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### Dispute Resolution and the Quest for Justice

Jean R. Sternlight

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

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# DISPUTE RESOLUTION

and the  
Quest  
for Justice

By Jean R. Sternlight



**D**uring and since the 1976 Pound Conference,<sup>1</sup> the rise of nonlitigation approaches has sparked an intense debate as to whether negotiation, mediation, and arbitration are consistent with justice or rule of law, and whether litigation itself is sufficiently accessible to support a quest for justice. This debate about procedural justice is not limited to the United States, but rather takes place in other countries too, in part because the United States has become an exporter of alternative dispute resolution (ADR), as well as judicial reform.<sup>2</sup>

At the extremes, some commentators seem to believe that only their own preferred form of dispute resolution is consistent with justice. Litigation sentimentalists<sup>3</sup> urge that litigation is critically important to allow economic

and political underdogs to advance. Mediation evangelists stress that mediation can result in better and more enforceable agreements, and perhaps even help us become better human beings. Arbitration advocates urge that their preferred technique allows disputants to voluntarily and knowledgeably structure their own method of dispute resolution, thereby maximizing free choice and economic well-being.

Yet, although these perspectives are founded on grains of truth, each is also severely flawed. While litigation has at times led to important social and political change, litigation is also too often inaccessible to many because of its high costs and slow speed. Further, as Professor Marc Galanter explained more than thirty years ago, the powerful forces

within a society have great ability to protect themselves in litigation and in the lawmaking process upon which litigation is ultimately dependent.<sup>4</sup>

Mediation can indeed be beautiful. It can help disputants recognize each others' interests and resolve their disputes. Yet, particularly when mandated by courts and legislatures, mediation can impose high costs, require expenditure of unproductive time, and allow more powerful parties to take advantage of weaker counterparts.

Arbitration, similarly, can work quite well when accepted voluntarily but can pose grave risks when imposed by one disputant on another. When companies are allowed to design a process of their own choosing and then force others into that process, we should not be surprised that unfairness and self-dealing often result. Regulation is not sufficient because no legislature can ever think creatively or broadly enough to proscribe every practice that a company might impose, and litigation challenges are too costly and time consuming to offer adequate protection from unfair arbitration provisions.

Further, voluntariness, while key, is also not the guarantor of justice. Apart from the psychological and linguistic games that can be played around the question of when is a seemingly voluntary process not voluntary, even truly voluntary mediation and arbitration can be critiqued for sometimes endangering the welfare of weaker parties or failing to result in public precedents. More broadly, there are public interests in justice that are not always protected even by honoring the voluntary requests of disputants.<sup>5</sup>

So, where are we left in the quest for justice? Does procedure matter? Can we opine that one process or certain processes are more just than others? To what extent can we rely on any process to serve the important goal, highly valued by some, of fundamentally redistributing power and interests in a given society? Below I offer some observations on these and related questions.

### Does Procedure Matter?

I suppose no professor of procedure could ever fail to say that procedure matters. U.S. Representative John Dingell's famous line—"I'll let you write the

substance . . . and you let me write the procedure, and I'll screw you every time"<sup>6</sup>—certainly carries a lot of weight with me.

Substance without procedure can be useless. The best laws in the world are meaningless unless they can be meaningfully enforced. Procedures can be used to give or deny great advantage.

### The Limits of Procedural Reform

Despite the admitted power of procedure, it is also clear to me that procedure, on its own, has limited capacity to accomplish significant reform against the interests of the most powerful members of a society. Although litigation enthusiasts seem confident in the ability of litigation to accomplish social reform, history is replete with examples of how powerful interest groups can limit such reforms. For example, both substantive and procedural legislation can be used to counter advances that were made or might have been made through litigation. In the area of "tort reform," we have seen companies seek to change the standards for liability, expand defenses, reduce available damages, and limit or eliminate class actions in order to make tort litigation more difficult for plaintiffs. With sufficient political clout, potential defendants can immunize themselves from the risks of litigation. Similarly, even without making such "rule" changes, powerful parties can gain significant advantages over their litigation opponents by taking steps including obtaining more and superior attorneys, amassing greater expertise, securing the appointment of judges likely to favor the position of the powerful, and convincing courts not to publish harmful precedents.

Nonlitigation procedures are similarly vulnerable to preexisting power imbalances. Whether one is talking about consensual or nonconsensual processes, such approaches do not allow us to sidestep or avoid the imbalances created by the background law, wealth, or power.

While it is true that settlements reached in mediation can (and often do) reach issues beyond those that might have been decided by a court, at least under a self-interested theory of human nature, there is no incentive for parties to agree to things they find undesirable

*Jean R. Sternlight is the Michael and Sonja Saltman Professor of Law and Director of the Saltman Center for Conflict Resolution at the University of Nevada, Las Vegas Boyd School of Law. She can be reached at [jean.sternlight@unlv.edu](mailto:jean.sternlight@unlv.edu).*

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unless there is a risk a court would find against them on those or other issues, or the costs of proceeding to court are too high, or other nonlitigation threats make settlement the preferable option. For example, groups in some other countries have espoused mediation as an effective means to accomplish human rights reform<sup>7</sup> or to limit domestic violence abusers' power over their victims.<sup>8</sup> However, it is very hard to see why a human rights violator or domestic violence abuser would voluntarily relinquish its power in mediation unless such powerful figure perceived a significant risk it would in any event lose a related claim in court or lose its power due to political agitation. Moreover, it would seem that some of the same kinds of factors that give powerful parties inherent advantages in litigation would also give them advantages in mediation. Although some might like to believe that representation by an attorney is not essential in mediation, it is likely that such representation is very helpful to most parties. Similarly, those more powerful parties that can muster significant resources to conduct research or gather evidence or allies will have an advantage in mediation, just as they do in litigation.

In arbitration as well, the powerful retain significant advantages. Even when arbitration is entered into consensually, a party whose economic resources are superior to its opponent can, for example, secure representation that will help it prevail; conduct more research that will enable it to select a more favorably disposed arbitrator; draft an arbitration clause in advance that will provide advantages with respect to venue or discovery or remedies; impose transaction costs on an opponent that will lead to concession or victory; or influence neutrals to rule in its favor for fear of otherwise losing future business. Just as in litigation, a party whose political resources are superior to those of its opponent can obtain more favorable underlying substantive law such that the arbitrator's rulings are likely to favor its own position.

When arbitration is imposed predispute by a powerful party on a less powerful party, these risks, of course, are heightened substantially. The arbitration clause itself may grant substantial advantages

to the powerful party by imposing high costs on the opponent, eliminating certain substantive claims, or limiting remedies or procedures that might help the less powerful party. Also, whereas the critics of binding arbitration have typically focused on the extent to which arbitration impedes "little guys" from bringing claims against powerful companies, of late, arbitration is increasingly being used as a weapon by large-company plaintiffs against consumer defendants. Such companies have found that when they seek to bring debt collection suits, for example, arbitration can allow them to obtain an enforceable judgment more quickly and cheaply than they would in small-claims court. Yet, a number of courts and commentators have taken issue with the extent to which consumers' rights to notice and a fair hearing are adequately protected in such arbitrations.<sup>9</sup>

#### **Are Some Processes More Just Than Others?**

If the effectiveness of procedures is limited, can we at least say some procedures are more just than others? While it is easy for me to identify certain processes as unjust (e.g., trial by ordeal),<sup>10</sup> I have a much harder time endorsing any standard process over another.

In part, my inability to endorse one form of dispute resolution as the most just stems from my inability to come up with a single satisfactory definition of justice. I seek a procedural mechanism that serves many interests, and I recognize that at times these interests are in tension if not conflict with one another. Ideally, dispute resolution would be accessible, fast, and fair, but it would also protect rights under the law; advance the interests of the less powerful; and serve such societal interests as rule of law, transparency, and advancement of desired substantive policies. I also believe that promoting harmony, balance, or reconciliation in a society can be appropriate goals of a justice system, although others see goals of harmony and justice as conflicting with one another.<sup>11</sup>

As I have discussed in detail elsewhere, whereas certain of these interests are served best by formal systems of justice, others are served best by informal approaches.<sup>12</sup> The relative justice advan-

tages of litigation, arbitration, mediation, and negotiation, for example, depend for me precisely on how the process is structured and on the nature of the dispute. As Professor Lela Love has noted, the various processes potentially offer different kinds of justice.<sup>13</sup> Thus, whereas certain public disputes are more suited to litigation, in order that they may provide precedent and education to the society as a whole, other more personal disputes may best be resolved through negotiation or mediation. Moreover, the difficulty in defining justice and in making an appropriate choice between individual and public interests in justice make it particularly impossible to choose one process over another in all circumstances. Instead, these various processes must be creatively combined with one another in order to serve our many, and to some degree, conflicting, interests in justice.

### How Can Procedural Reforms Enhance Justice?

I offer three suggestions for how we can try to ensure that simultaneous use of procedural reforms should enhance justice. First, we need to recognize that there are multiple forms of justice that are entitled to our recognition and support. Justice is not all about "rule of law" any more than it is all about conciliation or efficiency or access.<sup>14</sup>

Second, and relatedly, we should appreciate that multiple procedural forms can serve justice. It is usually a mistake to insist that any particular procedural approach is either desirable or undesirable in all circumstances. Instead, many approaches have virtues and detriments depending on the situation, and indeed the value of one procedure often depends on the extent to which another procedure may also be available.

Third, although I am to some degree counseling diversity and tolerance, it is also important to recognize that all procedural forms of dispute resolution are easily corrupted. All procedures can be turned to the advantage of the most powerful vis-à-vis the least powerful members of society, and we must be vigilant to try to ensure that this corruption does not occur. Litigation can be sabotaged by undermining substantive law or eliminating effective access for the less power-

ful. Negotiation can be unjust when powerful parties are allowed to use private deals to hide their misconduct or to deter future claims. Mediation can allow powerful parties to harm weaker ones by coercing settlements, deceiving weaker parties into waiving their rights, or even offering opportunities for physical harm. Arbitration can allow the powerful to obtain biased and unfair judgments against the less powerful, to shield themselves from liability owed under the law, or to prevent the public from learning of misconduct.

Yet, while dangers of injustice are rampant, there is no reason to end on a pessimistic note. If we are prepared to fight for what is right and just, we can all help ensure that various forms of procedure are used to help the weak and to improve our society. As lawyers, neutrals, policymakers, and even academics, we can try to ensure that underlying substantive laws are just and that all forms of dispute resolution are designed to protect the interests of all members of society as well as the public, rather than to entrench the interests of the most powerful. As stated in the book of Deuteronomy, "Justice, Justice Ye Shall Pursue."<sup>15</sup> ■

### Endnotes

1. See Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976) (keynote address at Pound Conference, introducing concept of "multidoor courthouse").

2. See Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with Rule of Law?: Lessons from Abroad*, 56 DE PAUL L. REV. 569 (2007).

3. Interestingly, some of the most enthusiastic litigation advocates are not practicing attorneys. Those who practice law are often somewhat more cynical about the prospective benefits of litigation.

4. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95 (1974).

5. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669-70 (1995); Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 300-01 (2003).

6. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell).

7. See Amy J. Cohen, *Debating the*



*Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295 (2006).

8. See Raquel Aldana & Leticia Saucedo, *The Illusion of Transformative Conflict Resolution: Mediating Domestic Violence in Nicaragua*, forthcoming 55 BUFF. L. REV. (2008).

9. E.g., *MBNA America Bank v. Credit*, 132 P.3d 898 (Kan. 2006) (approving trial court's refusal to enforce arbitrator's award in collection case, based on creditor's failure to prove existence of prior arbitration agreement or that debtor was properly served with arbitration decision).

10. The question of whether mandatory binding arbitration is unjust is not quite as obvious to me as is trial by ordeal. I ultimately conclude that it is neither the mandatory nor the binding nature of arbitration that renders it unjust, but rather the fact that such arbitration is private and imposed by a private rather than a public actor. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L.

REV. 1631, 1670-75 (2005).

11. E.g., Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. DISP. RES. 1 (1993) (discussing perceived movement to trade justice for harmony).

12. See Jean R. Sternlight, *Is ADR Consistent with Rule of Law?*, supra note 2; Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TULANE L. REV. 1401 (2004). See also Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289 (2003).

13. Lela P. Love, *Images of Justice*, 1 PEPP. L. REV. 29 (2000).

14. See Sternlight, *Is ADR Consistent with Rule of Law?*, supra note 2 at 590-91 (explaining that "rule of law" is better considered as part of a larger vision of justice than as an end in itself).

15. Deut. 16:20.

## 2009-10 Call for Nominations

The chair of the Senior Lawyers Division has appointed the following Nominating Committee: Chair Walter T. Burke, and members George H. Cain, Edward E. Kallgren, Richard L. Kaplan, Francis J. Larkin, and Anthony R. Palermo. All SLD members are encouraged to contact these individuals with recommendations to fill the following SLD offices for bar year 2009-10. Elections will be held during the ABA Annual Meeting in August 2009.

**Officers:** Chair-elect T. Maxfield Bahner automatically becomes chair at the adjournment of the 2009 Annual Meeting. Charles A. Collier Jr., SLD chair during the 2008-09 bar year, automatically becomes immediate past chair. Nominations will be made for the offices of chair-elect (one-year term), vice-chair (one-year term), secretary (two-year term), budget officer (two-year term), and delegate (three-year term).

**Council Members at-Large:** Three council seats will be open for election for four-year terms to expire in 2013. One seat will be open for election to a one-year term to expire in 2010.

**Honorary Council Members:** Two honorary council seats will be open for election to two-year terms to expire in 2011.

The Nominating Committee shall submit its report to the division chair on or before May 1, 2009. Additional nominations may be made by petition pursuant to Section 6.2 of the division bylaws, which requires receipt of such petitions by the chair of the division no later than sixty days prior to the opening of the Annual Meeting of the Association.

Please send recommendations for nominations in writing with a brief statement of the candidate's activities in the Division and the legal profession by February 15, 2009, to the chair of the Nominating Committee, Walter T. Burke, with a copy to SLD Staff Director Judith Legg, c/o Senior Lawyers Division, American Bar Association, 321 N. Clark Street, Chicago, IL 60654. Fax: 312-988-6033, e-mail: leggj@staff.abanet.org.

Walter T. Burke  
Burke & Casserly, PC  
255 Washington Ave.  
Albany, NY 12205  
wburke@burkecasserly.com

George H. Cain  
680 Woodshire Ln., Unit H-8  
Naples, FL 34105  
cainghsr@worldnet.att.net

Edward E. Kallgren  
Five Bridges Foundation  
28 Hillcrest Rd.  
Berkeley, CA 94705  
eekallgren@msn.com

Richard L. Kaplan  
University of Illinois  
504 East Pennsylvania Ave.  
Champaign, IL 61620  
rkaplan@law.uiuc.edu

Francis J. Larkin  
Southern New England Law School  
333 Faunce Corner Rd.  
North Dartmouth, MA 02747  
flarkin@snesl.edu

Anthony R. Palermo  
3450 South Ocean Blvd.  
# 204  
Palm Beach, FL 33480  
arpalermo@aol.com