Giovanni Cosi, Università di Siena

LAWYERS AND MEDIATION: AN ALTERNATIVE FOR THE PROFESSION

Fifty four years ago, Lon Fuller described the widespread misunderstanding of the lawyer's true competence and function in modern societies in these words: "The lawyer drafts treaties, settlements, contracts. Each of them shapes human relations. The lawyer is devoted to study these shapes and to disclose, by theoretical analysis and practical experience, the consequences that may derive. Surely, this is the most creative aspect of his work. We may expect a great concern of the philosophy of law in this aspect of the professional life. On the contrary, we find that it is almost ignored"[1].

Half a century later, the typical litigational concept of the lawyer's competence continues to falsifie and distort the services that lawyers may actually render in our societies. As John Austin has put it, the lawyer is a professional who "makes things with words": when drafting a contract, for example, he chooses the words to put on the paper so that his client's interests will be protected if things should later come to a lawsuit. There is no question that the competent lawyer renders this service, but it is a mistake and a reduction of the lawyer's concern, to conceive his competence exhausted in battening down the hatches against possible future litigation. The chief job of a lawyer, as a jurist, should consist instead in devising a framework of dealings that will function between the parties, that will produce the results desired, and that will not give rise to disputes: an eco-nomical and eu-nomical agreement.

This function of the lawyer is that of an *expert in structure*, one who is called in to design a formal structure into which the parties' respective interests can be accomodated fairly, comfortably and safely. In performing this service, the lawyer exercises a function analogous to that of the author of a constitution: one who is charged with the responsibility of organizing and setting up a governmental power; the architect of a charter that will govern the parties' future dealings and relations. The structure of which he/she is an expert, is the *law*; and law is mainly a device of the organization of social relationships. Thus the lawyer is (or should be) principally an architect of charters, an expert in the structuring of social relations.

[1] L. L. FULLER,"American Legal Philosophy at Mid-century", *Journal of Legal Education* 6 (1954): 476.

Pathologist or pathologic?

The idea of the lawyer as an expert in the structure of social relationships radically clashes with the litigational concept of his competence which reduces the lawyer mostly to a *pathologist*.

Historically, this reductionism is above all a consequence of the modern codifications and of the trend to identify the right with the law, with the norm issued from the state power: the legal formalism. In past ages, in Rome, under the so called 'common law' that preceded the codifications, the lawyer often was a *jurist* in the full sense. He was the main inventor and maker of the 'law in action': it is enough to recall the medieval *consilium sapientis*[2].

Today the lawyer's role, particularly in the 'civil law' systems, is much less creative. When the law and the standards of its enforcement are all state-made, the lawyer's function unavoidably comes down to intermediate requests in a preconceived logic and language. He becomes a *technician*; he is no more an *engineer*. If we assume that the real jurist is the researcher of the 'best possible' right – where 'best' means based on a critically assumed value judgment, and 'possible' means enforceable in the near future – then the lawyer-as-we-know-it is not a jurist: he doesn't look for the *best* right, but only for the right most *useful* to his client. In a legalistic system the 'full jurist' is made, often unintentionally, by the two opposing lawyers together with a neutral third, the judge, who takes the decision. Thus the lawyer, in the litigational conception, is a *half jurist*; his professional role finds itself in a kind of middle-world between the client's 'lay' world, with its interests and claims, and the 'sacred' world of the judge, with its rituals and rules, a position which often makes him disliked by both. The lawyer's ethics reflect this 'split' situation: the lawyer should be at the same time *zealous* with his client, *candid* with the judge, and *fair* with his colleagues. This 'trilemma'[3] in part explains why the legal profession today lives an identity crisis.

It was stated that the common conception of the lawyer's role is above all that of a pathologist: his competence is devoted to a *conflict*; to avoid it or to manage it. Not only is this a reductive conception of the lawyer's competence, but contemporary societies express a set of values which fosters in fact the evolution of the patologist in a further patologic phenomenon: our societies do not suitably reward, neither by prestige nor by pay, the 'generics' of prevention (taking teachers here as an example), whereas they reward, and often generously, the pathology 'specialists'; this inevitably happens, because to intervene in a crisis in progress is usually more expensive than to prevent it, and requires highly qualified and different technical competences. Thus a context grows up where 'therapy' systematically prevails over 'prevention', where pathological situations, professional specialized interventions and their related social costs, simultaneously and mutually increase.

This phenomenon is mostly evident in the case of the legal profession. The very

---

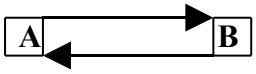
[2] See L. LOMBARDI, *Saggio sul diritto giurisprudenziale*, Padova : CEDAM, 1967.

[3] M.H. FREEDMAN, *Lawyers' Ethics in an Adversary System*,Indianapolis (Ind.) : Bobbs-Merrill, 1975.

manner in which the conflict arises, shows a trend more towards exacerbating rather than reducing the dispute. First of all, direct interpersonal communication breaks off: one party stops the other from speaking and, in order to avoid resorting to violence, they recruit the experts for 'formal' communication; this essentially translates as "I'm calling my lawyer" or "I'll be hearing from my lawyer". But, even under such premises, the lawyers will not speak to each other: they'll *write*; and finally, referring to each other in the third person, they'll apply to a neutral third provided with decisional power. The lawyer's language too, contaminated by pathology, may not be onto-centred and able to restore a real communication. Unavoidably, it is a self-centred language: it may not address a direct interlocutor in order to persuade him and to find together a solution; until proof to the contrary, it presumes and describes the other stiff in the will to pursue at any rate only its own interests. In short, it seems difficult to deny that lawyers' role in the conflict is not so oriented to take care of the relations between the parties – therefore to make up with juridical means for a failure of social communication – rather than get any possible consequences from that presumed failure: just in this sense the professional pathologist becomes he himself a pathological phenomenon.

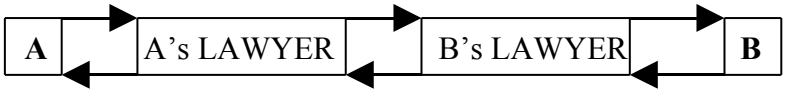
We can better understand the reasons for which the lawyer's role turns into a pathological one, envisaging the following three simple schemes of conflict management:

1) Direct negotiation



2) Negotiation with a mediator

3) Negotiation with representatives

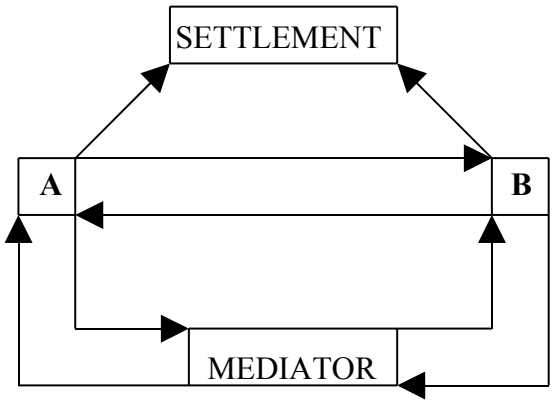


In scheme 1 we have the 'normal' pattern of a negotiation: the parts manage their conflict in an autonomous and informal manner; they have complete control over the procedure and its issues. The negotiation may be 'interest-based' or 'position-based'[44]; obviously, success is not assured.

Scheme 2 shows a more complex situation. Many misunderstandings and retaliations, sometimes violence, may have so marked past relations between the parts that a direct communication is no longer possible. Nevertheless, they *must* negotiate. This situation occurs in some international relationships. In this case the parts appoint a mediator, agreeable to both, as a spokesman of respective demands. If the mediator

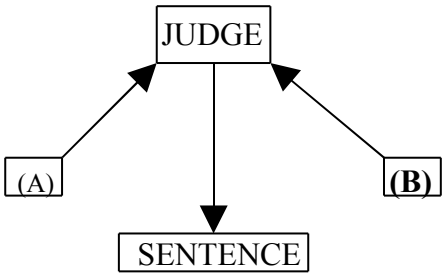
[44] The first kind of negotiation never loses touch with real interest that underlies the conflict: it doesn't stop at the exhibited rights or pretentions; it want to reach the true causes. The second is only a bargain between opposite pretentions: its issue may only be a compromise or a transaction, in which both parts renounce something. See, for example, the 'classic' R. FISHER, W. URY, *Getting to Yes*, New York: Houghton Mifflin Company, 1981.

succeeds in restoring the communication, scheme 2 may evolve into the following one:



This is the standard scheme of a mediation process. It also works very well in private relationships: we may describe it as a kind of 'assisted negotiation'.
In this new situation, the mediator withdraws to the role of a communication guardian. The parts may think that the settlement is a result of their own wills alone, and will thus be more induced to respecting it. This 'deception' will better preserve their future relationships.

The last example, scheme 3, represents a conflict managed by lawyers. As we can see, it is a very complex situation: A speaks to his lawyer, which speaks (or better, writes) to B's lawyer, which speaks to B; and vice versa. This kind of conflict management is slow, expensive and often out of proportion to the actual value of the conflict. Moreover, a communication that involves four mouths and four pairs of ears, each of them with a partisan view of the problem, increases the background noise and the lack of understanding. It is so very likely that scheme 3 may degenerate into the following:



This is the format of the 'standard' decisional system in our societies. The parts (or better, their representatives) acknowledge the breakdown of communication and appoint a neutral third: the judge. This is another pathologist provided with decisional power.
His normal 'product' is a sentence that defines a winner and a loser.

Parties A and B are shown within parentheses because at this phase of the conflict their presence becomes quite unnecessary: the leading role is now played by the pathologists, two lawyers and a judge, who debate the question in technical terms. The procedure is formal and heteronomous; and the sentence is out of the parties' control.

From the first to the last of the 3 situations described above, we can see how the social costs increase and the parties' control over the conflict decreases. In the last example, the lawyer is especially responsible for the pathological degeneration of the conflict: what a lawyer counsels to his client defines the future of the conflict. The main question then is: can a lawyer be a mediator and act as a jurist of prevention?

An alternative management of the conflict.

The pathological shift of the lawyer's competence is a direct consequence of the way of conceiving *conflict* in our societies. Our societies are not able to coexist with conflict: they perceive it as only a pathological event, as a trouble to remove or as a problem to face in a solely technical manner, by persons with professional skill within a formal context: the process-judgment, for example. All modern societies exhibit such a tendency: they are affected by a sort of widespread 'lack of imagination' and consider judgment, the decision imposed by an external power, as the main (if not the sole) useful manner of conflict solution.

A first step towards a different conception of the lawyer's competence may be to envisage the conflict not as a pathologic social event, as a disease to treat or to eliminate, but rather as a *physiologic* phenomenon; sometimes, quite positive. If deprived of its prejudicial negative feature, after all a conflict is often only a debate between different theses/hypotheses and opinions about a problem. We could view it as a chance for comparison, surely for contrast too, but not necessarily as a relentless clash which cuts out *a priori* any communication and transforms the adversary into an enemy that must be eliminated (according to the victory/defeat pattern typical of the trial). However, from a banal reflection on conflict in terms of 'social darwinism' clears up that it is essential to progress itself: a society without conflict is inevitably static; moreover we had better to be wary of societies that seemingly don't show any conflict. What really matters is not *that* conflict exists, but *how* it is managed.

It is obvious that a bad handling of conflict can deeply undermine a society. But the 'bad' is just in the handling, and not in the conflict as such. The conflict is only a *fact*, an event, a neutral phenomenon: our judgment qualifies it as 'useful' or 'useless', 'positive' or 'negative', and so on. It depends entirely on us as to how to consider it. We have confined ourselves to a single choice so far, believing that it is the only possible.

Furthermore, in a society where individuals often share only their contingent conflict, this should be understood also as a chance for communication that is sometimes able to produce new and unexpected opportunities for both parties, if well managed.

Mediation may be a way to a physiologic conduct of the conflict, and a way to recover the lawyer as 'expert in structure' and full jurist. As mentioned, mediation is a process where a neutral third, the mediator, assists the parties in searching for a reciprocally favourable solution to their conflict. The mediator should be an *instructed third*. Third, because he has no decisional *power* over the conflict, but only that *authority* which derives from his communicative competence. Instructed, because he must know not only *how* to mediate, but also *what* he is mediating.

As a matter of fact, the mediator is usually an expert in dispute resolution who knows conflict dynamics above all from a psychological point of view: more a communication psychologist than a technical specialist. But 'mediators' also include the lawyer and the judge, when trying to suggest reference points useful to a settlement[5].

[5] G. COSI, *La responsabilità del giurista. Etica e professione legale*, Torino: Giappichelli 1998, 328 .

Mediation trainers often have no faith in professional jurists as neutral peacemakers: they prefer a psychologist with some juridical knowledge, rather than a jurist with some knowledge of psychology. And there may be something in this way of thinking: in our societies the activity of law professionals is in fact more a pathologic-conflictual than a preventive-relational one; and their training too, if doesn't confirm this conception, surely does nothing to criticize it.

And yet, the law as such may be conceived and used also as an objectifying instrument of communication, as a means fit for shifting the attention of the parts in conflict from an exclusive perception of their own positions to an inclusive reflection on their common problem. Not only that, but even in a 'strict' legal system such as the italian, it is the professional jurist that should have mostly the knowledge needed to 'give form to informal'; to hope for acknowledgment and legitimization.

Obviously every jurist may pick up such a suggestion from now on; and so become a mediation jurist. But in order to realize this idea on a large scale, a deep reassessment, in methods and contents, of the whole training of the jurist is required, and not only at the university level. We should be able to *educate* women and men who want to become law operators, to be jurists which look not only 'back' to the faults and guilts, but also 'forward' to the interests and relations.

Siena, February 2008

GIOVANNI COSI is professor of Sociology of Law in the Faculty of Law of Siena University.

Besides several essays on scientific journals and contributions to collectives studies, he published the following volumes: "La liberazione artificiale", Milano 1979; "Saggio sulla disobbedienza civile", Milano 1984; "Il giurista perduto", Firenze 1987; "Il sacro e il giusto", Milano 1990; "Il Logos del diritto", Torino 1993; "La responsabilità del giurista", Torino 1998; "Invece di giudicare", Milano 2007. In 2001 he published two books of didactic materials: "Società, diritto, culture" and "La professione legale tra patologia e prevenzione".

In the Dipartimento di Scienze Giuridiche of Sassari University he managed a research team on mediation and alternative dispute resolution systems and edited the volume "Lo spazio della mediazione: conflitto di diritti e confronto di interessi", Milano 2003. In the last years, his main interests concern professional ethics and the forms of conflict resolution in traditional and modern societies.

Since 1999 he teaches in basic and advanced training courses for conciliators.

From 2003 to 2007 he was the manager of the 6 editions of the Master in "Procedure stragiudiziali di soluzione delle controversie", organized by the Faculty of Law of Siena University with the Chambers of Commerce of Arezzo and Grosseto. Now is the manager of the Master in "Gestione alternativa dei conflitti e sistemi di regolazione dei mercati", organized by the Faculty of Law of Siena University with the Camber of Commerce of Grosseto. He takes part in the teaching body of the PhD school in "Jus Publicum Europaeum" of Siena University.