Reflections on "Whose Justice, Which Rationality?" by Alasdair MacIntyre 2/12/05

This book helps to address some of the key issues in considering the relationship between mediation and the law:

- What values do mediators bring to their activity?
- Where do these values come from?
- Are they universal or situated in a particular society at a particular time?
- Is it our job to ensure that settlements are just? If not, whose responsibility is it?
- If we are expected to bear some responsibility for this, is it procedural or substantive justice?
- How do we evaluate competing approaches to justice e.g. between children's rights and father's rights, between rights and welfare? To which system of thought can mediators appeal?

Chapter 17: 'Liberalism Transformed into a Tradition' traces the development of individualism and individual preference as guiding norms for action. MacIntyre says,

> *"in the liberal public realm, individuals understand each other and themselves as each possessing his or her own ordered schedule of preferences…….[and] has first to ask him or herself the question: What are my wants? And how are they ordered?[1]"*

He contrasts this with Aristotle or even Hume's schemes of thought and describes a moment of cultural change which involved,

> *"coming to understand the arenas of public choice, not as places of debate, either in terms of one dominant conception of the human good or between rival and conflicting conceptions of that good, but as places where bargaining between individuals, each with their own preferences, is conducted."*

If this is accurate, then mediation as I was taught it is the child of this cultural change. For it assumes that individual preference, given a free and rational expression in a procedurally fair setting, will produce 'good' results. In other words mediation assumes the liberal individualist ideology prevalent in the western world.

The thing that really caught my eye was the way MacIntyre characterises the function of the justice system within liberal individualism. He claims that it has to be egalitarian for, *"The goods about which it is egalitarian in this way are those which, it is presumed, everyone values: freedom to express and to implement preferences and a share in the means to make that implementation effective.[2]"* He goes on to propose that debate about the precise content of justice within liberal individualism must be inconclusive,

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[1] p. 338
[2] p. 344

because its function is not to arrive at a conclusion but to underpin the value system itself:

> *"The function of that system is to enforce an order in which conflict resolution takes place without invoking any overall theory of human good."*[3]

And finally

> *"the mark of a liberal order is to refer its conflicts, for their resolution, not to those* [philosophical] *debates but to the verdicts of its legal system. The lawyers, not the philosophers, are the clergy of liberalism.*[4]*"*

So, where does that leave mediators? In the business of conflict resolution, for sure, but according to which set of principles? It seems from some of our reading[5] that certain mediation theorists are questioning the effectiveness of personal preference in producing good or right outcomes. In particular Bernie Mayer's concept of 'conflict engagement' rather than conflict resolution implies that the mediator is bringing something more than neutrality to the table. But what? And what right does a 3rd party have to bring anything to someone else's conflict?

Furthermore, if lawyers are the clergy of liberalism, what are mediators? The prophets? A nuisance? Or simply 'lawyers light'? This debate explains the discomfort some lawyers have with mediated agreements, scrutinising them for conformity to legal norms, even thought their clients have freely chosen an outcome at variance with those norms. Is it conceivable that in mediation we are doing more than simply offering a space for people to negotiate? Perhaps we are threatening the established order of liberalism in two ways:

1) By undermining the exclusive power of lawyers to interpret legal norms and apply them to practical situations
2) More fundamentally, by setting up an order in which some overall theory of human good <u>is</u> invoked in the resolution of conflict[6]

(OR, as MacIntyre might say, are we facilitating the application of liberal individualism to justice itself, by allowing personal preference to be the guiding principal in decision-making?)

The challenge for mediators, then, is to be clear about whether we have an overall theory of human good and, if we do, to articulate it comprehensibly and openly to our clients. We may then be able to go even further than Bush and Folger in stating that the

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[3] c/f Sandel, M (1982) <u>Liberalism and the Limits of Justice</u> Cambridge: Cambridge University Press p.116: *'a central principle of deontological liberalism is to derive a set of regulative principles that do not presuppose any particular conception of the good, not depend on any particular theory of human motivation.'*

[4] P. 344

[5] Bernie Mayer in "Beyond Neutrality", Bowling and Hoffman in "Bringing Peace into the Room"

[6] Bush, R & Folger, J <u>The Promise of Mediation</u> (2nd Edition) (2005) San Francisco: Jossey Bass. See page 45 'A Transformative Theory of Conflict' for an example of a theory where the resolution of conflict contributes to a 'better society'

true promise of mediation is as a 'practical laboratory of philosophy' – handing back to people the power to draw and re-draw their moral map and work out what is the human good, situation by situation[7], in territory that the law struggles to reach.

[7] Those reared in the common law will also recognise the threat to the idea of precedent in this vision