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Forms and Social Settings of Dispute Settlement.

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FORMS AND SOCIAL SETTINGS OF DISPUTE
SETTLEMENT

W. L. F. Felstiner

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Forms and Social Settings of Dispute Settlement

Introduction

Who helps settle other people's disputes?

In India there are government courts, industrial tribunals, village councils, caste panchayats, village headmen, dominant landlords, businessmen's associations, the President of India and a grab bag full of others. In the United States we have data on the government system and special panels for particular social groups. That is, we know something about the courts, the police (including their family crisis intervention units), administrative agencies, the arbitration association, Commissioners Kuhn and Rozelle, automobile industry umpires, better business bureaus, shopping center managers, labor arbitrators, canon courts, university disciplinary tribunals, marriage counselors and we know that something unofficial goes on in at least a few ethnic communities. Despite a blank in the literature there may be much more.

This paper is an attempt to develop some preliminary insights into the forms and settings of varieties of dispute settlement from non-Indian information. A later version will broaden the base of these propositions and will attempt to test them against Indian materials. Dispute settlement is studied when it appears within legal systems. Dispute and legal system are defined in succeeding paragraphs. Dispute settlement as a process is simply

the disposition of disputes. The purpose of the study is to see how far current learning can be pushed in explanation of the effects which forms of dispute settlement have upon each other and the extent to which various forms appear to be determined by the social environment in which they exist.

A dispute is defined as a disagreement between two or more people who have, singly or in concert, agreed that the disagreement should, at least in the short term, be mediated or its outcome determined by a third party or series of third parties or, without agreeing, are forced to participate in such mediation or outcome determination. Third parties are persons who are not asserting claims or resisting the assertion of claims or acting as the agent of such a party.

Richard Abel, perhaps allowing for the work of P.H. Gulliver with the Arusha and Ndendeuli of Tanzania, sets out a model of dispute settlement in which the dispute settler, the third party of my definition, "may be absent"; that is, I assume, may not in a particular society appear with any frequency. Although he does not define "dispute settler", presumably he includes not only the adjudicator familiar to state systems but the full range of lesser third party participants characterized by Jerome Alan Cohen as running from "errand boy" to the mediator "who specifically recommends the terms of a reasonable settlement." Any radically different definition would eliminate an important share of the world's legal business and especially of the more traditional portion of it in

which Abel is interested.

Of course disagreements between people are everywhere and continuously resolved without third parties. Whatever kind of process such conflict resolution may be, my thesis is that it is not profitable to discuss it at the same time as one analyzes dispute settlement within legal systems which do involve some third party role. Abel's own paper, I think, confirms such an inclination. Abel analyzes dispute settlement in terms of role differentiation. The role he examines most closely is that of dispute settler. Not only is his "guiding hypothesis . . . that the process will vary with the degree to which, and the way in which, the role of dispute settler has become differentiated", but he considers the ultimate question in this pocket of legal sociology to be "whether differentiation of the role of dispute settler is related to that of other functionally specialized roles, or to the degree of role differentiation in the society at large."

Contradictions in Gulliver's work have, I think, unnecessarily complicated the third party question. Many disputes which Gulliver reports involve third parties as mediators. Indeed, without participants beyond the disputants and their advocates there is hardly a dispute:

"I suggest that no dispute exists unless and until the right claimant, or someone on his behalf, actively raises the initial disagreement from the level of dyadic argument into the public arena" (Gulliver 1969:14).

As Sally Moore has pointed out, Gulliver, when propounding general theory, does not rigidly insist upon an adjudicatory -- negotiation dichotomy: political dispute settlement is a polar extreme, a heuristic and exploratory theoretical model. Considering his data, it is well that Gulliver does not make any greater claims. His reports of the Arusha as well as of the Ndendeuli are laced with examples of "supporters" acting as mediators, frequently because they were unpersuaded of the merits of the claims of the party to whom they were formally allied.* The issue is confused when Gulliver extrapolates from Arushan cases into general Arushan behavior. In summarizing the process of the

*In case 3, the plaintiff was "compelled to accept less than his rights because of the appeals of his age-mates;"

In case 8, the defendant's "age-group spokesmen fairly readily acceded to his guilt, and concentrated on urging a light compensation;"

In case 11, "a private meeting of the defendant and some of his age-mates . . . made it obvious that they believed him guilty and would only support him further if he confessed and allowed discussion of compensation to go forward."

In a discussion of lineages and jural processes Gulliver notes "uncommitted members of the single olwashe may be able to act as friendly conciliators . . . if the conflict cannot be settled . . . counselors and notables of the related lineages are most likely to be invited to intervene, and they are accepted as neutral but friendly . . . such friendly neutrals are in a position that they can insist on conciliation." He emphasizes that conciliators have no power of coercion (Gulliver 1963: 136-38).

Gulliver's analysis of the Ndendeuli recognizes the presence, even the necessity, of third parties. In all five cases he reports in Dispute Settlement Without Courts someone mediated the dispute. In all but two of seventeen cases for which he was able to make a satisfactory record, mediators were involved.

Arusha in his paper on the Ndendeuli, Gulliver asserts that the powerful men recruited as advocates by parties to a dispute are "in no way third parties." In the Arusha monograph he again asserts that these leaders "are in no way able . . . to take a neutral or judicial stand." The problem may be further confused by Gulliver's tendency to limit dispute settlement to dichotomous possibilities -- with or without an adjudicator -- without considering that the presence or absence of a mediator in a non-adjudicator situation is a matter of considerable importance. Gulliver recites that the Ndendeuli regularly use mediators. Yet in a Ndendeuli moot "there is . . . no third party, **no adjudicator**" (Gulliver 1969:66).

Gulliver, like almost all anthropologists now studying law, owes a methodological debt to Llewellyn and Hoebel. Indeed their notion of perceiving legal institutions in authoritative procedures and standards as well as in persons* is the starting place for his typological construction (Gulliver 1963:296). It may be relevant then to note the important part that third parties seemed to play in Cheyenne dispute settlement in the face of the role which their biographers give to self-executing pro-

*Aubert apparently would not agree with the Llewellyn and Hoebel formulation. "In the institutionalized intervention of some third party in the dispute . . . lies the embryo of the legal phenomena" (Aubert 1963a:34).

cedures and standards.*

Llewellyn and Hoebel were first drawn to study of the Cheyenne because they were known to have an explicit and self-conscious political structure (see Twining 1968:166). Functionaries of that political structure -- soldier societies, soldier society chiefs, tribal chiefs and the Council of 44 -- frequently played third party roles in disputes. The most common crisis analyzed by Llewellyn and Hoebel in the 54 "trouble cases" is that occasioned by murder. Nine cases report on twelve murders. In eight of the nine there was some third party intervention. Going beyond murders, Llewellyn and Hoebel note third party intervention on nineteen of twenty-one possible occasions in non-intra-family controversies. As with the Arusha, an important facet of Cheyenne third party intervention was its irregularity, its non-institutionalization. In the eight instances of third party action in murder cases, seven different third parties became involved -- the soldier societies at the invitation of the chiefs; the chiefs, soldier chiefs and all the warriors; the soldier chiefs at the invitation of the Council; two chiefs; the soldiers; the chiefs; and "the public".

*Barkun's "implicit mediation" where "the system itself becomes the third person" sounds like Llewellyn and Hoebel's procedures and standards. He offers no examples. As a consequence it is not possible to determine whether implicit mediation is a full substitute for third party participation, which I doubt, or is rather a way some disputes are settled (see Barkun 1964:126-27).

To note the small role left to procedures and standards in Cheyenne non-family disputes or what is either Gulliver's insensitivity to obvious role changes -- from advocate, to mediator, back to advocate -- or his insensitivity to the power of mediation may exhibit overconcern on my part with minor inconsistencies.* What is important, however, is that negotiation as a process was unstable with the Arusha and Cheyenne and simply does not seem elsewhere now to surface as the last resort of other societies' conflict reducing arrangements.**

Much of the material on which this stage of this paper has been based is about East Africa. The literature of legal anthropology indicates, especially by omission, that the police role in dispute settlement in East Africa is marginal, at least up country. In many other societies, certainly in India, the

*The reader may be reminded of Gluckman's formidable defense of Malinowski's use of the term "civil law" (Gluckman 1965: 238-39). -- "It is . . . a tragedy that many people . . . seem unable to read a whole book in order to assess the total analysis, but seize on, and seek to demolish, isolated statements." It may, however, be an equal tragedy for fieldworkers to overstate their data.

**The dispute case is present in every society. Universally such cases share most of the following components . . . presentation of the grievance (before a remedy agent such as a judge, go-between, lineage head)" (Nader 1965b:24).

Schwartz and Miller's sample of HRAF includes thirteen societies in which there were no "regular use of non-kin third party intervention in dispute settlement" (Schwartz & Miller 1964:164). How many of those societies present patterns of kin intervention and what constitutes intervention is unstated. Schwartz and Miller, moreover, believe that the absence of mediation may be due to an unusually low level of hostility and therefore of occasions for non-kin intervention.

police are major actors in the dispute settlement process. As a consequence, my definition of disputes is designed to include controversies between citizens which involve the police as well as those which do not, It is also constructed to include behavior by citizens which the police consider actionable, even if no one else does. For instance, two citizens quarrel, and one or both or a third person mobilizes the police or the police are self-mobilized. The police either try to mediate the dispute or file a complaint against one or both citizens. At a minimum in this situation there is one dispute: the citizens had a disagreement and agreed (they both called the police) or were forced to accept (someone else called the police) or one of them was forced to accept (the other called the police) that the disagreement should be mediated by the police or resolved by a court. At a maximum there are seven disputes fitting within the definition: between citizen 1 and citizen 2, the police and citizens 1 or 2, the police and citizens 1 and 2, citizen 3 (originally a non-disputing spectator who called the police) and citizens 1 or 2, and citizen 3 and citizens 1 and 2. The point is not to elaborate a contingency tree but to indicate the lines along which police involvement can be comprehended by the definition of dispute.

This definition also covers disputes in which one or all parties primarily seek something other than a resolution, even an advantageous resolution, of the disagreement. Such a phenomenon is thought to be endemic in India (Cohn 1967:154, Kidder, Rudolph & Rudolph 1967:262; see also Gluckman 1955:21-22,79;

Van der Sprenkel 1962:123): litigation and police mobilization are used as skirmishes, or important maneuvers, in economic and political warfare where the expense, inconvenience and disgrace elements of court involvement predominate over concern about the end result of the ostensible dispute, if ever an end result is intended. The definition obviously embraces the behavioral indicia of such controversies. The special motives at work might contaminate propositions which were concerned with outcomes -- in these instances how would one ever know if a dispute were "settled" -- but I think may be avoided here by definition. That is, a disagreement only becomes a dispute when a third party mediator or adjudicator is introduced. When the third party exists other than by virtue of replacement by another third party, there is no longer a dispute, although there may continue to be a disagreement. In a manner of speaking, then, the dispute is "settled" whether the parties originally sought victory, therapy, publicity or the other fellow's bankruptcy.

Even as defined, not all disputes are to be digested, but only those which occur within legal systems. A legal system, for my purposes, is any repetitive arrangement through which groups in societies seek to regulate relationships between individuals and between aggregates of individuals in those groups. By regulating relationships I mean setting boundaries for behavior, legitimating claims against property and policing and altering those boundaries and claims. It may do no more, but confining this paper

to dispute settlement within legal systems at least eliminates the necessity of grappling with ad hoc arrangements or inter-societal conflicts.

I do not, by this definition, mean to draw lines between etiquette, mores, custom and law. Llewellyn and Hoebel ought to have taught us once and for all to avoid analyzing behavior with categories as ambiguous, imprecise and loaded with folk meanings as custom and mores (Llewellyn and Hoebel 1941:275-76).^{*} Take Bohannan's classic attempt to distinguish law and custom (Bohannan 1965:34-37). He states that legal institutions settle disputes and counteract gross abuses of the rules of other social institutions. Custom is the rules of the other social institutions. Law is custom which is enforced by legal institutions. But what about societies without legal institutions as he defines them? Must we now say that in this sense Schwartz's kvutza has no law (except in the pronouncements of the state courts to which virtually no recourse is made)? What of societies in which many social institutions, like law schools and Indian jatis, enforce their own rules or they are not enforced at all. Even if the rule enforcers assume a differentiated role -- they clearly shift

^{*}For evidence that they have not, note Gluckman's confusion in the following passage: "customs, defined in the everyday sense of 'usual practice', though it too has an ethical value, that is ought to be followed" (Gluckman 1955:236).

from legislators to enforcers --they are not a legal institution because they are not policing the rules of other social institutions. What then is custom and what is law? Bohannan explicitly recognizes that it is only "customs, in some societies, [which] are reinstitutionalized." He is content, however, to ignore the limbo in which he has placed all other societies. I do not doubt that his distinctions are useful in analyzing social groups to which they are applicable. They are, however, absurd for investigators working on a broad range of dispute settlement agencies.

The usual carnards -- song contests, resort to the supernatural, duels, feuds, oaths and ordeals -- may be legal systems, or a part of a legal system, as far as I am concerned, although they are the subject of this study only if they involve a third party with the function of mediating or adjudicating disagreements. Nor, following Pospisil, am I concerned with distinguishing regulation recognized by any group other than the regulated as legitimate.

I have used a plastic definition to provoke descriptive generalizations from a wide range of social units out of concern that more precision would unnecessarily constrict the number of relationships which ought to be explored. Schwartz and Black, for instance, have worked on legal and informal control systems, but they define the distinction quite differently. To Schwartz the key to legality is "specialized functionaries who are socially

delegated the task of inter-group control". Or at least specialization is explicitly stated to be the key: sometimes it appears to be the nature of the sanction, rather than its administrator, which characterizes the process. In any event, to Black, who is trying to illuminate the same riddle of the relationship between legal and sublegal control systems, all of the legal systems which Schwartz investigates are sublegal. For Black is definitionally an Austinian; the law is the will of the state and anything less is sublegal. I do not mean to criticize Black, who came second, for not following Schwartz, nor Schwartz for not devising a definition which would inexorably pull the field behind him. I simply explain why I wish to use terms in such a way as to permit the inclusion of a maximum number of the distinctions already explored.

Syntheses of dispute settlement are limited not only by definitional distinctions, but by a reluctance of researchers to press the cross-cultural dimensions of their work. The preponderance of research on dispute settlement has been conducted by anthropologists. Perhaps because of an aversion to being labeled an ethnoanything other than an ethnoscientist; perhaps because of the cumulative criticism of Gluckman's irresistible impulse to discuss Barotse law in Latin maxims and in terms of Anglo-American practice: perhaps determined, or content, to wait for Bohannan's meta-language which will eliminate problems of

vocabulary in analysis; perhaps because of anthropology's classical interest in small communities and because of the field techniques it has developed to study them, legal anthropologists reveal a tendency towards non-cumulation; the range of most investigators is set by the particular materials pulled from their geographically circumscribed investigation.* Nader and Metzger, for instance, ignore Richard Schwartz's work on Israeli agricultural communities, although their Chiapas-Oaxacan comparison seems, at least to me, to support his hypothesis about the relationship between the intensity of social intercourse and the priority of "sublegal" control.

Fewer still are the efforts to produce even descriptive generalizations from the many village or tribal dispute settlement studies now available. If I exaggerate, I surely do not exaggerate by much. In addition to Hoebel's analysis of five primitive societies, there is little beyond Gluckman and Gluckman

*Such comment is hardly original. Moore, for instance, has noted "that unless the anthropologist conceives his research . . . in terms of comparative work, there is the risk . . . that the discipline will never advance, but endlessly naive, will forever re-tread the same paths" (Moore 1969:340). Presumably the Berkeley Comparative Village Law Project was designed to facilitate theoretical understanding of dispute settlement across cultures. Unfortunately, I have not found reports of its research strategy or results. In this vein, Nader's observation that recent cross-cultural law studies have been written by social scientists who were not anthropologists is provocative (Nader 1965b:12).

I have difficulty understanding Cochrane's complaint that legal anthropology has been obsessed with comparative work. Certainly his discussion, which is a diatribe against anthropologists for not knowing enough law, especially Anglo-American law, coupled to a rehash of familiar problems in defining law, does not illuminate that obsession (see Cochrane 1971:88).

when he is most self-consciously comparative, such as in the chapter titled "Some Comparative Implications in the Lozi Judicial Process" in his first book on the Barotse, is, as Bohannan has pointed out, interdisciplinary rather than cross-cultural: that is, he investigates problems of Anglo-American jurisprudence with Lozi ethnography as he had organized Lozi materials with western jurisprudential concepts.

Of course, it may be that recurrent strictures to compare comparables are, and ought to be, heeded. Certainly Schwartz's work on two Israeli agricultural communities is more satisfying, and more useful theoretically, than his and Miller's scaled analysis of fifty-one societies on several continents. On the other hand, when one goes beyond a single society, mechanical adherence to geographical proximity as the touchstone of comparability seems to me to provoke the same methodological problem as the one it is intended to minimize. The comparison of units with many elements in common increases the likelihood that different behavior can be attributed with reasonable confidence to the single, or limited number, of elements which they do not share. The trick is to identify the common elements which are important in the light of the particular comparison to be made. When one is studying dispute settlement those elements are not necessarily, or even likely, to have an areal base. The number of cultural groups, cohesion within groups, propensities to factional organization, the

degree of social stratification, the scarcity of resources and the organization of a state apparatus, for instance, seem to me to be more probative than the commonality implicit in geographical proximity. As a consequence the propositions with which this paper is concerned are drawn from a set of societies in different parts of the world in the expectation that whatever the comparability of their economic systems, child rearing techniques or what have you, it is methodologically tolerable to compare the forms and settings of their dispute settlement.*

The notion of groups in societies which is explicit in my definition of a legal system sooner or later becomes crucial because it forces the problem of the unit of analysis; that is, what is the social unit within which forms of dispute settlement

*Nader seems to agree. She suggests that "mechanisms of dispute settlement could profitably be compared" to discover incompatibilities, probabilities and non-connections between social organization and forms of dispute settlement (Nader 1965b:22).

If it is true that the historical division of scientific inquiry into disciplines with particularized mores, training, research methods and subject matter frequently constricts the intellectual reach of their practitioners, it is also true that some timidity in the face of data which one has no training to analyze is warranted. Gluckman may overstate the case when he warns his fellow legal anthropologists to leave to psychologists an explanation of why people conform to codes of law and morality while anthropologists labor only on the social setting of such conformity. Nevertheless, I intend for the most part to follow his lead. This paper will not seek to explain why people use one form of dispute settlement rather than another: it will try to trace the social settings of such choices. Where, however, another investigation ascribes motives I will not necessarily ignore the ascription. See, *e.g.*, Gibbs' notion of the cause of Kpelle use of courts in the discussion of The Proposition.

are to be analyzed and their social correlates investigated. For the first stage of this paper -- the development of propositions about the forms and settings of dispute settlement from the non-Indian literature -- I think that Needham's "familiar taxonomic difficulty of what is to count . . . as a single instance of the rule" can be ignored. The propositions only and not their empirical sources are relevant. Indeed, any particular proposition need not necessarily have an explicit empirical reference, although I would expect those apparently deductive in origin to be ultimately less useful.

The taxonomic difficulty must, of course, be faced when the propositions are tested, in this instance against Indian data. Available materials are predominantly village studies and, in the event, it may be prudent to ignore the rare urban investigations which come to some sort of terms with dispute settlement. The village studies are secondary data: I have collected, not conducted them. As a consequence only limited flexibility to define the relevant unit may exist. Indian villages are, however, to a large measure self-defining. They are not now, and few have been for some time, the self-contained isolates on which anthropologists have habitually worked. In varying degrees, but generally to a significant extent, Indian villages are integrated with the larger community -- socially, economically, administratively, legally, politically and ritually. In fact, an important dimension of this paper is an examination of the elements of that legal in-

tegration. Indian villages are, however, generally physical isolates. Villages are clusters of buildings, mostly dwellings, surrounded by agricultural lands or forest preserves or, occasionally, fronting on large bodies of water. Toward one or another of these resources a predominant form of economic activity is generally directed. Except in the densely settled coastal strip of Kerala, villages do not appear to run together, even along major highways. This supposition tends to be confirmed by the village studies so far identified: all investigate physically discrete settlements.

But if village studies are the prime source of data and a "village" can be defined with requisite precision in terms of its physical isolation, should it be the exclusive unit of analysis. To break villages down into smaller groups representing traditional units of cohesion which are comparable across settlements would be formidable considering the bewildering variety of social organization presented by India's more than 500,000 villages. Even the range of differences in groups appearing in the 100 or so village studies which discuss dispute settlement sufficiently to be used as data for this paper may be difficult to manage. Nevertheless, village as the order of aggregation poses a major problem: it loses too much data. For instance, as will later become apparent, the choice of one agency of dispute settlement rather than another and the form which dispute

settlement assumes may be related to "social cohesion." Different groups within a village have different levels of social cohesion. If the village is the sole unit of analysis, these differences in social cohesion will be lost. Perhaps even more importantly, enough is known of Indian dispute settlement in advance of its systematic analysis that we are aware that a significant proportion goes on at sub-village levels. These levels then, despite their wild variety, demand consideration.

Anthropological definitions of "group" are rare. Perhaps the most comprehensive attempt has been made by Nadel. Nadel characterizes groups as collections of individuals.

(a) "Who stand in regular and relatively permanent relationships, that is who act towards and in respect of each other, or towards and in respect of individuals outside the group, regularly in a specific, predictable, and expected fashion".

(b) Who maintain "some principle of recruitment whereby individuals are made members, that is, are made to assume the implicit rights and obligations".

(c) Who "operate and become visible" through institutionalized and semi-institutionalized modes of action.

(d) Who exhibit an enduring disposition "to coordinate their actions closely towards each other or in respect of each other".

(e) Who maintain an internal order constituted of differential rights and obligations (Nadel 1951:145-76).

Nadel's discussion presumably is designed to facilitate comparison of constituent elements of different groups or full description of particular groups, not to provide an operational definition of the concept "group". For the latter purpose its parts seem to overlap: group relationships are established in terms of behavior directed in and outside the group; group operation and visibility is viewed through behavior of members towards each other; and group order is maintained because behavior is channeled in respect of others' rights and obligations. In other words, groups are collections of individuals who behave as they do, who recognize that they behave as they do, and are recognized by others as behaving as they do, because of their group affiliation. Or groups are groups.

What we are searching for is a way of identifying potential jural communities; that is, groups which might, but do not necessarily, settle disputes by mechanisms not shared with other groups. If a non-circular operational definition of group is difficult to construct, can an inductive procedure adequately perform the definitional function? Can one, for instance, say that collections of individuals who cooperate on social activities are groups; that groups in which the cooperation is of a long term nature (an extended family or a Board of Directors as distinguished from spectators at a soccer match) are potential jural communities; that as such groups are encountered in the Indian village literature their lines of organization will be elaborated and that thereafter other collections with the same organizational

skeletons will be considered groups. Certain structural and functional arrangements will probably be stabilized definitionally as families, lineages, clans, jatis, castes and villages. Others may be less frequently reproduced. Groups will vary radically in the predictability of their group-related behavior, in the integrity of their principles of recruitment, in the degree of institutionalized modes of action and in their maintenance of internal order. In some cases, pieces of Nadel's jigsaw may not be observable. In this variance may lie an explanation for some of the variance in dispute settlement. Such anyway will be the strategy of investigation.

Sally Moore not only recognizes the difficulty in classifying a society's legal system when it uses, as many do, different procedures of dispute settlement for different parties or at different stages, she also notes the effect of case content on process (Moore 1970:324).^{*} What happens when the case is not the unit of analysis: will a comparison of jural groups engender relationships better explained by the substance, that by the social settings, of disagreements? Does not the failure to use cases fly in the face of Llewellyn and Hoebel's demonstration that it is the "case [of doubt] . . . which makes, breaks, twists, or flatly establishes a rule, an institution, an authority" (Llewellyn & Hoebel 1941:29)?

^{*}The same point has been made by Nader using the effective example of Yngvesson's work on California small claims courts (Nader 1969:88-90).

The argument to use cases would be rather compelling if adequate data were available. In the event, I believe that the most one can do with Indian village materials is to remain sensitive to the possible effect of case content and test it as a relevant variable when adequate information is provided.*

*I should, at this juncture, acknowledge that in trying to construct a framework for analysis I am strongly influenced by the probability of individual participation in several legal systems, most forcefully characterized in recent years by Pospisil as "legal levels", although "levels" introduces the notion of hierarchical ordering which does not necessarily typify multiple legal systems in India. In fact, the richness of Indian anthropological materials for exploration into the social setting of dispute settlement comes from the multiplicity of legal systems which seem to be operating in overlapping social groups. This multiplicity seriously calls into question Seidman's hypothesis that, because a unified economy requires unified legal institutions, dual legal regimes will disappear over time (Seidman 1970:17).

The Propositions

This section will state what I consider to be testable propositions concerning forms and settings of dispute settlement in legal systems. For the most part the propositions are derived from the literature listed in appendix A. For convenience in later reference each proposition has a title and I have included a summary table. The propositions are presented in groups. Each group represents a set of relationships which are stated at the head of the group.

To try to stabilize terminology between propositions, the following set of definitions is presented. Dispute settlement will be considered in two forms, adjudication and mediation. In adjudication the third party has, and is recognized by the disputing parties as possessing, the prerogative to stipulate the outcome of disagreements. In mediation the third party has no such prerogative: proposals of resolution must receive at least formal party assent before they become outcomes. This definition of adjudication includes only one-third of the characteristics of Gulliver's judicial process: ignored are the relevance of norms and the enforceability of the adjudicator's decision (Gulliver 1963:297). They are excluded because I am unpersuaded, as is Abel, that these characteristics are necessarily empirically united (Abel 1971:20):* Interaction between parties to a disagree-

*Lozi "informal courts . . . judge and apply law", but only courts "appointed by the kind can enforce their judgements" (Gluckman 1955:26).

ment without third party intervention will be characterized as negotiation. The terms arbitration and conciliation will not be used unless they are proper names. Procedures characterized as arbitration or conciliation by other commentators will be called adjudication when the arbitrator or conciliator has the power to decide and mediation when he does not. One complication only will be introduced: dispute settlement through the agency of that system established by the state to enforce modes of behavior prescribed by the state will be characterized as "litigation". Litigation can be either adjudicatory or mediational although in almost all non-socialist states and in many socialist countries it is adjudicatory.

Contrary to my expectation before first reading through the dispute settlement literature, I have come to believe that mediation as defined is a relatively rare phenomenon, especially in societies which have never been importantly influenced by the Confucian ethic. Of the fourteen societies described in appendix A materials, institutionalized mediation appears at some level in only six and three of those instances are Chinese, Japanese or Korean. A much more important distinction in the literature seems to be between those processes in which the adjudicator hears and decides disputes and those in which the adjudicator goes to greater lengths to secure the concurrence of the disputing parties to an outcome and decides the controversy only when that effort fails. The former type will be called "pure adjudication"

while the latter will be referred to as "mixed adjudication". In the American context, plea bargaining, because it goes on between the accused and the prosecutor or police and does not depend upon the active intervention of the judge, does not transform the criminal trial into a mixed adjudication mode. On the other hand, in those jurisdictions where civil pre-trial conferences are organized to promote settlements rather than to facilitate trials, the conferences push civil process toward mixed adjudication (Rosenberg 1964:7-8).

In addition to identifying the range of third party power, it will be helpful to distinguish modes of dispute settlement in terms of their formality. Formality is a complicated concept. It is a way of describing the nature of a process in terms of its adherence to pattern, its reliance upon ritual, its tendency to exclusivity and to freezing events forever in one posture. It is defined by the extent to which the following attributes are present: third party role specialization, advocate role specialization, ritualization of evidence, use of public facilities or regular locus, written records, fees, public attendance, stipulated channels of appeal, a bar against rehearing issues and ceremony such as costumes, swearing of witnesses and marked deference to the dispute settler.

These attributes are probably self-defining with the exception of ritualization of evidence and role specialization. Ritualization of evidence is intended to indicate the degree to which

controls over the order and admission of information are exercised. In the most open instance, any person present at a dispute settlement session is free to say anything or produce anything which he feels is germane to the dispute. For instances, in the Kpelle moot, "the complainant speaks first and may be interrupted by the mediator or anyone else present" (Gibbs 1967:281). A high degree of ritualization, at the other extreme, appears in the intricate formalities used by common law courts in jury cases. Along the continuum of ritualized evidence a line will be drawn to separate systems which have exclusionary rules from those which do not. The thought is that there is a qualitative difference between processes which are concerned only with the order of evidence and those which limit the types of information considered to be helpful. One indicator of non-exclusion would be the admission of lay opinion on technical subjects. Exclusionary practices such as the refusal to accept evidence from a woman or an untouchable, whether cloaked as rules of competency or not, will be determinative however the process is characterized by its participants.

Role specialization can be fixed by reference to regular performance of role functions, economic support of role performance, general social labeling as role occupant, special training, inhibition of other activities, specificity of selection and insignia of office. Regular performance means that the person in question

generally occupies the role in question: that is, he devotes a substantial proportion of his social -- non-personal -- activity to the role or generally occupies the role in question when it is occupied by anybody in the relevant social unit. For want of a better measure, "generally" and "substantial" will mean more often than not. Economic support will be considered to exist when the role occupant receives direct material compensation more valuable than the usual marks of hospitality for performance of the role whether the dispute is settled or not. The latter qualification is intended to differentiate between an economic return for services rendered and participation in a general distribution of goods, often alcoholic, frequently required of losing parties as a re-integrative sanction. General social labeling means that the role occupant when occupying the role is described with reference to that particular function, e.g. judge or counselor, rather than with reference to his general social role, e.g. landlord or merchant, or when no label is used. Labeling is closely related to specificity of selection which is an inquiry into whether the role in question is derivative from another role -- the third party is the landlord and he is the third party because he is the landlord -- or the role occupant was somehow specifically selected for the role in question. Special training approaches self-definition: it need not be as formal student or apprentice; it must be specifically directed to the

specific role. Training as a policeman would not count; training for a family crisis intervention unit would (see Bard 1969: 248-50). Insignia of office are material indications of role assumption such as costumes, maces, oars (when U. S. District Courts sit in admiralty) and wigs.

If one were setting out to compare the extent of role specialization of various dispute settlers or advocates, as Abel apparently intends to do, one might well wish to investigate each of these conditions, compare each and, perhaps, scale the composite. For the more limited purpose of deciding how role specialization of third-party or advocate affects "formality", I believe it is preferable simply to decide in each instance that the party in question is or is not a role specialist. To make a more refined judgement -- that the party is .643 a role specialist or rates 3.2 on an Abel specialization scale -- would be inefficient in the light of the coarse series of decisions which, as will be seen, accompany the categorization of dispute settlement along the "formality" vector.

An even more persuasive consideration is the likelihood that Indian village studies will say enough about the dispute settler, and perhaps about advocates, to permit determination of a general level of specialization, but will most probably not provide information one way or the other about some of the specified attributes. In such circumstances fine scaling may not be possible and, if possible, would probably be silly.

Among the indicators of role specialization only regular performance of role functions and special training by themselves seem to me to warrant categorization of the role occupant as a specialist. Central to this judgement is a feeling that at the core of specialization is a set of attitudes or perspectives or modes of cognition or analysis which set the specialist apart, in the sense of driving him to react differently in specialty matters from similarly situated non-specialists. If this characterization is at all accurate, then it is difficult to imagine means by which role occupants are so conditioned except by performance or training and, on the other hand, difficult, if somewhat less so, to imagine how regular performance and any kind of prolonged training would fail to produce these special ways of seeing the specialty world. Such, after all, is what socialization is all about.

Labeling and insignia of office are more in the nature of signals to others about the role occupant than factors which are likely to affect behavior although they may reinforce specialist notions of rank, ritual and special mission. Inhibition of other activities is unlikely to be separated from regular performance: there does not seem to be a substantial incentive for an individual to tolerate such a limitation or a social stake in permitting sporadic dispute settling to interfere with otherwise permitted activity. In any event the crucial question is whether a role occupant is to be considered a specialist if eco-

conomic support, specificity of selection, inhibition, labeling and insignia are present, but are not joined either with regular performance or special training. As indicated earlier, these factors may be useful in comparing degrees of role specialization. They are not likely to form a major influence on role performance. As a consequence, they are not, even in the aggregate, considered sufficient to signal that a specialization threshold has been crossed.

If determination of role specialization is ultimately somewhat arbitrary, characterization of the degree of formality may be even more so. I have previously listed ten attributes of formality. I do not believe that it is possible deductively to establish their relative contributions to the concept. Responses to a questionnaire administered to the faculty and fellows of Yale's Program in Law and Modernization were so dispersed as to indicate that a judging procedure is unlikely to be any more helpful. The attributes will therefore be given equal weight. One could perhaps rank all dispute settlement procedures with scores from zero to ten giving one point for each characteristic present. I have, however, two reservations about such scoring. First, many village studies may not give information about all ten attributes. To assume that unnoted dimensions are not present is no more sensible than to assume the opposite. Second, the total number of cases, that is groups analyzed, is likely to be so small in many cells of a 2 x 10 table that reliable inferences

would be difficult to draw.

To meet these objections formality will be divided into three categories -- high, medium and low. Low formality systems will be those where less than one-third of the formality attributes (about which information is presented) are present. Medium formality would then reflect one-third to less than two-thirds presence of recorded characteristics and high formality systems will be the remainder. To take an example from an appendix A study, Berman's description of Cuban Popular Tribunals would place them at a medium formality level -- four characteristics present, three absent. The judges are specialized (1336-37), the sessions use public facilities (1343) and are open to the public (1334, 1342) and channels of appeal are fixed (1338,1345). On the other hand, there is no advocate specialization (1344), no ritualized evidence (1326) and little ceremony (1334,1342). No information is provided about records, fees or rehearing issues.

[A later version of this paper will include operational definitions of social distance, cultural distance, anti-disposition to conflict, stratification, cohesion, mediational quotient and political security. Most of these terms are defined conceptually where they appear in this version]

One further digression will postpone introduction of the propositions. Dispute settlement systems may use different process for different disputes or different parties. For instance, on some occasions dispute settlers may stipulate an outcome only if the parties have agreed to it and in other cases, the same body may decide the dispute without the agreement of, or even advance notice of the decision, to the parties (see Nader 1969:87). Analytically such proceedings should be considered different dispute settlement systems. The form of the proceedings then should be predictable by the same propositions which determine the relationships between different systems in the same society. For example, a dispute settler which uses differing standards for the necessity of disputant concurrence in its decision will within its own process be subject to the Social Distance II Proposition: that is, its willingness to decide cases without party agreement will be related to the social distance between the parties; the closer they are to strangers, the less it will seek their agreement to the outcome (see Gluckman 1955:55).

Relationships Between
Forms of Dispute Settlement

The Proposition
The Counter Proposition
The Obvious Proposition
The State System Threshold
Proposition

Relationships Between Level of Dispute
Settlement and Social Factors

The Social Distance I
Proposition
The Cultural Distance
Proposition
The Cohesion Proposition

Relationships Between Mode of Dispute
Settlement and Social Factors

The Social Distance II
Proposition
The Cultural Propensities
Proposition
The Stratification Proposition
The Normative Influence
Proposition

Relationships Between the Organization
of Dispute Settlement Systems and
their Operation

The Political Security Proposition
The Relevance Proposition

Relationships Between Forms of Dispute Settlement

The Proposition - Formal dispute settlement process will be used to the extent that less formal process is ineffective.

This proposition is an offshoot from Schwartz's now classic conclusion that "the likelihood of legal control arising at all in a given sphere is a decreasing function of the effectiveness of informal controls" (Schwartz 1954:473). Schwartz defined legal control as that exercised by specialized functionaries. In both communities which he studied major decisions regarding community life were made by a general assembly and in both communities responsibility for special activities were delegated to committees. One community had a judicial committee while the other did not. The judicial committee heard complaints by members of the community against other members. In the terminology of this paper, it settled disputes.

Since settling disputes was the only function which Schwartz attributed to that committee, his thesis perhaps should more modestly be restated as "the likelihood of a need for a special agency to resolve disagreements is a decreasing function of the ability of a community to reduce the number of disagreements which can be settled without formal reliance on third parties". Or, the fewer the disagreements, the less the need for a specialist to help settle them. Even this reformulation may overstate his data since the community without "legal control" had committees "to deal with questions of economic coordination, work assignment,

education, social affairs, ceremonies, housing, community planning and health." Only in other spheres was there a potential need for third party assistance: that is, the community which Schwartz describes as having no legal control seems to have had plenty, even as he defines it, but its carriers were fragmented. From this perspective only a residual area of behavior was left for other than legal control.

I do not mean to challenge what I understand to be Schwartz's main thesis. He makes, I think, a strong case that behavior can be effectively controlled, in the sense of eliminating most public complaints of member against member, when it is highly visible and takes place in the context of a highly articulated and pervasive normative system. He demonstrates that where there is general agreement on what constitutes acceptable behavior and general knowledge about everyone's behavior, action by one member considered unacceptable to others is unlikely to occur and can be quickly, informally and effectively chastised when it does. Such a thesis does not, it seems to me, depend upon juxtaposing legal and informal controls and does not suffer from any inadequacies of that juxtaposition.

Unlike Schwartz's formulation, The Proposition is concerned only with social control at the stage when third parties are introduced into others' disagreements. Also unlike Schwartz's thesis, The Proposition is not neo-evolutionary. It does not assume that formal process flourishes only when informal process

fails. To the contrary, it postulates that many communities provide different dispute settlement mechanisms of varying formality with overlapping power to process disagreements and that the more formal machinery will be used in those instances when the less formal is not likely to be effective -- that is, when some structural or personnel dimension of the less formal system would jeopardize an attribute of the process thought to be important whether that attribute is impartiality or ability to understand the disagreement, digest it in time or enforce its resolution.

The Proposition does, however, imply the primacy of the less formal process. When both formal and less formal alternatives are equally effective, The Proposition predicts greater use of the least formal option. Formal process tends by definition to be more expensive, time consuming, public and irreversible than less formal process. A preference for informality then represents no more and no less than a preference for thrift, convenience, privacy and flexibility.

The literature of appendix A provides several examples of The Proposition at work. The Kpelle use courts rather than moots to handle assault and theft cases since they apparently believe coercive sanctions are required in response to such behavior (Gibbs 1967:279). Kawashima notes that disputes in Japan in which no continuing social relationships exist, e.g. between usurers and debtors and between village communities, resist mediation

and instead are shunted to litigation. He also points out that formal mediation under the "halo" of a state court was preferred to informal mediators as the status of these men of "face" became less important just as family disputes are now more likely to go to the family court than to marriage go-betweens. (Kawashima 1964:45,54,58). Disputes between members of different factions in a Lebanese village are taken to court rather than to the village mukhtar "who is supposed to maintain peace" because he could not be expected to be sufficiently neutral (Nader 1965a:395-96). Gulliver believes that the Arusha tend to use courts where justice requires a decision contrary to the loyalties of mediators who would otherwise act in the affair (Gulliver 1963:207).

Each of these societies also stands witness to the primacy of less formal process when it is likely to be at least as effective as more formal dispute settlement. The Kpelle use moots where coercion is not thought important, the Japanese prefer mediation to litigation in tenancy cases, Lebanese villagers depend on awadeem, respected individuals, rather than courts to settle intra-factional disputes and Arushan use of state courts is generally limited to disputes which concern the government, which are between parties who live far apart, which have not been settled by indigenous procedures or, as indicated above, where powerful men wish to avoid complicity in a particular solution.

The Proposition is not a causal statement. The degree of formality, as I have defined formality, is not generally the proximate factor which dictates use of one process or another. In the instances cited such factors appear to be connected to the impartiality to be expected, the coercive power sought, the interest in a propensity to honor rights rather than status or to maintain the integrity of continuing relationships. The Proposition rather is descriptive. It tells us:

(a) more than one process is frequently available to settle particular disputes;

(b) these processes can be defined in terms of their formality;

(c) there may be an association between formality and coercive power, potential for impartiality, attachment to ascription and the relevance of disputants' attitudes towards each other after the dispute is settled;* and

(d) if the factors cited in (c) are neutral, informal process will be preferred to more formal process.

Finally, The Proposition serves to introduce The Counter Proposition, which is causal in nature.

*Some of these associations may be spurious. Coercion may be directly related to adjudication as regard for continuing relationships may be to mediation. Their relationship to formality then is no more than a result of adjudicatory systems' tendency to be more formal than mediational systems.'

The Counter Proposition - Less formal dispute settlement will develop and be used when more formal dispute settlement is not available or is ineffective.

Availability as an aspect of The Counter Proposition is more a functional than a descriptive term. More formal disputes settlement may be technically available in the sense that the formal tribunal would process the dispute if asked and may process many disputes with similar subject matter. The more formal process may be effective if utilized in the sense of reaching for a modus vivendi toward which it is willing to negotiate or reaching a decision which it is willing to enforce. But the more formal process may threaten such high levels of economic cost, public disgrace, physical danger or party antagonism that it is not functionally available.

The most striking example of functional non-availability of formal dispute settlement is the conventional view of imperial courts in Ch'ing China. If we can trust Cohen, Van der Sprenkel and Bodde and Morris, which Buxbaum says we should not,* resort to the state's courts was "inordinately expensive, time consuming . . . unpredictable in outcome. . . . a degrading and harsh experience" (Cohen 1967:64-66) and "there was a general predisposition not to set the official legal machinery in motion . . . but

*Buxbaum, working with archival materials previously unavailable to sinologists, alleges that civil cases were not approached from a penal perspective; that entanglement with the imperial legal system was not necessarily a personal disaster and that the system did not tend to terrify the public rather than settle disputes (Buxbaum 1971:267-70). A judgement in the matter must await full publication of his materials.

rather to leave other units of social organization to deal with all matters they were capable of handling" (Van der Sprenkel 1962:78). The great bulk of dispute settlement was accomplished by village leaders and tsu and guild intervention.

Ch'ing China is an instance of less formal process flourishing as more formal process is to a degree functionally unavailable. The Counter Proposition goes beyond such circumstances and asserts a temporal and causal relationship between the unavailability of formal dispute settlement and the development, either from scratch or from crude and sporadic use, of less formal institutions. Santos' favella is an example of such growth. Dwellings in the favella are constructed without permission on land owned by others. As a consequence, although not a necessary consequence, the state's courts will not entertain disagreements between favella residents arising out of real property relations. A Residents' Association "emerged . . . to meet the need for reducing a social tension", disputes over property which the state courts would not hear. Once in the business of settling disputes, the Residents' Association began to replace the state courts in contract as well as property controversies (Santos 1970:6), an instance of The Counter Proposition and the primacy of less formal process dimension of The Proposition at work in tandem.

The social aversion to a dispute settlement vacuum which these two propositions reflect lead to an hypothesis of particular interest to current, perhaps especially American, legal sociology. These propositions suggest that groups in a society which have come to view government courts as administrators of an alien set of values will establish an alternative mechanism for settling disagreements among their members. Thus we would expect residentially segregated youth groups and racial minorities to ignore the civil courts as well as the police in favor of indigenous process in the adjustment of the general run of intra-group controversies.

At first blush formality of process would seem to be irrelevant to this hypothesis. Should The Counter Proposition be more simply restated as "new dispute settlement process will develop and be used when existing dispute settlement machinery is not available or is ineffective"? Donald Black has, I think, hinted at one reason why such an amendment might be rash. He notes that "over time the drift of history delivers proportionately more and more strangers who need the law to hold them together and apart. Law seems to bespeak an absence of community, and law grows even more prominent as the dissolution of community proceeds" (Black 1970:37). The Counter Proposition substitutes "formal process" for "law" in Black's formulation. Formal process fails when it counts some communities out. The process which re-

places it reverses, in a sense, the drift of history and operates less and less on strangers. Because this process is intra-community, by Black's law (and The Social Distance II Proposition, *infra*) it will be less formal than the frustrating and frustrated formal system.

The Obvious Proposition - The higher the economic costs relative to the resources of the disputants and the amount in dispute, the more time consuming and the more degrading a dispute settlement process, the less likely is resort to it.

Examples are apparent from both ends of the spectrum. The Obvious Proposition was ostensibly put to work as a litigation control by the Chinese Emperor K'ang-shi -- "lawsuits would tend to increase to a frightful amount if people were not afraid of the tribunals" (see Cohen 1966:66) while Gluckman believes that Lozi disputes were pulled to courts in part because litigation was convenient and cheap (Gluckman 1955:26-27).

A corollary to The Obvious Proposition is that high cost, time consuming, degrading systems are likely to be invoked when supplies of money, time and status are disproportionate between parties. Such process would be attractive to the well endowed party because the relative opportunity costs for him would be low.* There may, however, be an expertise exception. Parties with equal resources may invoke such a system despite its costs if the system

*Cf. the differences in professional and consumer as creditor in Leff 1970:20-24;

has a special competence for the dispute at hand.

The corollary assumes that money, time and status work in the same direction: I think in general that they do. Especially in poor societies those who possess money possess surplus time also. For the poor, the price of time away from work may even prejudice the struggle to survive. The relationship between status and degradation is more complicated. People of high status may be reluctant to use a public dispute settlement process because of the shame accompanying open disclosure of personal problems (see Nader 1967:124; Nader & Metzger 1963:585). On the other hand, this reluctance may only hold for domestic affairs. For low status people the disincentives are different. High cost, time consuming process tends to be formal, urban and government administered. Frequently it is run in a language they do not speak. ~~Whatever the language~~, the process uses a vocabulary and procedure unfamiliar to them and they may be required to participate through agents they neither understand nor trust. Whatever the quarrel, the experience is likely to be distasteful (see Beardsley, Hall and Ward 1959:393).

The Obvious Proposition and its corollary have limited marginal explanatory power. They are introduced with the idea that exceptions to them may be revealing: what differentiates social systems in which there is significant reliance upon burdensome alternatives, as, the conventional wisdom tells us, has been the case in India for nearly 200 years (see Rudolph & Rudolph 1967:260) from apparently more rationally organized groups?

The State System Threshold Proposition - Once the state dispute settlement process has been invoked, non-state process will not be engaged. On the other hand, as long as the state system threshold is not crossed, a wide range of non-state processes will remain available.*

This proposition reflects three independent notions: that the state system is frequently used only when other dispute settlement process has failed (Gluckman 1955:13; Gulliver 1963:206; Henderson 1965:128-29; Nader 1967:121); that state systems must speak to the resolution of a dispute, they cannot postpone acting indefinitely (Gulliver 1963:165); and that non-state systems tend to be non-hierarchical (Gulliver 1963:178; 1969:40-41).

Social units in which adjudication is particularly uncongenial, including possibly to adjudicators, appear to be an exception to the major premise that once the state has been called upon to decide a dispute, it does so without referring matters back to non-state procedures. Materials on both the

*Any dispute settlement system will be considered a state system if the state has assumed the prerogative to set or alter the system's method of proceeding or if appeals from the system are heard by a state body (one whose procedure is set by the state) other than de novo. I do not know whether this distinction is easy or important to make in African legal systems. In India it is difficult and may be crucial because of government established nyaya (new), or statutory, panchayats. These bodies function very much like traditional panchayats with lay judges, no lawyers, no pleadings and no exclusionary rules of evidence, but the ritual they do follow, the fees they collect, the substantive law they administer and the manner of choosing judges are stipulated by the state. Their hybrid nature will increase the difficulty in understanding the social correlates of different forms of dispute settlement since the forms will not appear undiluted.

Arusha and Ch'ing China indicate that state magistrates occasionally on their own initiative insisted that disputes submitted to them be referred to non-state bodies before they would process them. It is not possible to tell, however, whether such a course was adopted whenever the litigants had not exhausted appropriate non-state remedies or whenever the magistrate deemed another process more likely to produce an acceptable accommodation (see Cohen 1967:69, 71; Gulliver 1963:214).

Relationships Between Level of Dispute Settlement and Social Factors

The Social Distance I Proposition - Disputes between parties socially separated are likely to be submitted to the more formal of alternative dispute settlement processes.

Social distance is not used in the conventional sense of sympathetic understanding explicit in Bogardus' social distance scale, but is a way of expressing the degree of unfamiliarity in the relationship between disputing parties. It does not have a necessary vertical or superordination - subordination dimension although such differentiation may, as well as say geography, explain the unfamiliarity. The lay notion of "strangers" captures most of the ambiance of social distance.

Although Evans-Pritchard probably first broached the relationship between law and (what he called) structural distance,* its most effective use in analyzing political systems which, unlike the Nuer, provide machinery for redress against strangers short of warfare has been made by Donald Black. Beginning with the observation that the police are more likely to accede to a complainant's request to arrest a stranger than a familiar, Black notes that the link between "formal litigation" and the "relational distance between the adversaries" may be a general explanation of the tendency of political authorities to leave disputes within minority groups to their own processes. He cites overseas Chinese, Gypsies, American Indians and Jews to which we can add most colonized peoples, and most especially Indians under the Moghuls as well as the British. Black then suggests that the non-use of litigation between familiars is a consequence of the availability to them of a less than legal alternative. He does not, however, imply one way or the other as I do that "sublegal control" is likely to be less formal than litigation.

The most important jural characteristic of the relationship between non-stranger adversaries is that it is likely to

*"The distance between groups of persons in a social system, expressed in terms of values" (Evans-Pritchard 1940: 110).

Pospisil notes that the Kapauku refer disputes "to the authority of the least inclusive group that includes both litigants as its members" (Pospisil 1967:12). He does not inquire why.

continue after the dispute has been settled. Both parties have a substantial interest in damaging as little of that relationship as possible. The Social Distance I Proposition hypothesizes that the probability of greater publicity, more adversary mode of examination, more limited scope of inquiry and added expense implicit in more formal process is more likely, and understood to be more likely, permanently to impair a relationship from which there is no escape nor frequently any inclination to escape.* The proposition may then explain in part the development of labor and commercial arbitration and marriage counselors.

The proposition has been discussed as if the relationship were either a complete stranger or familiar -- familiar dichotomy. Social life is of course not so constructed and an empirical evaluation of the proposition will try to set various levels of social distance against proportional choice of formal - less formal process.

The Cultural Distance Proposition - The greater the cultural distance between the parties to a dispute or the party who controls the locus of a dispute and a dispute settlement system, the less the probability that such a system will be invoked to settle the dispute.

*Kpelle evidence may be to the contrary. Gibbs notes that although Kpelle courts are particularly inept at resolving matrimonial disputes, most court cases involve disputed rights over women. We cannot be sure what this means in terms of the Social Distance I Proposition since he presents no information on the proportion of marital disputes which go to courts rather than to moots or other less formal process (Gibbs 1963:279).

Cultural distance between disputants and a dispute settlement system means cultural disparity between the disputants and the personnel who staff the system. The disparity will be located in differences in language, dialect, dress, literacy, education, religion, ethnic origin and rural or urban experience.* The greater the disparity, the less likely is invocation of the alien system: as the gap closes, reliance on the system should increase.**

The Cultural Distance Proposition may have the highest pay-off in investigating colonial and ex-colonial legal systems. In India especially there is a wealth of material covering nearly 200 years of an alien litigation system becoming continually less foreign according to some observers (Law Commission 1958:1, 29-30) and remaining quite alien according to others (Srinivas 1955:18).*** It is clear that even in the eighteenth century cultural distance did not foreclose reliance on British courts (Galanter 1968:69). Various attributed to provision of a

*Gulliver, for instance, recites that the local court magistrates and clerks in the Arusha country, because educated, are necessarily Lutheran Christians, young and without indigenous seniority and, as a consequence, "not representative ... of what is still a mainly pagan, non-literate and conservative people" (Gulliver 1963:164). Schwartz believes that one cause of the small number of cases going to state courts from the communities he studied was the "shielding of fellow members from ... 'outsiders'" (Schwartz 1954:471).

**As Chinese in San Francisco become involved in more commercial transaction with non-Chinese and are subject to other westernizing influences, the role of elders in dispute settlement withers (Grace 1970:51).

***The disagreement may reflect initial perspective. Anthropologists seem to see significant vitality in indigenous process and prejudice against the state courts, while lawyers see neither. Compare Cohn 1963:147-57 and Galanter 1969:2; 1968:67-70,83.

mechanism to settle disputes where there had been none (Maine 1895:70-71), facilities for summary execution of decisions (Derrett 1961:18) or means of an escape from status disabilities (Rudolph & Rudolph 1967:262), the social circumstances which did and did not, which do and do not, influence the use of the state's courts should illuminate the limitations in the explanatory power of the Cultural Distance Proposition.

The Cohesion Proposition - Disputes will tend to be processed by dispute settlement machinery associated with the smallest social unit of which all disputants are members in relation to the cohesion of such a unit.

Cohesion refers to the strength and diffusion of interdependence and antagonism within the social unit. By interdependence I mean the mutual need for social actors for the services and good will of others. Interdependence may be economic (one person needs another's help or trade or good will, i.e. inheritance, to achieve economic objectives) or social (where the need of help, trade or good will is to achieve social goals, e.g. to find a spouse for a child). Cohesion is, I think, less related to political interdependence for the importance of meeting power needs seems less crucial and less pervasive than economic and social drives.* By strength I mean

*I am, of course, aware of the artificiality of segregating social, political and economic affairs in such a fashion. I agree with Marion Levy that it would be "pedantic beyond belief" to refer to particular matters as predominantly economically oriented, predominantly politically oriented etc., and, unlike Levy, I can resist the temptation (see Levy 1966:24).

the importance to the actors of the relevant interdependence. If instead of borrowing my neighbor's bullock for plowing I can rent a rototiller from the local fertilizer supplier, my economic dependence upon my neighbor is weak. If the alternative is to pull the plow myself, it is strong. By diffusion I refer to the range of interdependence within the social unit whether it be a family, a caste, a village or a state. If members of the social unit are connected in a series of interlocking economic and social relations, if there is a highly articulated system of who provides what services, **who produces** what goods, who performs what rituals, who marries whom, who resides with whom, who inherits from whom, then interdependence is diffuse within that unit. If on the other hand, a few significant mutualities exist, but most important economic and social acts are selected from many alternatives, then interdependence is not diffuse. My notion of diffusion of interdependence is not equivalent to Nader's multiple secondary groupings (Nader 1965a:397, 399) since many of the relations she notes seem to spring from less than critical associations -- musicians' groups, savings and loan groups, common work groups.

A social unit may incorporate strong and diffuse interdependencies and nevertheless be subject to such high levels of antagonism so as not to be considered cohesive. Think of a quarrelsome nuclear family. The father depends upon the mother to cook, keep house, monitor the children's activities and for

sexual gratification and procreation. The mother depends upon the father for economic support, physical activities beyond her power, protection, for sexual gratification and procreation. The children depend on the mother to protect their health and their father to feed, shelter and clothe them. In turn, they may be expected to provide for their parents' old age. Suppose at the same time that each member of the family detests the other and avoids as much interaction with any other family member as possible. The antagonism can easily be seen to have countered the cohesiveness created by the interdependencies.

The Cohesion Proposition says that the more cohesive a social unit, the more likely it is to have and use its own dispute settlement process. It also identifies the relevant social unit within which to seek empirical confirmation as the smallest social unit of which all the disputants are members. If our nasty mother is quarreling with one of her nasty children, the unit is the family and the proposition predicts they are not likely to seek third party assistance from the nasty father.

The proposition is not intended to deny the obverse -- that the more a social unit settles its own disputes, the more cohesive it will be (Beardsley, Hall & Ward 1959:392). Outsiders with the power to affect the settlement of disagreements within a social unit may be more likely to fracture the interdependencies within the unit than dispute settlers who are members of the groups. Some part of unit cohesion may depend upon its self-image as a group which can handle its own deviance. A directed empirical

inquiry may reveal which condition, if either, is the more fundamental. How frequently will one find cohesive groups without interior dispute settlement; how likely is interior dispute settlement in non-cohesive groups?

Nader and Metzger's comparison of two Mexican communities is perhaps a more appropriate example than the nasty family of The Cohesion Proposition at work. Both towns have the same number of legal levels available to husband-wife conflicts. In the town where inheritance and residence patterns force greater dependency of children on senior family males, marital rows are settled by those males.* In the town where such dependence is not maintained, marital disputes are tendered to the town court rather than to family members at least when severance of the relationship is sought.

Factionalized social units are examples of non-cohesion. Nader (1965a:395-97), Gluckman (1955:13) and Van der Sprenkel (1962:101, 120) all report that factions within social groups lead either to the use of dispute settlement machinery associated with a social unit larger than that which includes the factions or an ad hoc arrangement through which a satisfactory level of impartiality is sought.

*The authors state, but do not describe, the mutuality of this relationship (Nader & Metzger 1963:589).

Relationships Between Mode of Dispute
Settlement and Social Factors

The Social Distance II Proposition - The fewer the disputes between strangers processed by a dispute settlement system, the more likely it will be to use a mediation or mixed adjudication, rather than a pure adjudication, mode of settlement.

The Social Distance I Proposition predicted that disputes between strangers would be processed by the more formal of available systems. Social Distance II implies that where a process is rarely used by strangers it will be geared to supporting continuance of the relationship between the disputants. The proposition assumes that a dispute will least prejudice such a relationship if the disputants help fashion, or are at least heard at length about, the outcome of the dispute. (See Gibbs 1963:279; Gluckman 1965:219; Kawashima 1964:43).

So much is obvious. The interesting questions are what is there at the social level which might help explain: (a) the use of pure adjudication for stranger laden systems and (b) the use of mediation rather than mixed adjudication or vice-versa in process habitually dealing with familiars. Appendix A materials are not helpful: hopefully the Indian village literature will be.

With respect to (a), most investigators would begin, I think, with some notion that caseload is a factor. Such an

explanation could at least take two routes. First, it could assume that all societies tend to support activities in proportion to their contribution to the society's goals and that such goals tend to be essentially material. In this view disputes are non-productive and even a single dispute "overloads" the system. If disputes are non-productive,* the less the social resources devoted to them the better. An endeavor to economize would limit disputant participation in formulating outcomes to situations where there is a social gain in so doing, a continuing relationship to be supported, (see Gluckman 1965: 219) or to systems where there are generally social gains in so doing, continuing relationships to be supported.

Another way of reaching the caseload explanation is to postulate a demographic effect: to wit, machinery for dispute settlement, like most social machinery, is established to meet current demand, but even when all else is no worse than neutral, demands increase because population increases. All dispute settlement systems then have a tendency toward overload and we again face an endeavor to economize on the resources devoted to any particular dispute.

The search for explanation of a preference one way or another for mediation or mixed adjudication should, at least in

*Of course, in some instances disputes may be not only productive, but the product, e.g. entertainment. See Nader 1965b:19; Berman 1969:1350-51.

the first instance, examine caseload (this would be a modified form of the immediately preceding rationale), latent function (what, other than determining outcomes, is dispute settlement all about and how might such other roles affect this choice) and cultural propensity (is there something about the society's ethnical perspective which militates in favor of one procedure or the other). The last factor will now be considered at greater length.

The Cultural Propensities Proposition - The greater the anti-disposition to conflict in a social unit, the more likely it will be to use a mediation rather than a mixed or pure adjudication mode of dispute settlement.

Let us begin by recapitulating the orthodox analysis of three societies commonly assumed to be highly prejudiced against interpersonal conflict -- pre-1945 China, Japan and Korea. All three were heavily influenced by the Confucian idealization of harmony and of its restoration, once disturbed, by compromise. Adjudication, represented by lawsuits in the state's courts, disturbed the natural harmony and contaminated human relations through its use of coercion. Yielding to the unreasonable demands of others was preferred to attempting to vindicate rights or justice. Not only is adjudication disfavored because it openly acknowledges one's failure to avoid conflict, it compounds the inequity by publicly assigning fault and destroying the opportunity

for generalized face saving.*

The Confucian influenced societies displayed a marked preference for compromise as a goal and mediation as a technique for achieving it. They were also societies in which the members were markedly interdependent in economic and social matters. Would, we ask, this interdependence continue to produce a preference for mediation if the prevailing ethic has been the bellicose perspective of Rajput principalities or Punjab hill tribes (see Levine 1961:10)? To find out one could control for interdependence or for ethics. One could, for instance, review Korean uses of mediation and adjudication in less interdependent situations, i.e. as villages become monetized and trade increases or, even better, in urban neighborhoods inhabited by rural migrants.** But this line of inquiry is unlikely to be anything near conclusive. For the breakdown of interdependence may well be accompanied by shifts in ethical perspective. In this situation it will be difficult to attribute changes in modes of dispute settlement to one source or the other. Kawashima, for instance, notes that Japanese involved in mediation of domestic disputes "have frequently complained that

*This pastiche is drawn from Cohen 1967:59-61; Van der Sprenkel 1962:30-31; Kawashima 1964:43-44; Hahm 1971:3-8.

**I suggest Korea for the obvious reason that both the Confucian ethic and traditional interdependence have persisted with greater vitality there than in China or Japan.

lay mediators did not pay sufficient attention to their rights under the law" (Kawashima 1964:59). But did changes in family structure cause changes in rights consciousness or vice versa?

Alternatively, one could try to identify social groups which follow similar dispute settlement practices, but which incorporate significantly different ethical perspectives. If successful one could hypothesize that cultural propensities may be irrelevant to modes of dispute settlement. In a sense, the proposed analysis of Indian village data will constitute such an attempt. It too, however, has major methodological weaknesses. Aside from the obvious contaminating effect of a range of other ecological factors, Buxbaum's forthcoming monograph may indicate that the traditional understanding of Confucian influenced dispute settlement is radically wrong to begin with (see Buxbaum 1971:257).

The Stratification Proposition - The more highly stratified a social unit, the less it will resort to litigation.

The basis for this proposition is not that litigation tends to be adjudicatory. Looking somewhat ahead, many social units in India are highly stratified and have adjudicatory dispute settlement systems. The notion is rather that modern states tend, at least formally, to rules of non-selective application and effect, that litigation thus tends to support universalistic

values and that such values do not easily co-exist with the differentiated behavioral expectations characteristic of stratified social groups (Cohen 1967:61).

J. A. Barnes' work suggests one refinement to this thesis. He notes that after some Ngoni courts were "absorbed into the British legal system as officially recognized Native Courts" the judges of those courts continued to be the political leaders of the people subject to the courts. Not only was there then no clear separation of courts from politics, but "Ngoni society is not egalitarian and status differences are reflected in differences in penalty" (Barnes 1961:179, 181). Barnes is not explicit about the degree to which status induced differential penalties flew in the face of leveling strictures which the British sought to enforce. He notes that the native judges propensity to juggle custom and selectively to ignore, or lose, British law which they found inconvenient permitted them to use judicial decisions as political maneuvers. In like manner, it is not probably that any British egalitarian notions would have frustrated native inclination to use the courts to support status differences. In any event, the proposition ought to recognize that there are differences between litigation systems staffed by members of the stratified social unit and those staffed by outsiders. Its reformulation would thus be: "the more highly stratified a social unit, the less it will resort to litigation where dispute settlers are not members of that social unit."

Of course, there will be instances where members of a stratified social unit will invoke a litigation system precisely because it may constitute a way to avoid status differences (see Galanter 1965:70; Rudolph & Rudolph 1967:261-62). But litigation systems are apt to be expensive, time consuming and degrading, especially to those of lower status who tend to be short of time and money. As a consequence, those who doctrinally might most benefit from universal rules are most unlikely to be able to invoke such doctrine and those able to invoke the process are likely to be at odds with the doctrine. Or, in stratified social units litigation will be between members of the higher strata.

The Normative Influence Proposition - The higher the mediation quotient in a dispute settlement process, the less precise will be the normative referents and the less attention will be paid to them.

This proposition is Gulliver's (see, e.g., 1969:18-19). He realizes that it is oversimple and empirically untested.* It seems to me half-wrong and half-untestable.

Let us start with the thesis that adjudicators pay more attention to norms than mediators. Why do we think so? Because they announce decisions in normative, rather than ad hoc or random, terms while mediators generally announce nothing at all. If we cannot trust what the adjudicators say about how they operate, and legal realism teaches us at least that, what can we do? Gulliver lectures anthropologists to pay more attention to the

*It is, as a hunch, endorsed by Bohannan (see 1965:39).

process of "ratiocination" (Gulliver 1969:19). I am afraid we would have to enlist the entire Menninger Clinic to analyze one Lozi kuta and we might be disappointed even then. Perhaps if that awesome battery of social science artillery -- projective psychology; action, interest group and game theory; bloc analysis; dominance matrices; cumulative scaling; psychometrics; factor and content analysis and linear regression -- were directed away from the U. S. Supreme Court and toward non-American judicial behavior we might improve our ability to determine the uses dispute settlers make of normative standards. But perhaps not. Much imagination has so far been expended to learn precious little (see Schubert 1968:307-14).

From the assumption, testable or not, that judges decide by standards more than mediators springs Gulliver's hypothesis that the standards they use are more definite and rigid than those of societies where mediation is more important. The opposite conclusion is theoretically equally tenable. The need to announce a rationale for decision coupled with any inclination of adjudicators to believe in the myth of mechanical jurisprudence may produce flexible and shifting rather than fixed norms to ease the co-existence of consistent standards with particularized outcomes. Such a perspective is, I think, what Gluckman means by the certainty of the law residing in the uncertainty of its basic concepts. (see Gluckman 1955:326).* Abel points out that while

*And see Aubert 1963b:19 "It may well be that the leeway offered by the traditions of legal reasoning is a necessary condition for arriving at verdicts which will be accepted as 'just' in individual cases."

social science inquiry into the characteristics of norms used in dispute settlement is recent, legal philosophers have long dogged the question (Abel 1970:14). But they have tended to do so in an empirical vacuum. On one proposition then I would expect Pound and Weber to agree with Gulliver: that is, "these hypothesis require cross-cultural testing and, doubtless, modification in the light of empirical material."

Relationships Between the Organization
of Dispute Settlement Systems and their Operation

The Political Security Proposition - The greater the political security of a dispute settlement system, the more it will assume judicial trappings.

This proposition is an outgrowth of Moore's investigation of the relationship between the political security of Chagga chiefs and the manner in which they performed a dispute settlement role. By political security I mean the degree to which the political authority's power is subject to upset by persons in the class of those for whom the authority performs a dispute settlement function. In the immediately pre-colonial period Chagga "local lineages were in a chronic state of potential secession or treason". Chagga chiefs, subject to constant threat of usurpation, engaged in an elaborate charade to avoid appearing to be deciding most cases brought before them (Moore 1970:327-29). German occupation of Tanganyika produced peace between chiefdoms and increased chiefly functions and backed

them with German force. No longer threatened by their subjects, the chiefs dropped the reality and trappings of consensus and consultation: they presided over court, discussed cases only with their own entourage and announced and enforced decisions (Moore 1970:331).

This proposition may be generally irrelevant to legal systems in which political and judicial functionaries are different. In such cases political coups do not necessarily spell judicial replacement. Where there is such a threat depersonalized judicial decision making on the Chagga model would not be likely to afford much political protection. But where political power and dispute settlement roles are coincident, as in Indian village and caste councils, Moore's hypothesis may help structure our understanding of different procedures used in dispute settlement.

The Relevance Proposition - Adjudicatory dispute settlement will inquire less broadly than mediational dispute settlement.

This proposition assumes that an increase in the number of roles involved in determining outcomes will proliferate the matters thought by role occupants to be germane to the outcome. Adjudicators may limit information to what they believe will contribute to the decision their role requires them to make. If the adjudication ethic requires them to make a major effort to secure party concurrence in their decision, they will be inclined to hear not only what they believe relevant, but what the parties

believe relevant. If no outcome is possible without party assent, then the disputants' concept of relevance may stand on equal footing with the mediators'.

The proposition is complicated by three tangential notions; whatever the form of dispute settlement must there be any limit to the information it considers; what are the consequences of the prior knowledge of the third party; and what are the consequences of the relationships between the disputants. A priori no dispute settlement process can afford every party's and every witnesses' total recall. As implied in the discussion of Social Distance II, if dispute settlement systems do not economize on the resources devoted to any particular dispute, then they must bear the social costs of many unresolved disagreements which, I assume, they are not inclined to do (see Winter 1971:336-37).

Prior knowledge may be a short-cut to the necessary information transfer. It even may be a short-cut less generally available to litigation systems where judges are supposed to be ignorant of matters not presented in court. But prior knowledge is not a question of relevance, but of how relevant information came to the notice of the dispute settler.

One of the central themes of Gluckman's celebrated treatise on the Lozi is that the kuta's scope of inquiry is determined by the relationship between the disputants. The more enduring the relationship (from kin and village ties to

husband and wife to strangers), the more important is reconciliation; the more important is reconciliation, the more important to ferret out whatever is disturbing the relationship; the more important it is to get to the crux of the disagreement, the broader the scope of inquiry (Gluckman 1955: 21,47). He may be right although I do not think that his cases provide much support.* In any event, empirical investigation of dispute settlement should probe the association between the function of the dispute settler and the scope of inquiry as well as between the parties and the scope of inquiry. Gluckman's failure to do so was the result of his single focus on the highest level of kuta, a failing he acknowledges in his 1966 reprise and which he, perhaps quite rightly, attributes to the "then state of our discipline." Let us, in bringing this set of propositions to a close, rejoice in progress.

*Gluckman cites two instances of exclusion (Gluckman 1955: 317). Ironically one is in a case involving kin (The Case of the Headman's Fishdams). In the other, one judge says "their evidence does not enter", which Gluckman translates as "it is irrelevant." Nevertheless the evidence was heard and other judges relied on it in reaching a decision (Gluckman 1955:130-33).

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