May 15th, 9:00 AM - May 17th, 5:00 PM

Rhetoric or Argument: The Rational Culture of ADR

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RHETORIC OR ARGUMENT?: THE RATIONAL CULTURE OF ALTERNATIVE DISPUTE RESOLUTION

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Abstract:
If some have conceptualized law as a culture of argument, then perhaps ADR is a culture of rhetoric. Judges facilitate rational argumentation during trials. Mediators and arbitrators sometimes seem to glory in their sophistic lineage. As the attractiveness of mediation increases, it is worth pausing to consider whether these perspectives on ADR are warranted. There is some truth to fears about potential abuse of power in mediation. Would the culture of argument improve it? Those engaged in "transformational mediation," I argue, can accommodate such concerns and facilitate understanding of the proper role of argumentation in dispute resolution processes.

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First a bit of context related to the timeliness of this topic. Most of us have come to identify the law courts as the appropriate institution in our society to settle conflicts which have escalated into a full blown dispute. Within the common law tradition[1] the role of the law courts has been gradually expanding since the pivotal year of 1215, which witnessed the signing of the *Magna Carta*, the Papal elimination of all clerical involvement with supernaturally warranted Judicial Ordeals, and the early beginnings of the jury system. This continuing tide has carried us to a point in North American society, where, we now routinely hear concerns expressed about our now being "governed by the judiciary". We can add to this these complaints from those who claim that court proceedings have become the new fodder for media exploitation. Law is everywhere. Witness O.J. Simpson, Paul & Karla, and Clifford Olsen![2] So as not to appear too pristine and pure about all of this, I have to own here that I teach in a university interdisciplinary Legal Studies department, which has as its mission, to expand both public knowledge about law and justice, and the critical use of reason in all areas in which the law is involved. Whether this flood of law is a good or a bad thing is not my subject today. Nor am I concerned with fleshing out any truth about what really goes on in the courts as opposed to the myth.[3] In fact I am interested in discussing something quite different.

The logical basis of the so called "litigation explosion", which traces its roots to the judicial activism in the 1960's of the United States Supreme Court under Chief Justice Earl Warren, has been persuasively described, I suggest, by Richard Gaskins in his fine book *Burdens of Proof in Modern Discourse*[4]. Gaskins' argument is essentially that courts are able to effect momentous shifts in social policy through the argumentative practice of setting and articulating the burden of proof in any given type of legal proceeding. Courts do not need the power of the purse, or of the sword, for they have the equipotent power of determining the structure of the argumentation that takes place before them.[5] Gaskins is particularly good at articulating how subtle this power the courts wield can be, and he claims that the subtlety of the practice accounts for much of its strength. Judges are able to effect the social changes they desire, yet publicly speak in ways (in their judgments) which claim that nothing important has really changed at all! A marvelous rhetorical tactic, except that it loses much of its potency

within a critically educated public sphere. And I can speak here from experience having used Gaskins as a text in the last year.

The reason for all of this is, ultimately, to point out that there has been a recent project within the academic legal community to reconstruct the "logic" of legal practices within "culture of argument".

> I want to start by thinking of law not as an objective reality in an imagined social world, not as a part of a constructed cosmology, but from the point of view of those who actually engage in its processes, as something we do and something we teach. This is a way of looking at law as an activity, and specifically as a rhetorical activity ... This means that the process of law is at once creative and educative. Those who use this language are perpetually learning what can and cannot be said, what can and cannot be done, as they try—and fail or succeed—to reach new formulations of their positions. It also means that both the identity of the speakers and their wants are in perpetual transformation. If this is right, the law cannot be a technique, as the bureaucratic model assumes, by which "we" get what we "want", for both "we" and our "wants" are constantly remade in the rhetorical process ... In this way we might come to see the law less as a bureaucracy or a set of rules than as a community of speakers of a certain kind; as a *culture of argument*, perpetually remade by its participants.6

Though this excerpt from the work of James Boyd White's work is of great contemporary interest and importance, we should not forget that much of his work resonates in many ways with the early efforts of John Wisdom, Gilbert Ryle, and especially Stephen Toulmin and Chaim Perelman. Toulmin is particularly notable for his rather counter-intuitive claim that not only is law a rational practice, but that law ought in fact to be treated as the paradigm of rational practices in other disciplines. I am obviously speaking here about the well known "jurisprudential analogy", that Toulmin articulated in first in *The Uses of Argument*. I assume that most of us would not have too much trouble coming up with a counterexample or two to the Toulmin thesis!

But it is time to get around to my actual topic, and that is the set of practices that have come to be known recently as "alternative dispute resolution" (ADR). They include processes such as negotiation, conciliation, mediation, arbitration, neutral fact finding, and a variety of processes that originally found their home in the litigation system, such as mini trials and settlement conferences. The unifying thread that runs through them is that they all eschew the litigator's adversarial and confrontational approach to dispute resolution, albeit to varying degrees. Mediation is a completely voluntary process that discourages the positional arguing characteristic of the law courts, whereas arbitration can often look very similar to the imperial formality of proceedings found in our "higher" courts.

The reason that this is of concern now is that in late 1996 a Commission created by the government of Ontario, reported on proposed reforms to the system of civil (non-criminal) justice.7 One significant recommendation was acted on almost immediately by the Attorney General, and that was that most civil law disputes would be required to attempt mediation before they could proceed before a judge. We are, in Ontario, as a result of this initiative, now in the process of preparing for a new world of dispute resolution, starting in the summer of 1997. Though there are many fascinating aspects of this development, many that relate to interests of those at this conference, not the least might be that the Attorney General might want to consult with Sally Jackson on the design of an effective mediation system, I wish to focus our attention on one or two only.

In announcing the details of how this system will work the Director of the Mediation Project, Victoria Vidal-Ribas, on a number of occasions has emphasized that we are not looking here at setting up a sort of denatured,

amateur adjudication. This is to be true mediation;[8] and as one way of certifying this, it has been made clear that lawyers will not be allowed to "dominate" the provision of mediation services in Ontario.[9] In fact, there seems to be at least an unofficial desire to have the approved court mediation panels consist of roughly 50% lawyers and 50% non-lawyers.

Now what are the implications of this for those interested in argumentation and/or rhetoric? Well, it seems to me, that the first thing we can notice is that ADR proponents may well be arguing against Toulmin's notion that the general logic of rational argument can be found in common law procedural norms. If this were not the case, why would there be such a concern about allowing the legal profession to import its conceptual system into the practice of mediation? Why institutionalize a requirement that parties try to mediate before they resort to adversarial litigation? Well as interesting as this is to speculate about, time limits prohibit our tarrying on this quandary for too long.

If we accept a story, something like White's, that the law is striving toward becoming a culture of argument; if law is attempting to reconcile itself not only with logic[10], but with other intellectual disciplines, particularly mathematics and the sciences, then we have to wonder what might be going on in mediation that is so different. Once we detect what the difference consists in, we can make some judgments about the comparative value of adjudication and mediation.

So what is mediation all about? Mediation, is in actuality, a kind of assisted negotiation. Like adjudication, mediation inserts a third party into a dispute in order to, hopefully, bring about a resolution. But this is just about as far as the similarity can be stretched. In adjudication, particularly within the common law system adversarial, the judge[11] has the authority, and the duty, to declare a winner of the argument and to benefit the winner accordingly, assisted if necessary by the coercive power of the State. The winner is determined through the judicial application of governing legal rules and principles (if one follows Hart & Dworkin and the like), coupled with the determination of the "facts" of the case, and the enforcement of the parties' obligations to conform with the rules of pleading and procedure and that apply in the specific situation. Mediation, on the other hand, uses the third party, the mediator, to facilitate the parties negotiating a solution to their conflict. However the mediator, unlike a judge, has absolutely no power to order the parties to do anything or to refrain from doing anything. Mediators do not declare "winners."[12]

So what do mediators do, if they do not enforce procedural or substantive norms on the mediating parties? Well, this, in fact, is an area of great controversy within the conflict resolution community. And it has interesting and important ramifications for the study of applied argumentation and informal logic. One of the areas that I have been interested in for some time has been the movement within the common law to reconnect with "the rational tradition." Common law judges have been notorious for declamations such as that of Oliver Wendell Holmes Jr., to the effect that the "life of the law has not been logic, but experience." Or, the infamous phrase of Lord Halsbury in *Quinn v. Leatham*, "I entirely deny that a case may be quoted for a proposition that may seem to follow logically from it. The law is not always logical at all." Farther back in history we can trace this attitude in the comments of Lord Chief Justice Coke, whose claim was that the law is governed by an "artificial reason" to be distinguished, apparently, from the "reason" evident in other areas of life. My argument, which I am still in the process of fleshing out, is that the law's alienation from logic, was in fact primarily an alienation from formal deductive logic, first in its Aristotelian form and more recently in its mathematical incarnation. The resurgence of argumentation and informal logic studies, I suggest, will ultimately allow the legal system to rejoin the intellectual family, as the "model" of logic that the judges have been habitually rejecting is no longer the only game in town. And that is for the good.

There are four "stories" or philosophies of mediation, recently articulated by R.A. Baruch Bush, and Joseph Folger.13 In the *satisfaction story* the goal of mediation is to assist the parties to arrive at "some" resolution of their dispute through helping them to reframe their conflict in a way that each party can see themselves getting what they really want out of it. The notion here is that the legal system frequently constrains parties by limiting their goals to those sanctioned by the judiciary. Parties are said to be more *satisfied* with the result, and more likely to comply with it, if they can agree on what the "problem" they face is, and can collaborate in arriving at "a" solution to that problem. The *social justice story* focuses on accessing mid-level organizations that allow people to mobilize against a "common enemy." They can derive support and strength from organizations such as tenants' rights groups and thus make the playing field more level than it might be in many disputes. The *oppression story* differs from the others in that it argues that the informality of mediation is a dangerous thing which should usually be avoided, especially by groups that have been the victims of historical discrimination. Courts best protect the rights that have been long fought for by the marginalized and oppressed in society. Mediation is seen as only an attempt to placate those who have less power in society, by encouraging them to believe that they can play in the same game with the rich and powerful, as long as a "neutral" mediator is there to referee. Finally, the *transformation story* argues that mediation is in fact a process that encourages moral growth and character development in disputing parties. To the extent that the mediator is not vigilant in promoting these goals, he or she is not doing mediation.

The authors go on to describe that the *satisfaction story* is the predominant one in the field today. And a good example of this view can be found in *Reconstructing Argumentative Discourse*.14 It views the goal of mediation as "achieving a mutually satisfactory solution." Implicit in this is that the substantive nature of the solution that is arrived at is of no particular interest. If the parties choose to agree on something different than a judge might have ordered, that is perfectly acceptable. If one party wants to do something that his or her advisers, or the mediator, thinks imprudent, extravagant, or foolish, or even "irrational" that again is of no real concern. The point is the "agreement" the parties come to, nothing else. One can see here the focus of the concern that *oppression story* critics have identified. A standard example, regularly encountered in family mediation, is the case of a woman who is willing to trade away an interest in the matrimonial home or some other property in return for the man agreeing not to contest custody and/or child support arrangements the woman desires.

Now there are some interesting implications of this approach to mediation. If mediation is actually best framed in terms of the *satisfaction story* then one has to wonder whether the mediator has any argumentative, or dialectical role to play? Presumably, if the parties are easily persuaded by fallacious arguments, if they regularly contradict themselves, if they violate the pragma-dialectical rules for rational discussions, if they violate Gricean principles, the mediator has no obligation, indeed no right, to intervene. Now this sounds much like the traditional view of rhetorical practice, as least as advocated by Gorgias. If rhetoric focuses only on persuasion of a particular audience of a particular position, then mediation in this satisfaction model seems to be even a better representative of it than traditional adjudication. The informality of mediation, the free form of its processes, the focus on the individual case, all suggest that the "universal audience" of Perelman is not involved in any way. The mediator's "art" in this model is to continually refocus the movement of the negotiations in the direction of an identified common ground. One can readily imagine a mediator actively employing techniques that violate rules of logic or rational discussions, in order to facilitate an agreement. And here I just want to raise yesterday's keynote discussion and ask whether system design can cope with it? An agreement warranted by fallacious reasoning is better than no agreement at all!

Contrasted to this, I want to suggest, is the *transformation story* of mediation, which has very different

implications. The following is Bush and Folger's description of transformational mediation.

> The unique promise of mediation lies in its capacity to transform the character of both individual disputants and society as a whole. Because of its informality and consensuality, mediation can allow parties to define problems and goals in their own terms, thus validating the importance of those problems and goals in the parties' lives. Further, mediation can support the parties' exercise of self-determination in deciding how, or even whether, to settle a dispute, and it can help the parties mobilize their own resources to address problems and achieve their goals. The mediation movement has (at least to some extent) employed these capabilities of the process to help disputing parties strengthen their own capacity to handle adverse circumstances of all kinds, not only in the immediate case, but in future situations. Participants in mediation have gained a greater sense of self-respect, self-reliance, and self-confidence. This has been called the *empowerment* dimension of the mediation process.
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> In addition, the private, nonjudgmental character of mediation can provide disputants a nonthreatening opportunity to explain and humanize themselves to one another. In this setting, and with mediators who are skilled at enhancing interpersonal communication, parties often discover that they can feel and express some degree of understanding and concern for one another despite their disagreement. The movement has (again, to some extent) used this dimension of the process to help individuals strengthen their inherent capacity for relating with concern to the problems of others. Mediation has thus engendered, even between parties who start out as fierce adversaries, acknowledgment and concern for each other as human beings. This has been call the *recognition* dimension of mediation.[15]

Now clearly we are not talking about a traditional rhetorical environment, at least in the sophistic sense. Yet we are also not within a judicial space that imposes rational procedures and decisions on parties, then seeks to secure their acceptance through the rhetorical device of the judicial reasons for judgment. The fascinating aspect of the development of mediation as an emergent profession in Ontario, at this point in time, is the possibility of participating in the development of its paradigm. Bush and Folger provide a practical opening for those who work in the fields of argumentation, informal logic, etc. The same disputes that would have routinely appeared before a court are now going to be subject to a process that can be governed by the values that the transformational model espouses. Now in addition to the jurisprudential aspects of all of this there are the argumentative ones. Though judges have made some progress in adapting the legal process to better standards of reasoning, the law is still a process based on the imposition of a result. Judges must take on an argumentative role in the legal system, as they must convince others of the value in their decisions, whether these "others" are viewed as the parties, lawyers or other judges. The "artificial reason" of the law has to be translated into the vernacular at some point! But if formal logic is abstract and beyond the ken of many in our world who have not learned how to "calculate" with it, informal logic has much broader public appeal.

If ordinary people in our society can be educated to reason critically with each other, then as Bush and Folger suggest, we may well have much less need for professionals, i.e. judges, to adjudicate conflicts. In some ways the potential gift of transformational mediation is would be the delegalization of our society. No longer would we need to complain about judges invading every aspect of our lives, as we would no longer need to "bring" most of our disputes to the courts. It is an interesting question as to why the informed public has accepted the imperialism

of the judiciary so easily? Is it really that we believe in the "legal rights" based society, the authority of the Charter of Rights & Freedoms?16 Or, could it be that acquiescence in the rise of judicial power is also connected with a sense of lack of appropriate critical abilities on the parts of disputants? Is it enough to have professional surrogates, i.e. lawyers, possess these critical abilities, or should everyone be encouraged to develop them? Or is it enough to build them into the procedures of the dispute resolution system? This is, if you think about it, the argument between Lord Coke and King James I reprised. This time however the King wins!

Though I have been rambling around many issues here, let me conclude by trying to articulate the essence of the intersection between the advent of mediation in Ontario and the argumentation-rhetoric debate. Though there is a lot more to the distinction between argument and rhetoric than I have offered here, and this has clearly been the theme of this conference, I suggest that a rhetorically informed field of argument, much like what White refers to as "constitutive rhetoric"17 is something that the contemporary legal system is striving toward embracing. Yet, the litigation system is, by definition, incapable of shedding its judgmental aspects. The parties to litigation merely "advocate" positions, as we know from lawyers, without anything more than abstract formal acceptance of those positions as their own. The only standpoints available for advocacy are those which the judiciary will accept. Thus, the conflict between the parties must be first transformed into a "legal dispute" before it can be processed in a court. But very often, if not almost always, the conflict between the parties has precious little to do with the formal categories of law. Parties to a commercial dispute, for instance, are frequently alarmed when they are told by their lawyers that their dispute is "actually" about an obscure aspect of the doctrine of consideration, not about dependability of service, or trade customs and expectations.

It is little wonder that neither party is usually satisfied with the decision of a court. Even if one side "wins", current statistics in Ontario suggest that it costs roughly $37,000 per party in legal fees to litigate a dispute where $50,000 is at stake. Winning simply costs too much in the courts, both financially and emotionally for most people.

So one solution to the problem may lie in empowering litigants, i.e. potentially everyone in society, to conduct rational argument and negotiation themselves, assisted as needed by advisers such as lawyers, accountants, etc. But the success of mediation will be predicated upon the ability of parties to achieve settlements of integrity. Though winning through deception and bluff are well known aspects of litigation lawyering, one has to question whether parties are well served by a process that denies them access to important data, or encourages them to generalize beyond the available facts, or to be seduced by fallacious reasoning. *Ad Baculum* and *Ad Hominem* flourish in dispute resolution. What I am arguing for is a conception of the role of a mediator as a kind of critical thinking coach. In this model, I suggest that mediation is perhaps more adaptable to becoming a culture of argument than is the law. I will end with a quotation from a wonderful book on conflict resolution, *The Heart of Conflict*, by Brian Muldoon. "Conflict resolution is essentially a process of bringing a submerged issue out of the darkened waters and up to the surface where it can be seen. Once exposed to the light, conflict can be a powerful teacher. It tells us what we don't want to hear but need to know."18 I can't personally think of a better description of the goals of our field.

Notes

1. Although I am aware that there are people trained in the European Civil Law Tradition among us, my comments today only refer to the Common Law System.

2. I presume that everyone has heard of "OJ". For those who are not familiar with the others in this cast of characters: Paul Bernardo & Karla Homolka are a couple who have been convicted of murdering two young women while sexually torturing them, very close in proximity to where we are today; Clifford Olsen is a child murderer of some notoriety in Canada, who is currently the subject of hot controversy, as he is being granted the opportunity to ask for early release on parole from his life sentence, due to some provisions in the Canadian Criminal Code, which provide for such a "last chance" after he has served 15 years of his sentence. These provisions have recently been changed, but Olsen's case ripened before the amendments were passed.

3. Basically, I am shelving, for today anyway, the whole debate surrounding the critiques associated with legal realism and the various forms of critical legal studies. However I can't resist putting anyone interested onto Duncan Kennedy's new book, *Critique of Adjudication*, 1997, Harvard University Press. Some great stuff to reflect on!

4. Gaskins, R., *Burdens of Proof in Modern Discourse*, 1992, Yale University Press, p. 50 ff.

5. He argues that the primary argumentative strategy of legal reasoning is the incessant, institutionalized, use of the argument from ignorance.

6. James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law,* 1985, University of Wisconsin Press, especially pp. 35-37.

7. *Civil Justice Review: Supplemental and Final Report*, Ministry of the Attorney General of Ontario, November, 1996, especially pp. 50-82.

8. This abstracts from the paradoxical nature that some find in the concept of "mandatory mediation".

9. Suffice it to say that the legal profession, faced with the de-monopolization of many traditional legal services over the last decade or so, has made serious attempts to "regulate", i.e. control the practice of mediation, based on the argument that lawyers are the best qualified to do this work and safeguard the public while doing it. It seems safe to assume that this hegemonic move by the Law Society of Upper Canada will not succeed.

10. Here I am talking primarily about "informal" rather than formal logic. Although, the formalists are hard to kill off. See for a recent instance: P. Kannan, "Symbolic Logic in Judicial Interpretation", 27 *University of Memphis Law Review* (1996), pp. 85-112.

11. In some cases in the common law the Jury bears the responsibility for decisions on some aspects of the case being tried, so "judge" should be read herein as including "jury" when applicable.

12. Now there are certain forms of labour mediation that call upon the mediator to propose a solution to the dispute if the parties cannot agree on one after an appropriate effort. In fact, the "mediator" is really acting as an "arbitrator" in such circumstances and this practice has come to me known as med-arb. In it the third party starts out mediating and then, when no solution is forthcoming, the mediator changes hats and acts as an arbitrator, rather than sending the dispute back to the courts. It has expanded recently in areas such as

custody of children after marital breakdown.

13. See: R.A.B. Bush, and J. Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition*, 1994, Jossey-Bass. Pp. 15-32.
14. P. 130.
15. Ibid, p. 21.
16. The Charter is Canada's constitutional rights legislation. For a very interesting view of the role of "rights talk" in western society see M. Glendon, *Rights Talk,* 1991, Free Press.
17. White, Op. Cit. p. 37.
18. B. Muldoon, *The Heart of Conflict,* 1996, G.P. Putnam, p. 30.

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