative approach are cited. At times, these are implemented to attain educational, positive, and rehabilitative results—this is the function of the Settlement Judge and of the Therapeutic Judge.

The first chapter of this section describes at length the role of the settlement judge, the one who conducts judging procedures that strive to achieve an agreed solution between the parties, and the nature of this settlement judging. The stages of the development of the role of the settlement judge are surveyed, and several of its models in the court system are presented. In addition, the chapter describes the characteristics of settlement judging in comparison with classic judging. The second chapter is devoted to a discussion of the role of the therapeutic

judge, who conducts judging procedures that aim at sensitive and behavioral results that are constructive and rehabilitative. The characteristics of therapeutic judging in the court system are presented. The implementation of this judging approach is noticeable in special law courts known as problem-solving courts, and its characteristics may be found, too, in the rest of the courts.

The third chapter in Section Three discusses the range of patterns of judicial dispute management in light of the paradigmatic change described. The broad possible range of ways of conducting the judicial procedure on the basis of the various concepts of the role of the judge as a settler of disputes is also presented. The manner in which the judicial proceeding is conducted might move, then, into a space loaded with contradictions between the application of the adversarial approach and the application of the cooperative and, at times, even the therapeutic approach. Therefore, this chapter will also discuss the knowledge and skills required today for the proper fulfillment of the new judicial roles that put into practice the cooperate approach. The relations and connections among these roles are also examined in this chapter. The last chapter in this section deals with settlement judging, which prevails in court systems in Israel, and in therapeutic judging, which is in a trend toward development and expansion.

The book's Section Four provides an in-depth discussion of cooperative and therapeutic law and settlement judging procedures. The first chapter has a lengthy discussion of the criticism and fears, as well as of the advantages, stemming from the frequency of settlement and therapeutic judging procedures in the court system. The second chapter proposes a mapping and evaluation of these judging procedures from several points of view. Among other topics, the question is examined as to how the procedures mentioned reconcile with concepts of substantive justice and procedural justice. The conducting of these judging procedures is examined, too, from a gender perspective in light of the ideas of the cultural feminism school. The chapter also presents judging objectives and discusses the question whether these procedures stand in opposition to classic judging objectives. This is followed by a discussion of the subject of judicial neutrality, and changes are cited that were made in the rules of judicial ethics in the United States in order to adjust them to the adoption of cooperative approach judging procedures.

The third chapter in this section deals with the possible connection between the role of the therapeutic judge of the present and the ideas of the legal realism school at the beginning

of the 20th century. Therapeutic judging is presented here as actualizing the ideas of this school and as a way of providing a response to doubts and criticism that the legal realism movement raised against the formalist world outlook and the function of the judge derived from it. The fourth chapter of Section Four concerns itself with Israeli law and the need for setting down clear rules on the matter of applying settlement judging in Israel.

The last section of the book, Section Five, revolves around cooperative law and the paradigmatic change in the function of the lawyer in the court system. The transition from the model of an attorney representing clients in an adversarial approach to a model of a problem-solving lawyer representing clients in a cooperative approach is described at length. The first chapter defines the adversarial representation model and, its opposite, the cooperative representation model. Several advantages are cited that inhere in the change of the professional paradigm and in the adoption of the model of the lawyer in a cooperative approach directed at problem solving. The second chapter examines the special development of the role of the problem-solving attorney who seeks to achieve therapeutic results; in other words, educational, constructive, and rehabilitative results benefiting the client. This model of representation, of the therapeutic lawyer, is demonstrated in the context of representing clients in criminal disputes and aiding clients in therapy on civil matters.

The third chapter in Section Five describes the work of the lawyer who adopts the cooperative approach. Tools for representing clients in cooperative procedures, in particular mediation, are proposed. Criteria are specified according to which the lawyer can prepare a detailed plan of representation to accompany the client during the procedure. This representation plan aids qualitative and efficient professional handling of the client's needs in the pragmatic mediation procedure. The fourth chapter details the knowledge and skills that are necessary for the lawyer today who works in a court system in which the cooperative approach prevails. The fifth chapter deals with the model of the problem-solving lawyer and with the therapeutic lawyer in the case of Israeli law. Emphasis is given to the advantages of a broader adoption of the cooperative approach model of client representation in Israel.

The book concludes with an "afterword" briefly summarizing the argument for a paradigmatic change in law and the growth of cooperative law. Interspersed in the discussion are several relevant recommendations for applying cooperative law in the Israeli legal system, including updates required in legal education and in the conduct of settlement judging in Israel.

It would make me happy if this book proves useful for research and activity in the area of dispute resolution in general, and if it will aid in instilling the cooperative approach for clarifying and resolving disputes in an efficient, qualitative manner in Israeli law in particular.