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Résumé de l'article

La vision pluraliste du droit aide à bien comprendre la portée et la signification sociale et morale des modes alternatifs de solution des conflits, c'est-à-dire, par rapport à l'ordre juridique étatique, des modes de solution autres que celui correspondant à l'intervention décisionnelle des tribunaux ordinaires. Ces modes peuvent se rattacher à une typologie souple qui inclut d'autres formes d'adjudication, l'arbitrage, la médiation et la négociation. Mais, on doit tout aussi bien comprendre d'autres voies établies et pratiquées sans le concours de l'État. L'étude du pluralisme juridique en tant que phénomène universel permet de constater l'existence quasi universelle de tels forums correspondant à plusieurs ordres sociaux semi-autonomes et non étatiques.

L'étude du pluralisme juridique incite de plus à poser que les différents modes de solutions des conflits ont tendance à être associés à différents corpus de normes juridiques. On peut démontrer, pour ce qui est de l'ordre étatique, que, dans une certaine mesure, les modes alternatifs font appel à différents ensembles normatifs. Quant aux voies non étatiques, on peut également établir que les normes appliquées diffèrent, parfois même de façon marquée, du droit étatique. Bien qu'une conception centralisée du droit refuse de qualifier de "jurisprudence" ces normes, aucune véritable raison ne permet de refuser de tenir ces règles et principes, qui régissent des ordres sociaux autre que l'État, pour du "droit coutumier", au sens général du terme.

On a souvent reconnu aux modes alternatifs de solution des conflits l'avantage de promouvoir l'effectivité du droit, d'élargir l'accès à la justice ou au droit. Cependant, si la présente thèse est correcte, il ne suffit plus de s'en tenir à cet apport relié à l'application du droit. En fait, chacun des modes alternatifs met en oeuvre une espèce distincte de droit. Les fonctions sociales de ces différents droits correspondant à différents modes de solution de conflits, qu'ils soient ou non étatiques, varient; d'où la nécessité d'une approche spécifique. De même, doit-on étudier, dans toute société donnée, si une loi y porte atteinte aux rapports de pouvoirs. Si on a avancé l'idée que les modes alternatifs de solution des conflits offrent aux parties faibles et défavorisées l'occasion de faire valoir leurs intérêts, on a aussi soutenu, à l'inverse, qu'ils peuvent permettre à des justiciables déjà bien nantis, d'augmenter leurs pouvoirs, étant ainsi à l'abri de l'influence régulatrice des tribunaux étatiques. À certains moments de l'histoire, les démunis peuvent même manipuler à leur avantage l'intervention étatique. Les voies non étatiques peuvent également, en certaines circonstances particulières, favoriser collectivement les membres de certains collectivités dans lesquelles elles interviennent.

The alternative law of alternative dispute resolution*

Gordon R. WOODMAN**

The perceptions afforded by the study of legal pluralism assist an understanding of the full scope and the social and moral significance of alternative dispute resolution. The latter term includes all modes and forms of dispute resolution within the legal order of the state other than the usual forms of adjudication by the ordinary courts. These modes may be classified in relatively wide and fluid categories as other forms of adjudication, and arbitration, mediation and negotiation. However, alternative dispute resolution also includes instances of all these processes which are not established, adopted, or made effective by the state. The study of legal pluralism throughout the world shows that almost everywhere are many such instances, generated within many semi-autonomous social fields other than the state, and falling into all the listed categories.

The study of legal pluralism further suggests that the different dispute settlement processes are likely to be associated with different bodies of legal norms. There is evidence that to some extent alternative state processes employ different bodies of laws. The evidence also shows that non-state processes employ bodies of norms which always differ, and may differ widely from those of state law. While legal centralism denies these norms the name of "laws", there seems no good reason not to classify such rules and principles, which order relations within social fields other than the state, as "customary law", or by some similar term.

Alternative dispure resolution processes have been lauded as enhancing the effectiveness of the law, providing wider access to justice or law. However, if the argument presented here is correct, it is not sufficient to represent them as implementing "the law". Rather each implements a different variety of law. The social functions of these

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different laws of different dispute resolution processes, both state and non-state, vary, and so need investigation in each particular case. Whether any law is to be approved as affecting power relations in the society concerned is similarly a matter for investigation. While it has been suggested that alternative dispute resolution processes can confer on the weak and underprivileged an opportunity to assert their interests, it has been argued against such a view that they may provide opportunities for the already powerful to increase their powers, free of the restraining influence of regular state courts. On the other hand, state processes may at certain historical moments be manipulated by the weak to their advantage. Non-state processes may, also in special circumstances, empower collectively the members of the social fields in which they operate.

La vision pluraliste du droit aide à bien comprendre la portée et la signification sociale et morale des modes alternatifs de solution des conflits, c'est-à-dire, par rapport à l'ordre juridique étatique, des modes de solution autres que celui correspondant à l'intervention décisionnelle des tribunaux ordinaires. Ces modes peuvent se rattacher à une typologie souple qui inclut d'autres formes d'adjudication, l'arbitrage, la médiation et la négociation. Mais, on doit tout aussi bien comprendre d'autres voies établies et pratiquées sans le concours de l'État. L'étude du pluralisme juridique en tant que phénomène universel permet de constater l'existence quasi universelle de tels forums correspondant à plusieurs ordres sociaux semi-autonomes et non étatiques.

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justice ou au droit. Cependant, si la présente thèse est correcte, il ne suffit plus de s'en tenir à cet apport relié à l'application du droit. En fait, chacun des modes alternatifs met en œuvre une espèce distincte de droit. Les fonctions sociales de ces différents droits correspondant à différents modes de solution de conflits, qu'ils soient ou non étatiques, varient; d'où la nécessité d'une approche spécifique. De même, doit-on étudier, dans toute société donnée, si une loi y porte atteinte aux rapports de pouvoirs. Si on a avancé l'idée que les modes alternatifs de solution des conflits offrent aux parties faibles et défavorisées l'occasion de faire valoir leurs intérêts, on a aussi soutenu, à l'inverse, qu'ils peuvent permettre à des justiciables déjà bien nantis, d'augmenter leurs pouvoirs, étant ainsi à l'abri de l'influence régulatrice des tribunaux étatiques. À certains moments de l'histoire, les démunis peuvent même manipuler à leur avantage l'intervention étatique. Les voies non étatiques peuvent également, en certaines circonstances particulières, favoriser collectivement les membres de certains collectivités dans lesquelles elles interviennent.

The concept of Legal Pluralism is currently the subject of analysis of a number of students of legal theory. The social phenomenon of Legal Pluralism is the subject of empirical investigation by a many students of law and society in all parts of the world. Perspectives and conclusions differ, but many of those involved have found that the concept is a powerful aid to conceptual analysis, sociological understanding, and

evaluation in fields related to law[1]. This paper is an attempt to employ the concept to develop an understanding of the implications of alternative dispute resolution.

1. What is the field of alternative dispute resolution?

1.1. Introductory issues

No-one could by the light of nature understand the meaning of Alternative Dispute Resolution. The precise signification of each of the three words is problematic. Fortunately the literature illuminates some of these problems. It indicates that in some respects accepted conventions provide a reasonable degree of precision. For other aspects of the subject it clarifies the competing meanings between which one must choose if one would discuss the topic in theoretical terms, that is, generally.

This paper debates certain general propositions about the topic. It is not intended to deny the usefulness of contributions which fasten on and develop specific issues within the fields. But it does assert as a premise the overriding importance of theory. It is based on the contention that, whenever any discussion of a specific issue is claimed to be a contribution to a particular field of knowledge, that claim presupposes a map, that is, a general theory of the field.

The central term "dispute" has been treated by some as interchangeable with "conflict"[2]. Although for some sociological inquiries that may be helpful, it applies the term "dispute" to too broad a range of phenomena for the purpose of the present discussion. To keep the debate within reasonably narrow bounds, and to accord with established convention, it seems more helpful to adopt a more restrictive notion. Here a dispute will be seen as the species of conflict which has developed

1. It is not possible to list here the considerable literature on Legal Pluralism. The following introduce certain aspects of the notion, and refer to a large quantity of literature: J. GRIFFITHS, "What is Legal Pluralism?", (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1; S.E. MERRY, "Legal Pluralism", (1988) 22 *Law & Society Rev.* 869; M. CHIBA, *Legal Pluralism: Toward a General Theory Through Japanese Legal Culture*, Tokyo, Tokai University Press, 1989; G.R. WOODMAN, "Folk Law", in M. CHIBA (ed.), *Supplement* to A.-J. ARNAUD (gen. ed.), *Dictionnaire d'Éguilles*, Paris and Brussels, Librairie générale de droit et de jurisprudence and Story-Scientia, forthcoming.
2. See *e.g.*: V. AUBERT, "Competition and Dissensus: Two Types of Conflict and of Conflict Resolution", (1963) 7 *J. of Conflict Resolution* 26; T. ECKHOFF, "The Mediator, the Judge and the Administrator in Conflict-Resolution", (1967) 10 *Acta Sociologica* 148.

to the point where there is a public assertion of the mutually inconsistent claims and the fact of their incompatibility[3].

This definition is not limited to disputes over the appropriate remedies for alleged past acts, which are the commonest subject of litigation. It extends also to expressed conflicts over the appropriate terms of continuing future relations between the parties. These cannot be excluded, since the topic is generally agreed to include, for example, the resolution of labour disputes as to the future terms of work contracts[4]. Consequently the definition of "dispute" includes many instances of conflict over purely political or administrative matters. They will not require much discussion because the term "resolution", as it is to be defined, is not often applicable to the means used typically to deal with them[5].

The word "resolution" as used in the phrase is really intended to refer to processes or modes of resolution. It is used by some to refer to any mode at all of dealing with disputes, including for example exit, avoidance, tolerance and unprincipled coercion. These are, again, of interest for some sociological inquiries, but not, it is believed, for the present purpose. However, the literature also reveals a converse danger of defining "resolution" too narrowly. If taken to mean the final elimination of a dispute, it would be a rare occurrence. Even that apparently most definite of resolutions, the final decision of a court of law, does not necessarily terminate a dispute, and may constitute no more

3. R.L. ABEL, "A Comparative Theory of Dispute Institutions in Society", (1973-74) 8 *Law & Soc. Rev.* 217. See also: A.L. EPSTEIN, "Introduction", in A.L. EPSTEIN (ed.), *Contention and Dispute: Aspects of Law and Social Control in Melanesia*, Canberra, Australian National University Press, 1974, p. 1; D. COUNTS and D. COUNTS, "The Kaliai Lupunga: Disputing in the Public Forum", in A.L. EPSTEIN (ed.), *id.*, p. 113; F.G. SNYDER, "Anthropology, Dispute Processes and Law: a Critical Introduction", (1981) 8 *Brit. J. of L. & Soc.* 141; M. CAIN, and K. KULCSAR, "Thinking Disputes: An Essay on the Origins of the Dispute Industry", (1981-82) 16 *Law & Soc. Rev.* 374; P. FITZPATRICK, "The Political Economy of Dispute Settlement in Papua New Guinea", in C. SUMNER (ed.), *Crime, Justice and Underdevelopment*, London, Heinemann, 1982, p. 228.

4. This was insisted upon repeatedly by Fuller in his influential articles on dispute resolution. See: L.L. FULLER, "Collective Bargaining and the Arbitrator", (1963) *Wis. L. Rev.* 3; *Id.*, "Human Interaction and the Law", (1969) 14 *Am. J. Juris.* 1; *Id.*, "Mediation—its Forms and Functions", (1971) 44 *So. Calif. L. Rev.* 305; *Id.*, "The Forms and Limits of Adjudication", (1978) 92 *Harv. L. Rev.* 353; also M.A. EISENBERG, "Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking", (1975-76) 89 *Harv. L. Rev.* 637.

5. See further: L.L. FULLER, *supra*, note 4 (1971, 1978); T. ECKHOFF, *supra*, note 2.

than one further factor in an indefinitely continuing dispute[6]. Other modes of dispute resolution, such as mediation or negotiation have been found to be at least equally likely to result in a "settlement" which constitutes no more than a staging point in a continued process of disputing[7]. Therefore a resolution is best viewed as an event which terminates a particular stage in the dispute by changing the normative relationship between the parties to a greater or lesser degree, but which does not necessarily terminate the dispute.

Thus far the formula Alternative Dispute Resolution appears less than entirely satisfactory. But the qualifier "alternative" is yet more unsatisfactory than the other constituent elements. Grammatically it is inappropriately placed, because apparently it is intended to qualify not "dispute", but "resolution". Categorically it is ill-chosen because it is a contradiction in terms to speak of a singular alternative. When people use the adjective in this manner they usually mean "something which could stand in place of that which I have in mind at the moment". In such cases the "alternative" is the Beauvoirean second, "the other". Thus an alternative mode of dispute resolution means a mode which could be used instead of the standard. The implied notion that there is an intrinsically basic, standard mode is commonly related to a politically useful fallacy: that that with which the powerful are personally associated is the natural, standard instance. The notion may be inspired by ethnocentrism, religious faith, some other superstition, or simple egotism. In truth, standard cases are never intrinsically, only conventionally so.

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6. Thus it is shown how adjudication may be merely the basis for further bargaining between the still disputing parties, in G. CALABRESI and A.D. MELAMED, "Property Rules, Liability Rules, and Inalienability—One View of the Cathedral", (1972) 85 *Harv. L. Rev.* 1089. The importance of post-adjudication disputing, and especially negotiation, is shown in: K. von BENDA-BECKMANN, *The Broken Stairways to Consensus: Village Justice and State Courts in Minangkabau*, Dordecht-Holland and Cinnaminson-U.S.A., Foris Publications, 1984; *Id.*, "The Social Significance of Minangkabau State Court Decisions", (1984) 23 *Journal of Legal Pluralism and Unofficial Law* 1. Adjudication by a court is seen as rarely terminating disputes, but as a sanction which one party may use against another in a continuing dispute, by S.E. MERRY, "Going to Court: Strategies of Dispute Management in an American Urban Neighbourhood", (1979) 13 *Law & Soc. Rev.* 891.

7. P.H. GULLIVER, *Social Control in an African Society*, London, Routledge & Kegan Paul, 1963; *Id.*, "Introduction: Case Studies of Law in Non-Western Societies", in L. NADER (ed.), *Law in Culture and Society*, 1969, p. 11, at p. 14-15; R.L. ABEL, *supra*, note 3, p. 228; M. SALTMAN, *The Kipsigis: a Case Study in Changing Customary Law*, Cambridge Mass., Schenkman, 1977, p. 46-49; C.S. MESCHIEVITZ and M. GALANTER, "In Search of Nyaya Panchayats: The Politics of a Moribund Institution", in R.L. ABEL (ed.), *The Politics of Informal Justice*, New York, London, Academic Press, 1982, Vol. 2: "Comparative Studies", p. 47.

We can in the present case only adopt the convention, while attempting to escape from its evaluative undertones. The convention seems to be that alternative dispute resolution consists of the modes of dispute resolution which are alternatives to adjudication in the longest-established, traditional courts of the state according to their usual procedures (hereafter adjudication by state courts). That this latter is seen as the standard is not surprising in view of the fact that the bulk of the literature has been written by legal practioners and others whose business it is to operate, study or teach about the work of these institutions[8]. It is worth emphasising by an example the element of ethnocentrism in the convention. Among the Arusha of Tanzania modes of dispute resolution existed before the advent of colonial rule and the inception of the modern state. Those processes, as they continued vigorously in the colonial period, are examined in the influential work of Gulliver. Referring to the advent of colonial rule, and the establishment of state courts, he is led by the historical sequence to sum up the development by saying that "adjudication by government magistrates became an alternative method of dispute-settlement"[9].

The adjective "alternative" also carries the association of a choice between the objects on offer. However, disputes involve two parties at least, who do not usually, at the initial stages, find it easy to agree about very much. There is no particular reason why the choice between alternatives should be made by one party rather than the other, or should not be made by some third party with authority over them, or by the community to which they belong. There are many examples of different possibilities. The mode of choice is, therefore, a variable. It has been included as such in studies of the ways in which disputing parties may manoeuvre for procedural advantage[10].

8. See also M. CAIN and K. KULCSAR, *supra*, note 3, p. 378-83.
9. P.H. GULLIVER, *supra*, note 7 (1963), p. 273-74. His perspective was noted by M.A. EISENBERG, *supra*, note 4, p. 640. See similarly: P. FITZPATRICK, *supra*, note 3, p. 246, 247; S.E. MERRY, "Anthropology and the Study of Alternative Dispute Resolution", (1984) 34 *J. Legal Educ.* 277.
10. See e.g.: L. NADER, "The Anthropological Study of Law", (1965) 67 (6) *American Anthropologist* 3, p. 23; M.J. LOWRY, "Me ko Court: The Impact of Urbanization on Conflict Resolution in a Ghanaian Town", in G. FOSTER and R. KEMPER (eds.), *Anthropologists in Cities*, 1974, p. 153, at p. 173-76; F.G. SNYDER, *supra*, note 3, p. 145; K. von BENDA-BECKMANN, *supra*, note 6, Chap. III; J. GRIFFITHS, "Four Laws of Interaction in Circumstances of Legal Pluralism: First Steps Towards an Explanatory Theory", in A. ALLOTT and G.R. WOODMAN (eds.), *People's Law and State Law: the Bellagio Papers*, Dordrecht-Holland and Cinnaminson-U.S.A., Foris Publications, 1985, p. 217; F. von BENDA-BECKMANN, "Some Comparative Generalizations About the Differential Use of State and Folk Institutions of Dispute Settlement", in A. ALLOTT and G.R. WOODMAN (eds.), p. 187. These writings all show

A term frequently met in recent literature, and sometimes used interchangeably with alternative dispute resolution, is « informal justice ». It is defined in the literature on that subject[11]. It coincides with alternative dispute resolution frequently, but not in every instance. Consequently much, but not all of the literature on informal justice is relevant to the present discussion. Some will be referred to below.

The argument of these opening paragraphs has been pedantic. But they constitute the first step in opening the view on a field which is larger than it may seem at first sight. It follows from them that, to examine modes of dispute resolution which are alternatives to adjudication by state courts we must consider: modes alternative to adjudication; and modes alternative to those of the state.

1.2. Alternative modes of dispute resolution

Alternatives to the standard case are sometimes provided by *alternative forms of adjudication*. These may take the form of special adjudicative procedures in the ordinary courts, of adjudication in special sections of those courts, or of adjudication in special courts within the state judicial system. Many small claims procedures and courts are examples[12]. These modes of dispute resolution are alternatively only to a limited degree, being not much more than duplicates. All are instances of adjudication in the state judicial system.

In adjudication a decision on how the dispute is to be resolved is reached by a third party, the judge. The judge's authority to decide is derived from the holding of an office, which confers authority over both of the disputants for the purpose of the dispute. The judge reaches or purports to reach the decision by applying pre-existing rules. The decision can normally be enforced by official coercion[13].

The state may provide alternative dispute resolution processes not only by setting up new institutions of adjudication, but also by providing for modes of dispute resolution other than adjudication. Students of law, anthropology and sociology have identified a number of other modes of dispute resolution. All are represented in the legal systems of modern

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also that the freedom of either party to choose between the alternatives may be limited in various ways. On this see also M. SALTMAN, *supra*, note 7, p. 57.

11. E.g. in R.L. ABEL, "Introduction", in R.L. ABEL (ed.), *supra*, note 7, Vol. 1: "The American Experience", p. 1, at p. 2.
12. Another is referred to in C.S. MESCHIEVITZ and M. GALANTER, *supra*, note 7. See also the discussion of Papua New Guinea Village Courts *infra*.
13. On adjudication, see further L.L. FULLER, *supra*, note 4 (1978).

states. There is not complete agreement among students, but most would agree that is it reasonable to categorise them as arbitration, mediation and negotiation. In practice each of these modes occurs in a variety of forms, some of which are hardly distinguishable from similar forms of other modes[14].

Arbitration differs essentially from adjudication only in that the third party's authority is derived from a specific agreement for that purpose between the parties. State courts in England were long hesitant to grant legal recognition to agreements to arbitrate or to arbitrators' decisions[15]. Today examples are common in relation to disputes over commercial transactions and labour relations[16]. The form of the process varies[17], and in some instances the procedures of arbitration are indistinguishable from those of other modes of dispute resolution. At one extreme are arbitrations which are identical with the processes of the standard type of adjudication, in which facts are determined according to evidence formally adduced, and rules are applied to the facts as found. At the other extreme are processes where the concern of the arbitrator (and this applies also to judges in some cases) to achieve a resolution acceptable to both sides leads him or her to act in ways which are not greatly different

14. The discussion of the categorisation of forms of dispute resolution has been voluminous. The present writer finds the following particularly useful: V. AUBERT, *supra*, note 2; *Id.*, "Law as a Way of Resolving Conflicts: the Case of a Small Industrialized Society", in L. NADER, *supra*, note 7, p. 282; A.L. EPSTEIN, *supra*, note 3, p. 19-25; D. COUNTS and D. COUNTS, *supra*, note 3, p. 123-24; G. BIERBRAUER, J. FALKE and K.-F. KOCH, "Conflict and its Settlement: An Interdisciplinary Study Concerning the Legal Basis, Function and Performance of the Institution of the Schiedsmann", in M. CAPPELLETTI (Gen. Ed.), *Access to Justice*, Alphenaandenrijn and Milan, Sijthoff and Giuffré, 1978-79, Vol. II, Book I, p. 39, at p. 51-56; S. ROBERTS, *Order and Dispute: An Introduction to Legal Anthropology*, Penguin Books, Harmondsworth, 1979, p. 69-78, 162-67; E. JOHNSON, "Thinking About Access: A Preliminary Typology of Possible Strategies", in M. CAPPELLETTI, *supra*, Vol. III, p. 3; K.-F. KOCH, "Access to Justice: An Anthropological Perspective", in M. CAPPELLETTI, *supra*, Vol. IV, p. 1; E.D. GREEN, "A Comprehensive Approach to the Theory and Practice of Dispute Resolution", (1984) 34 *J. Legal Educ.* 245.

15. G.L. WILLIAMS, "The Doctrine of Repugnancy—II: in the Law of Arbitration", (1944) 60 *Law Q. Rev.* 69.

16. For English developments in another area, see R. THOMAS, "Alternative Dispute Resolution—Consumer Disputes", (1988) *Civ. Just. Q.* 206.

17. For an indication of the varieties possible, see R. WILLIAMS, "Should the State Provide Alternative Dispute Resolution Services", (1987) *Civ. Just. Q.* 142.

from mediation, although there is controversy as to whether the two roles can be effectively exercised by the same person[18].

Mediation entails activity by a third party who is not a judge or any type of umpire, is not acting in pursuance of authority to impose a decision, and can only propose to the parties the terms of possible agreements by which they might resolve the dispute. The process is sometimes called conciliation, and is exemplified in the field of labour relations in the more publicised function of the British Arbitration and Conciliation Service[19]. The third party may be a collectivity, although this is unlikely to be the case with state mediation. The clearest instances are those described, for non-state mediation, by anthropologists, where the entire adult community meets to debate a dispute with a view to persuading the disputants to agree to a settlement[20]. This mode also varies. The third party may take a proactive role, and have a degree of authority which makes it difficult for the disputants to reject the terms of a settlement which he or she proposes. Mediation in such a case approaches arbitration or adjudication, as mentioned in the previous paragraph. At the other extreme, and especially where the mediator is a collectivity, its members may be almost indistinguishable from agents of the respective parties, and so it may verge on negotiation[21].

Negotiation (or bargaining[22]) consists of any process directed towards an agreed resolution in which no third party plays a significant part. The disputing parties are commonly both subject to some economic or social pressure to reach an agreement, and hence to constraints on the degree to which they can refuse terms to settle. These constraints are

18. See: L.L. FULLER, *supra*, note 4 (1963); P.H. GULLIVER, *supra*, note 7 (1969), p. 22; B. YNGVESSON and M. HENNESSEY, "Small Claims, Complex Disputes: a Review of the Small Claims Literature", (1965) 9 *Law & Soc. Rev.* 219; A. SARAT, "Alternatives in Dispute Processing: Litigation in a Small Claims Court", (1975-76) 10 *Law & Soc. Rev.* 339; M. CAPPELLETTI and B. GARTH, "Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report", in M. CAPPELLETTI, *supra*, note 14, Vol. I, Book 1, p. 3, at p. 59; K.F. RÖHL, "The Judge as Mediator", (1985) 4 *Civ. Just. Q.* 235.
19. See also: R. THOMAS, *supra*, note 16; R. YOUNG, "Neighbour Dispute Mediation: Theory and Practice", (1989) 8 *Civ. Just. Q.* 319.
20. E.g. GULLIVER, *supra*, note 7 (1963).
21. T. ECKHOFF, *supra*, note 2; L.L. FULLER, *supra*, note 4 (1971); M. SALTMAN, "Indigenous Law Among the Ksipigis of Southwestern Kenya", in M. CAPPELLETTI, *supra*, note 14, Vol. III, p. 311; S.E. MERRY, "The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America", in R.L. ABEL, *supra*, note 7 (1982), Vol. 2, p. 17.
22. E.H. NORTON, "Bargaining and the Ethic of Process", (1989) 64 *N.Y.U. L. Rev.* 493, p. 494 n. 1, and generally.

frequently set by the terms which would be imposed if the dispute were taken to adjudication[23]. The parties may be institutions, or groups of individuals. Especially in these cases, but also when they are single individuals, they may act through agents. This process frequently precedes the commencement of any of the other processes, and its outcome may postpone or obviate recourse to them[24].

In consequence of the definition of "dispute" which has been adopted, the notion of negotiation has a wide range. It extends to many of the disputes over political and administrative decision-making which could not feasibly be subjected to adjudication, or even in many cases mediation. It could be illuminating to compare negotiations on such matters with those involving issues which could feasibly go to mediation, or even to adjudication. However, the present discussion is concerned with comparisons between different dispute resolution processes. For this purpose it will suffice to focus on negotiations over matters which could be the subject of the other forms of processes[25].

Conciliation need not be considered as a separate category. It is some sometimes a form of mediation, sometimes a form of therapy[26]. In the latter case the objects of the conciliator's intervention are usually disputing parties engaged in negotiation, and the aim is to influence their conduct of the negotiation.

All these forms of dispute resolution "by talking" are contrasted by some with the further alternative of dispute resolution "by fighting" or coercion[27]. However, even if these can be reasonably included in the category of dispute resolution, the research currently available on them, while of sociological interest and practical value, supports the conclusion that relatively little is to be learnt about the other processes by comparison with them.

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23. M. CAPPELLETTI and B. GARTH, *supra*, note 18, p. 64-66; R.H. MNOOKIN and L. KORNHAUSER, "Bargaining in the Shadow of the Law: the Case of Divorce", (1979) 88 *Yale L.J.* 950.
24. T. ECKHOFF, *supra*, note 2.
25. *Cf.* T. ECKHOFF, *supra*, note 2, p. 166-69. See generally P.H. GULLIVER, "Negotiations as a Mode of Dispute Settlement: Towards a General Model", (1972-73) 7 *Law & Soc. Rev.* 667.
26. M. CAPPELLETTI and B. GARTH, *supra*, note 18, p. 61-63; A. OGUS *et al.*, "Evaluating Alternative Dispute Resolution: Measuring the Impact of Family Conciliation on Costs", (1990) 53 *Mod. L. Rev.* 57; S. ROBERTS, "A blue-print for family conciliation?" (1990) 53 *Mod. L. Rev.* 88.
27. Terminology from S. ROBERTS, *supra*, note 14, Chap. 9; *cf.* P. FITZPATRICK, *supra*, note 3, p. 233.

Any of these methods may be applied to a dispute which could otherwise be resolved by adjudication by state courts (although they may also be applied to disputes which could not). Thus a legislator or other policy-maker who thinks it necessary to introduce a substitute for adjudication by state courts may resort to any of them. Consequently, the reforming legislator should, if the work of reform is to be comprehensively conducted, consider the possibility of resorting to each.

There may be a far more complex relationship between these modes than the either-or choice pattern. One dispute may include a large number of distinguishable issues. The various issues may be resolved by different modes. Thus during the course of litigation directed to resolution by adjudication, various issues may be settled by agreement between counsel on their own initiative (negotiation through agents), or at the suggestion of and on terms suggested by the judge (mediation) ; these may occur before any adjudication has occurred, or when some major issues have been adjudicated but others not, or after all the principal issues have been adjudicated.

1.3. Dispute resolution by non-state processes

The examples given in the previous section were predominantly processes of dispute resolution established, controlled or enforced by state institutions. In this subsection it will be argued that all these modes can and frequently do also exist independently of the state.

For the purpose of this discussion it is perhaps not essential to argue for a particular definition of law. The category of alternative dispute resolution is neither expressly nor impliedly restricted to processes involving the application of "law"[28]. Nevertheless, the argument to be developed below will have more general implications if it is coupled with a particular argument as to the use of the word "law". It is contended that the word may be properly used to refer to all socially accepted norms, and need not be limited to those observed and enforced by the state. From this it follows that it is as appropriate to use the term "law" of the norms applied in non-state dispute resolution processes as it is to refer to the norms applied in state processes as "law".

The argument for this contention starts from an observation. There exist everywhere bodies of observed social norms other than the laws of the state. These are generated and operate in semi-autonomous social

28. *Cf.* the arguments in : R.L. ABEL, *supra*, note 3, 221-24 ; F.G. SNYDER, *supra*, note 3, p. 145.

fields[29] which rarely coincide with the international boundaries of the state. Such norms frequently structure the social relations of those in their fields to a far greater extent than the laws of the states which claim their allegiance. These customary laws (to use one among a plethora of alternative labels[30]) include the social norms of minority ethnic groups, both indigenous (such as in Australia and the Americas) and immigrant (virtually everywhere), and also of ethnic groups which comprise the totalities of populations (such as in most of Africa and much of Asia). They also include the self-generated social norms of groups everywhere who are united not by ethnicity but other features such as the pursuit of a particular occupation, or residence in a particular locality.

It is contended that there is no justification for the ideology of legal centralism[31] which sees a significant difference between state law and customary law. The two types of law share the same characteristics and are divisible into the same categories, with norms of obligation, sanctions, various types of secondary rules[32], principles[33] and, as will be argued, the various forms of dispute resolution processes. State laws and customary laws merge into each other in fields such as those of constitutional conventions, the customary practices of commerce and trade, and the norms of positive morality which state judges feel themselves bound to take into account when developing state law[34]. Nevertheless it has to be

29. This helpful term was coined in the paper which eventually became Chap. 2 in S.F. MOORE, *Law as Process: an Anthropological Approach*, London, Routledge & Kegan Paul, 1978.
30. Those terms known to me are listed G.R. WOODMAN, *supra*, note 1.
31. J. GRIFFITHS, *supra*, note 1.
32. Following the analysis of H.L.A. HART, *The Concept of Law*, Oxford, Clarendon Press, 1961.
33. Following R. DWORKIN, *Taking Rights Seriously*, Cambridge Mass, Harvard, U.P., 1977.
34. See: E. EHRLICH, *Fundamental Principles of the Sociology of Law* (trans. W.L. Moll), Cambridge Mass, Harvard, U.P.,1936; E.A. HOEBEL, *The Law of Primitive Man: a Study in Comparative Legal Dynamics*, Cambridge Mass., Harvard U.P., 1954; L.L. FULLER, *supra*, note 4 (1969); J.F. HOLLEMAN, "Trouble-Cases and Trouble-less Cases in the Study of Customary Law and Legal Reform", (1972-73) 7 *Law & Soc. Rev.* 585; B. de SOUSA SANTOS, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada", (1977) 12 *Law & Society Rev.* 5; S.F. MOORE, *supra*, note 29; C.P. DREDGE, "Dispute Settlement in the Mormon Community: The Operation of Ecclesiastical Courts in Utah", in M. CAPPELLETTI, *supra*, note 14, Vol. IV, p. 191; M. GALANTER, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law", (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1; E. LE ROY and M. WANE, "La formation des droits non étatiques", in *Encyclopédie Juridique de l'Afrique*, vol. 1, "L'État et le Droit", Dakar, 1982, p. 353; H.W. ARTHURS, *'Without the Law': Administrative Justice and Legal Pluralism in*

observed that the ideology of legal centralism is widely accepted among students of law, and much discussion of alternative dispute resolution, such as the Florence Access-to-Justice Project, have been based on its assumptions[35].

The categories of state and non-state dispute resolution processes might be distinguished according to whether the state originally established them, the state currently provided logistic support, the state enforced their resolutions, or they applied state norms. Many instances would be differently classified according to the criteria used, and some

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Nineteenth-Century England, Toronto, London, U. of Toronto Press, 1985 ; A. ALLOTT and G.R. WOODMAN, *supra*, note 10 ; F. STRIJBOSCH, "The Concept of Pela and its Social Significance in the Community of Moluccan Immigrants in the Netherlands", (1985) 23 *Journal of Legal Pluralism and Unofficial Law* 177 ; K. von BENDA-BECKMANN and F. STRIJBOSCH (eds.), *Anthropology of Law in the Netherlands : Essays in Legal Pluralism*, Dordrecht, Foris Publications, 1985 ; M. CHIBA (ed.), *Asian Indigenous Law : In Interaction with Received Law*, London and New York, KPI, 1986 ; *Id.*, *supra*, note 1 ; J. GRIFFITHS, *supra*, note 1 ; P. SACK and E. MINCHIN (eds.), *Legal Pluralism : Proceedings of the Canberra Law Workshop VII*, Canberra, Australian National University, 1986 ; MERRY, *supra*, note 1 ; B.W. MORSE and G.R. WOODMAN (eds.), *Indigenous Law and the State*, Dordrecht, Foris Publications, 1988 ; G.R. WOODMAN, "What is the Commission About ?", (1988-89) XIV-XVII *Newsletter of the Commission on Folk Law and Legal Pluralism*, International Union of Anthropological and Ethnological Sciences. An important recent discussion of non-state dispute resolution processes in western societies is M. GALANTER, *supra*, which provides support for many of the contentions in the present paper. A neat example of legal centralism in respect of dispute resolution is the statement : "The administration of justice is perhaps the oldest of the state monopolies", R. THOMAS, "A Code of Procedure for Small Claims : a Response to the Demand for Do-it-yourself Litigation", (1982) 1 *Civ. Just. Q.* 52, p. 52.

An explanation is due for the omission of any mention of international law in this paper. I believe that the example of international law — manifestly not a state law (although its substance may be adopted as state law in some jurisdictions), but universally referred to as a law — could be used to illustrate virtually every observation suggested here. However, it is the subject of a distinctive field of doctrine and practice. A great deal of explanation and justificatory argument would be needed to employ it as an example. For economy of space, therefore, this illustration is not used.

35. M. CAPPELLETTI, *supra*, note 14, especially the questionnaire, Vol. I, Book 1, p. 125. *Cf.* L.M. FRIEDMAN, "Access to Justice : Social and Historical Context", in M. CAPPELLETTI, *id.*, Vol. II, Book 1, p. 3, at p. 8, showing that the notion is a relatively modern development. A work strongly marked with a legal centralist orientation is J.S. AUERBACH, *Justice Without Law ?*, New York, Oxford, Oxford U.P., 1983. That work considers non-state dispute resolution processes not to be "legal". *Cf.* S. HENRY, *Private Justice : Towards Integrated Theorising in the Sociology of Law*, London, Routledge & Kegan Paul, 1983, the basis of which study implicitly rejects legal centralism ; L.K. WROTH, "Pluralism and Uniformity in the Common Law Legal Tradition", (1988) 37 *U.N.B.L. L.J.* 76, especially at p. 82-84, adopting an analysis of alternative dispute resolution similar to that offered here.

could not be classified unequivocally even if a single criterion were used. In the following discussion those dispute resolution processes will be classified as non-state processes which are not structured primarily by the state. These are processes which are neither established nor adopted by the state, and the resolutions of which are not systematically enforced by the state. The types of norms applied in such processes are the variable discussed in this paper.

The remainder of this section will note the existence in non-state fields of the various modes of dispute resolution already listed.

Non-state adjudication occurs when customary law confers on an office-holder authority to determine disputes by the application of established norms. This is not unusual. "The decision of the Secretary [or Chairman, or Registrar, or Headmaster, or Management Committee] shall be final" is a common provision in the rules of private institutions. Where the decision is to be determined at least in part by rules or principles, and where the institution itself has some means of enforcement (whether or not the state courts would in fact also enforce the decision if called upon), non-state adjudication exists[36]. That the designated official may misinterpret or blatantly disregard the rules or principles which are required to be applied, or that the means of enforcement are feeble and ineffective, are immaterial at this point: the conduct of state judges and courts sometimes display the same features. If they occur beyond a certain extent in either a state or a non-state system of adjudication the result is liable to be the demise of that system. But either type of system can survive a great deal of abuse and feebleness.

Arbitration which is independent of the state occurs when the agreement to confer power on a third party is effective under a customary law, rather than state law. This generally occurs in a different type of context from that in which there is recourse to adjudication. A general provision for dispute resolution by resort to arbitration is likely to be a major part of the laws of the institution, which may even have been established primarily for this purpose. In the case of adjudication the

36. See for examples e.g.: ANONYMOUS, "Rabbinical Courts: Modern Day Solomons", (1970) 6 *Colum. J.L. & Soc. Probs.* 49; H.J. KIRSCH, "Conflict Resolution and the Legal Culture: a Study of the Rabbinical Court", (1971) 9 *Osgoode Hall L.J.* 335; M.J. LOWRY, *supra*, note 10; B. de SOUSA SANTOS, *supra*, note 34; E. COMBS-SCHILLING, "Grieving and Feuding: The Organizational Dilemma of a Labour Union", in L. NADER (ed.), *No Access to Law: Alternatives to the American Judicial System*, New York, London, Academic Press, 1980, p. 461; C.S. MESCHIEVITZ and M. GALANTER, *supra*, note 7; S. HENRY, *supra*, note 35; U. BAXI, "Popular Justice, Participatory Development and Power Politics: The Lok Adalat in Turmoil", in A. ALLOTT and G.R. WOODMAN, *supra*, note 10, p. 171.

reference to the "final decision" of the official is often a relatively insignifiant part of the institutional rules. Trade, labour and professional associations are likely to provide for arbitration of disputes between members, providing that disputing members may agree on the person to act as arbitrator, and are to accept the decision given[37].

Mediation which is independent of the state has been scientifically studied in detail in non-western societies, but is found everywhere. Where the notion of a strict application of rules to resolve all disputes is regarded with disfavour, there is an expectation that disputants will seek to resolve their differences by compromise. The assistance of a third party may be vital in securing a resolution which both can be induced to accept[38].

Non-state negotiation is to be found, for example, when a dispute between two members of a family or an informal voluntary association is resolved by negotiation which employs no state institution or official, and terminates in a resolution which is binding under a customary law rather than state law[39].

1.4. Conclusion

It has been argued that the area of alternative dispute resolution may be usefully seen as larger than it is sometimes assumed to be. There are two dimensions of variation. First, dispute resolution may occur within the field of activity of the state, or within any other semi-autonomous social field. Because the fields of jurisdiction are semi-autonomous, a particular resolution within one field may have effects in other, overlapping fields. Secondly, a process of dispute resolution may consist of adjudication, arbitration, mediation or negotiation, or include elements of two or more of these. Any study of an aspect of existing dispute resolution processes should take account of existing alternatives. Any analysis of an existing situation, and any proposal for future action,

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37. An example is given in the account of M. EASTON, "The Better Business Bureau: 'The Voice of the People in the Marketplace'" in L. NADER, *supra*, note 36, p. 223.
38. See e.g.: P.H. GULLIVER, *supra*, note 7; ANONYMOUS, *supra*, note 36; H.J. KIRSCH, *supra*, note 36; L.-W. DOO, "Dispute Settlement in Chinese-American Communities", (1973) 21 *Am. J. Comp. L.* 627; A.L. EPSTEIN (ed.), *supra*, note 3; L. NADER and C. SHUGART, "Old Solutions for Old Problems", in L. NADER, *supra*, note 36, p. 57, at p. 74-78; D.R.C. CHALMERS, "A History of the Role of Traditional Dispute Settlement Procedures in the Courts of Papua New Guinea", in D. WEISBROT, A. PALIWALA and A. SAWYERR (eds.), *Law and Social Change in Papua New Guinea*, Sydney, Butterworths, 1982, p. 169.
39. For examples, see A.L. EPSTEIN (ed.), *supra*, note 3.

concerned with a particular aspect of dispute resolution should at an initial stage take account of the possibilities for comparison (in analysis) and choice by policy-makers (in proposals for the future) offered by the dimensions of variation in this area.

2. The legal norms of dispute resolution systems

2.1. The relation of laws to dispute resolution: the general issue

The conclusions reached thus far are relevant to the study of dispute resolution processes. They have not been shown to be directly relevant to the study of law.

One possible justification for holding that the study of dispute resolution processes is a legal study must be disavowed. It has been quite widely asserted in the common-law world that law is no more than the activities of courts. The realists have claimed that the law consists of "prophecies of what the courts will do in fact"[40], or "what officials do about disputes"[41]. According to that view, legal study is nothing other than the study of dispute resolution processes, or some of them. The profound error in the view was adequately summed up long ago by Kantorowicz: "One cannot define... courts of law without law. The law is not what the courts administer but the courts are the institutions which administer the law"[42]. It is not denied that many students of legal theory have found the realist view practically helpful for certain specific inquiries[43]. But in the present instance it would foreclose the further inquiry which it is intended to pursue. For this purpose is it preferable to follow a much older and more generally accepted view of law as consisting of norms, or rules and principles.

The issue is the nature of the relationship between legal norms and the various processes of dispute resolution. Through an inquiry into this issue the notion of alternative dispute resolution may be used to throw

40. O.W. HOLMES, "The Path of the Law", (1986-87) 10 *Harv. L. Rev.* 457, p. 461.
41. K.N. LLEWELLYN, *The Bramble Bush* (2nd ed.), New York, Oceana, 1951, p. 9.
42. H. KANTOROWICZ, "Some Rationalism About Realism", (1934) 43 *Yale L.J.* 1240, p. 1250. See also especially: J.F. HOLLEMAN, *supra*, note 34; M. GLUCKMAN, "Limitations of the Case-Method in the Study of Tribal Law", (1972-73) 7 *Law & Soc. Rev.* 611; R. DWORKIN, *supra*, note 33. See J.S. AUERBACH, *supra*, note 35, a work which contains some interesting accounts of and comments on alternative dispute resolution processes, but is perhaps limited in its usefulness because it is uninterested in the norms affecting them; and see also the comment on the work, *supra*, note 35.
43. As the present writer did in G.R. WOODMAN, "Some Realism About Customary Law—The West African Experience", (1969) *Wis. L. Rev.* 128.

light on the nature and variety of law. The central thesis of this section is that there is a definite, although not easily analysed relationship between the content of a body of norms and the form of dispute resolution process in which they are applied.

For the purpose of this argument it is necessary to question further the ideology of state law. The ideology asserts that (i) the law of every state is a self-consistent system with a single source of authority, and (ii) this state law is the only law properly so called. From these there follow two further propositions : (i) that all those dispute resolution processes in a state which are established or recognized by state law apply the same law ; (ii) that any processes which are not related to state law are at best non-legal (i.e., have no significant relation to and are unrecognised by any law), and at worst are illegal.

In considering the role of norms in dispute resolution, state processes will be discussed first.

2.2. The variety of state laws

The traditional account of adjudication by state courts states that the process consists exclusively of the "application" of legal norms to particular situations, or could and ought to consist exclusively of this. Although that view is generally rejected today, on the ground that judges commonly have a certain degree of discretion, it is widely agreed that norms are of predominant importance in the resolution of disputes by adjudication.

Given this view of adjudication, alternative modes of dispute resolution established by the state are sometimes sought to be justified as "making rights effective", i.e. giving fuller effect to people's rights under state law than would adjudication by the regular state courts[44]. This claim assumes that the same substantive norms will be applied in the state's alternative processes as in adjudication. In practice it seems to be conceded that some changes in substantive rights are always likely to occur[45]. In some instances it seems clear that distinctly different norms arise in different fora of adjudication[46].

The clearest instances of special state courts which apply different laws from those applied in the principal courts have been where the state

44. E.g.: M. CAPPELLETTI and B. GARTH, *supra* note 18; B. GARTH, "The Movement Towards Procedural Informalism in North America and Western Europe: A Critical Survey", in ABEL (ed.), *supra*, note 7, Vol. 2, p. 183, at p. 190-91.
45. M. CAPPELLETTI and B. GARTH, *supra*, note 18, p. 83-84.
46. E.g. H.W. ARTHURS, *supra*, note 34, p. 138-162.

has "recognised" and incorporated into its own judicial system institutions which has previously operated independently of the state. The British colonial policy of indirect rule resulted in the "recognition" thus of many existing "native courts". Those courts continued to apply some of the same norms as previously, although these had been norms of a customary law which were very different from the principal state law. Some of the most important studies by legal anthropologists of customary laws have been studies of such courts[47].

Another demonstration is provided by the Papua New Guinea Village Courts Act 1973. This statute implements a policy according to which the state is to establish local courts which will follow local customary procedures and practices, and not the procedural or substantive laws of the common law which are followed in all other state courts. The Act provides for the establishment of Village Courts, rather than the recognition of existing courts. But it provides that these creations of the state are to seek to secure "just and amicable settlements". To this end they are not to be bound by any laws other than the Constitution and the Village Courts Acts. Thus they are not to be bound by the procedural or substantive norms of the common law or statute, and are rather to decide cases "in accordance with substantial justice"[48]. Here, as in the cases of native courts, is an express acknowledgement in state law that certain state courts may not apply the same laws as the regular state courts.

When arbitration is provided for by state law, the arbitrators can be required to apply exactly the same norms as judges. But there is no necessity either in theory or in policy for this, and in practice it is not always a requirement. The arbitrator is normally selected for the possession of expert knowledge relevant to the matter in dispute. It is expected that the arbitrator will make use of this knowledge, whereas a judge would have to be informed through the court's formal methods of proof. It may be appropriate for an arbitrator to adopt a different approach from that of a judge in deciding issues of law. The arbitrator's approach may be less formal, or on other occasions more formal[49], but in either event is different and so may give rise to different decisions. Research suggests that some categories of arbitrators act predictably, according to known norms ; but that the norms may be not those of state courts' case-law. They may, for example, be those of commercial

47. M. GLUCKMAN, *The Judicial Process Among the Barotse of Northern Rhodesia*, Manchester, Manchester U.P., 1955 ; P. BOHANNAN, *Justice and Judgment Among the Tiv*, London, New York, Toronto, Oxford, U.P., 1957.
48. *Village Courts Act*, ss. 29, 30 ; D.R.C. CHALMERS, *supra*, note 38, p. 180-84.
49. L.L. FULLER, *supra*, note 4, (1963), p. 6-10.

custom[50], of specific codes of practice[51], or of the exigencies of target attainment in a planned economy[52]. Arbitrators are sometimes required to formulate decisions in disputes which would not be considered justiciable. This occurs, for example, when an arbitrator is required to draw up the many, detailed, interdependent conditions of service of the employees of a large industrial concern[53]. It may be concluded that to some extent, and in some circumstances, different norms are applied by adjudicators from those which judges sitting contemporaneously in the same state would apply[54].

Mediation and negotiation pose the problem of dispute resolution processes which arguably do not entail the application of any norms whatever. For a resolution by either of these modes the consent of the disputants is necessary. If necessary, it could also be sufficient: the parties, it can be argued, are free to agree on any terms at will, and this degree of discretion excludes the governance of norms.

This possibility is not, however, found to be effectuated in the cases of mediation and negotiation which have been studied. Thus Gulliver, who once argued for a non-normative view of negotiation, later modified his view. He arrived at the conclusion, after long observation, that mediators and negotiators did seek out and express an overarching rule which could be said indisputably to apply to both parties. Such a rule, by providing an accepted framework for the dispute, could be the basis for a positive phase leading to agreement on a resolution. Although "in adjudication there [was] a greater inhibition by norms and rules"[55], norms were referred to in virtually every negotiation[56].

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50. ANONYMOUS, "Note. Predictability of Results in Commercial Arbitration", (1948) 61 *Harv. L. Rev.* "The Predictability of Nonlegalistic Adjudication", (1972) 6 *Law & Soc. Rev.* 563.
51. R. THOMAS, *supra*, note 16.
52. J.A. SPANOGLE and T.M. BARANSKI, "Chinese Commercial Dispute Resolution Methods: The State Commercial and Industrial Administrative Bureau", (1987) 35 *Am. J. Comp. L.* 761, describing a transition from dispute resolution by administrators according to such norms to resolution by arbitrators according to "strict law".
53. L.L. FULLER, *supra*, note 4 (1963).
54. See also: D. RHIDIAN THOMAS, "Commercial Arbitration—Justice According to Law", (1983) 2 *Civ. Just. Q.* 166; F.A. MANN, "Private Arbitration and Public Policy", (1985) 4 *Civ. Just. Q.* 257.
55. P.H. GULLIVER, *supra*, note 25, p. 683.
56. P.H. GULLIVER, *supra*, note 7, (1963), (1969) p. 17-21; *Id.*, "Dispute Settlement Without Courts: The Ndendeuli of Southern Tanzania", in R.L. NADER, *supra*, note 7, p. 24; *Id.*, *supra*, note 25; see also the critical discussion of Gulliver on this issue in: M. SALTMAN, *supra*, note 7, p. 45-46; M.A. EISENBERG, *supra*, note 4, p. 640-42.

Furthermore, it may be contended that, even if there are disputes in which no party at any stage overtly cites a norm, the external boundaries of any dispute in society are set by norms. A decision, whether by agreement or by imposition, which would contradict any norm which is accepted in the social field to which the disputants belong, is not usually a possible resolution of a dispute. No doubt further constraints are imposed in some instances by facts such as the power of one of the disputants. But the exercise of power occurs within the normative frame within which the dispute is fought and resolved. It may be a rule in a society—it is probably a rule in many societies—that disputes are not to be settled in zero-sum manner, and that if a strict application of legal norms would have this result, then the norms must not be strictly applied[57]. But this very approach is embodied in a normative principle, and in so far as it is considered binding on all parties to disputes it may be characterised as no more than an overriding legal norm. There are, therefore, strong grounds for concluding that legal norms play a part in most dispute resolution processes, including not only adjudication by state courts but all other modes, including those where the outcome is not determined by a third party[58].

If all instances of mediation and negotiation are constrained by legal norms which are effective in a social field of the parties, instances which are established under the authority of state law are constrained within a framework of state law norms. Thus both mediation and negotiation must be conducted with regard to the laws of state courts if there is a desire that the final settlement should be enforceable or recognisable there. In a common law jurisdiction disputants will, for example, need to avoid committing provable misrepresentation, as it is understood by the law of the state courts, although they need not avoid puffing. A party may find it wise to require the other to put his or her representations, made in the course of a dispute settlement process, in writing, so that if they prove false they may be proved and a remedy obtained in a state court. It has been said that the law of contract and tort generally govern negotiation, with divorce and labour law also applying in relevant cases[59].

How far is the law which is applied in state mediation and negotiation the same law as that applied in state adjudication? The body of norms

57. L. NADER, "Styles of Court Procedure: to Make the Balance", in L. NADER (ed.), *supra*, note 7, p. 69.

58. R.L. ABEL, *supra*, note 3, p. 236-39; see also A.S. MORRISON, "Is Divorce Mediation the Practice of Law? A Matter of Perspective", (1987) 75 *Calif. L. Rev.* 1093.

59. E.H. NORTON, *supra*, note 22. See also R.H.MNOOKIN and L. KORNHAUSER, *supra*, note 23.

applied in mediation and negotiation does not include all those which would govern in adjudication. Consequently, although the resolution reached through mediation or negotiation is ordinarily enforceable in a state court, it can differ from the resolution which would have been reached by that court. Further, there is evidence that in negotiation the parties are likely to observe a combination of state laws and non-state laws[60]. Therefore, in so far as identifiably state-law norms are observed, their character is likely to be changed by the simultaneous adherence to non-state laws. This will be further developed when mediation and negotiation outside the purview of the state are considered.

2.3. Dispute resolution in non-state laws

The conclusions to be drawn here largely follow from arguments already presented, although they could be established independently on the evidence. It has been argued that there exist alternative bodies of law, in the sense of non-state, customary laws. It has been argued that there exist alternative dispute resolution processes in the sense of processes established and governed by customary laws. It has been argued that not only adjudication, but also arbitration, mediation and negotiation involve the application of legal norms ; and that, as between different state-law modes and forms, the contents of the applied laws differ. It follows that each non-state dispute resolution process involves the application of a particular body of non-state law.

There are numerous examples of adjudication by judges owing their authority to customary laws, and in which resolutions are reached by the strict application of customary law[61]. Perhaps more numerous are instances of arbitration, since this does not require the existence of a permanent office-holder. However, if the disputants are able to exercise a degree of choice in selecting the third party, they are likely also to be able to ask that that party mediate rather than giving a determinative decision, unless the governing customary law precludes mediation. Thus it has been shown that, in the law of a certain New York Jewish community, some disputes must be determined by the application of strict rules, but for others the disputants are asked to choose between *din* ("strict law")

60. T. THOMAS, *supra*, note 16. *Cf.* R. YOUNG, *supra*, note 19, p. 326-27, concluding that the absence of commonly accepted norms was one of the causes of the relative failure of a state mediation scheme.

61. See e.g. : ANONYMOUS, *supra*, note 36 ; H.J. KIRSCH, *supra*, note 36 ; B. de SOUSA SANTOS, *supra*, note 34 ; C.P. DREDGE, *supra*, note 34 ; L. POSPISIL, "Modern and Traditional Administration of Justice in New Guinea", (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 93; BAXI, *supra*, note 36.

or *pesharah* (comprise, i.e. mediation), and nearly always choose the latter[62]. Mediation nevertheless does entail the application of norms[63], as does negotiation[64].

Frequently the disputes submitted to non-state resolution processes could alternatively have been taken to state processes. The resolutions which emerge from the application of customary laws are different from those which would emerge from the application, in corresponding processes, of state laws. That conclusion may be challenged in respect of some instances. It sometimes appears, and is claimed, that customary laws are identical with state laws. The state legal system may, for example, expressly provide for the "recognition" or "incorporation" of customary laws into state law. That such claims to identity of content are usually false is shown by the experience of attempts to apply customary laws in state processes. These have been shown to result in the transformation of the norms applied. For example, in relation to the Village Courts of Papua New Guinea, Paliwala has shown that the realities of state power and economic changes resulted in the Village Courts in practice applying a body of norms different from those of the practised customary laws, and becoming adjudicatory rather than

62. ANONYMOUS, *supra*, note 36; H.J. KIRSCH, *supra*, note 36.

63. P.H. GULLIVER, *supra*, note 7 (1963); A.L. EPSTEIN (ed.), *supra*, note 3; A.L. EPSTEIN, *supra*, note 3, p. 21; M. SALTMAN, *supra*, note 21; C.P. DREDGE, *supra*, note 34; P. FITZPATRICK, *supra*, note 3, p. 234-38.

64. P.H. GULLIVER, *supra*, note 7 (1963); *Id.*, *supra*, note 7 (1969); *Id.*, *supra*, note 56; *Id.*, *supra*, note 25; A.L. EPSTEIN, *supra*, note 3; M.A. EINSENBERG, *supra*, note 4; C.P. DREDGE, *supra*, note 34. In the course of his detailed and subtle discussion Eisenberg advances two arguments which need attention in the development of a theory which views laws as consisting of bodies of social norms. (1) He argues that western jurisprudence fails to see the full range of legal norms in status-oriented societies, and so fails to appreciate that norms are being taken into account when status relations affect negotiating positions in such societies. (2) He argues that in all negotiation, even in industrialised western societies, "the universe and operation of norms is open-ended", that is, all applicable norms are taken into account, even if they "collide" (partially conflict) or are "legally invalid" (inapplicable in adjudication). (See M.A. EISENBERG, *supra*, note 4, p. 642-45). These observations illuminate a notion recently developed by Chiba. He argues that, whereas in western societies the motivating attitude to legal rights is "definite" (strict), in Africa it is "elastic". He relates the latter particularly to the importance of status roles, which he characterises as a "functional complement" to law in African societies. In passing he wonders whether the Western approach is as definite as it has been represented, and whether there might be a Western functional complement in terms of "the freedom of each party to resort to or waive his or her rights". (See M. CHIBA, *supra*, note 1, especially p. 149, n. 3; discussed further G.R. WOODMAN, Book Review, (1990) 29 *Journal of Legal Pluralism and Unofficial Law* forthcoming.) Perhaps Chiba's functional complements are not unrelated to Eisenberg's norms which affect negotiation but are ignored in adjudication.

mediatory institutions[65]. It has been observed that in consequence the genuinely indigenous dispute resolution processes continue outside the aegis of the state, while the village courts constitute an "alternative [sic] forum" to these, rather than a substitute for them[66]. Similarly it has been argued that the enforcement of "customary laws" in regular state courts in African countries has resulted in the creation of new bodies of "lawyers' customary laws". These laws owe much of their content to the previous, practised customary laws, but some vital features also to the characteristic procedures and remedies of the state courts[67].

This account confirms a conclusion which has sometimes been drawn from the study of state courts over time, concerning the interaction between dispute resolution processes and the content of legal norms. The processes in any social field (including the state) are an integral part of the implementation of the body of law of that social field. But although the processes are often viewed as having been established by legal norms, and as being continuously legitimated by legal norms, it seems that they react upon the content of that body of norms. Consequently the legal norms are formed in part by the requirements and limitations of the procedures and remedies of the processes. This is true not only of state law and dispute resolution processes, but of the law and dispute resolution processes of other social fields.

It has been argued that the requirements and limitations of the standard case of state law adjudication differ from those of alternative modes and forms of dispute resolution. Alternative processes of dispute resolution therefore entail alternative bodies of substantive law. Thus alternative dispute resolution is intertwined with legal pluralism.

3. Implications

3.1. Social

The differences between the substantive laws of the various state and non-state dispute resolution processes result in a different pattern of outcomes for each process. It seems reasonable to propose the hypothesis that different processes may be found systematically to favour the interests of different social categories. This is a field in which relatively

65. A. PALIWALA, "Law and Order in the Village : The Village Courts", in D. WEISBROT, A. PALIWALA and A. SAWYERR (eds.), *supra*, note 38, p. 191 ; *Id.*, "Law and Order in the Village : Papua New Guinea's Village Courts", in C. SUMNER, *supra*, note 3, p. 192.

66. P. FITZPATRICK, *supra*, note 3, p. 246, 247.

67. G.R. WOODMAN, "How State Courts Create Customary Law in Ghana and Nigeria", in B.W. MORSE and G.R. WOODMAN, *supra*, note 34, p. 181.

little investigation has been completed. Much of that which is available has been done for the purpose of evaluative discussion. Consequently only a few miscellaneous comments will be made here. The question will be central to the next section.

It seems to be established that the categories benefited by a newly developed process are not always those which were predicted to benefit by those who set up the process. Thus small claims procedures have often been promoted on the ground that they would assist individuals with few resources to assert their rights against larger opponents. But it has been repeatedly found that on the whole small claims procedures have tended to be used primarily by businesses against individuals[68]. Again, there is evidence that in Africa those particular dispute resolution processes set up or "recognised" by the state to apply customary laws have tended to enhance the dominance of males, the old, and those with high traditional status[69].

It is to be expected that the social functions of dispute resolution processes may be traced in the first instance by investigating the modes and forms of production out of which legal institutions arise. The basis of most particular bodies of law can be found in specific instances of modes of production, the social relations within which are both reflected and maintained by the application of legal norms. It is a reasonable hypothesis that a body of law or a category of dispute resolution process will benefit the class which is formed by and dominant in the relations of production with which the law or process is associated.

In modern industrialised, western states, the modes of production are relatively homogeneous. In so far as customary laws arise directly from relations of production or exchange, these norms and the dispute resolution processes which apply them tend to maintain those relations and the dominance of particular interests within them. Frequently, however, the social fields of non-state laws are particular classes or sub-classes, such as wage-labour, or the practitioners of a particular profession. In any such case the laws and their dispute resolution processes may produce solidarity within the field against hostile external groups, but are likely within the field to favour a varied set of interest groups.

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68. B. YNGVESSON and M. HENNESSEY, *supra*, note 18.
69. M. CHANOCK, "Neo-traditionalism and the Customary Law in Malawi", (1978) 16 *African Law Studies* 80 ; *Id.*, "Making Customary Law : Men, Women and Courts in Colonial Northern Rhodesia", in M.J. HAY and M. WRIGHT (eds.), *African Women and the Law : Historical Perspectives*, VII, *Boston University Papers on Africa*, 1982 p. 53 ; *Id.*, *Law, Custom and Social Order : the Colonial Experience in Malawi and Zambia*, Cambridge, Cambridge U.P.,1985.

The homogeneity of production processes means that it is likely to be difficult to introduce new dispute resolution processes alternative to state adjudication in modern western societies. A significant number of disputes here arise between persons whose sole field of common membership is that of state law. Many accept the norms of state law only when they are coercively applied. When such disputes between such parties cannot be resolved by state adjudication, there may be no means of resolving them[70].

For certain third-world countries it has been argued that traditional customary laws arise from a distinct mode of production which is clearly distinguishable from, although articulated with, the capitalist mode which has given rise to state laws. If this were the case, one would expect quite different but identifiable interest groups to be benefited by the different laws and their dispute resolution processes. However, it is difficult to distinguish in any of these countries two relatively uniform modes of production as distinctly as the hypothesis supposes. One can identify a number of modes and forms of production which are deeply interdependent at any moment, even though this interdependence may not be necessary to the reproduction of any. The study of customary laws and modes of production in third-world countries suggests that no simple, general account of these differences is possible.

3.2. Evaluative

Value judgments of particular acts or practices depend, of course, on the underlying value premises of the critic. It may suffice to note here the value-discussion of alternative dispute resolution and non-state law which has developed in the past decade or so.

The possible social changes which might be effected through state introduction, fostering and control of alternative dispute resolution processes was a new topic of concern to law and society theorists in the late seventies. Initially enthusiastic arguments were advanced for the view that, at least in western societies, the promotion by the state of alternative dispute resolution was a liberalising, progressive phenomenon. An example is the progress of the Florence Access-to-Justice

70. L. NADER, "Disputing Without the Force of Law", (1979) 88 *Yale L.J.* 998 ; R. YOUNG, *supra*, note 19.

project[71]. This favourable view has been widely rejected as a result of empirical research and critical analysis of the theoretical arguments[72].

The advancement of alternative dispute resolution has been criticised first on the basis of the values of the liberal democratic state. It has been argued that adjudication has the merit that it enables state courts to "right wrongs" as determined in accordance with democratically accepted values. Thus one powerful critic of alternative dispute resolution has asserted that "civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals"[73]. If this is so, then to replace adjudication by other dispute resolution processes is to substitute processes which result in compromises in favour of power[74]. It might perhaps be replied that the state courts have generally claimed an overarching, controlling authority which could enable them to impose community values on powerful interests even when those interests are at an advantage. However, it was seen above that the norms given practical effect in other modes of dispute resolution tend, notwithstanding the supervisory control of state courts, to differ from those implemented in adjudication. This is essentially the argument which has been relied upon by these critics of alternative dispute resolution. They have claimed that the opportunities for control, and the enforcement of conciously accepted community values, by state courts are more limited when consensual dispute settlements are reached, perhaps as a result of pressure in the process of mediation or negotiation, than in adjudication subject to appeal or review[75]. However, in so far as critics claim that alternative dispute

71. See M. CAPPELLETTI (Gen. Ed.), *supra*, note 14. The initiation of the alternative dispute resolution movement in the USA has been identified as the Pound Revisited Conference at St. Paul Minnesota in 1976: L. NADER, "The ADR Explosion—the Implications of Rhetoric in Legal Reform", (1988) *Windsor Y.B. Access Justice* 269, p. 271-75.

72. See the discussion and literature cited *infra*. Notable statements of viewpoints opposed to the advance of alternative dispute resolution are: R.L. ABEL, "Conservative Conflict and the Reproduction of Capitalism: the Role of Informal Justice", (1981) 9 *International J. of the Sociology of Law* 245; *Id.*, *supra*, note 7; L. NADER, *supra*, note 71. Similar criticisms appear to be endorsed by J.S. AUERBACH, *supra*, note 35, especially p. 144. However, the analysis presented in that work is concerned only with dispute processes, not norms, and is committed to a legal centralist view. It needs to be added that the Florence Project was sufficiently balanced and scientific not to emerge with unqualified support for alternative dispute resolution.

73. O.M. FISS, "Against Settlement", (1984) 93 *Yale L.J.* 1073, p. 1089.

74. O.M. FISS, *supra*, note 73, p. 1085-87.

75. O.M. FISS, *supra*, note 73, p. 1083-84. For a detailed reply to Fiss, see J.K. LIEBERMAN and J.F. HENRY, "Lessons from the Alternative Dispute Resolution Movement", (1986) 53 *U. Chic. L. Rev.* 324. Their discussion starts from a description of the notion of alternative dispute resolution framed in terms of approved aims, and so heavily value-laden.

resolution is inimical to the rule of law, their analysis may be questioned. The argument of the present paper implies that these processes are inimical to the rule of the law of state adjudication, but are in accord with the rule of other laws[76].

Secondly, some critics, whether committed to liberal democratic values or not, have focused on the interests which alternative dispute resolution favours and the attitudes to which gives effect. It has been argued that it tends to increase the disadvantages of already disadvantaged groups, and also to provide more openings for the influence of social prejudices[77]. As a subsidiary argument it is also claimed by some that, in addition to the direct conferment of advantages on a class basis, it performs the ideological functions of concealing the realities of class domination, and dividing an oppressed class[78].

These criticisms generally compare alternative dispute resolution processes with adjudication in the regular state courts. Some of the critics, while not greatly approving of the results produced by the latter, are seeking to warn that (from some bases of judgement) other state processes may be still less desirable. However, there are many categories of disputes for which adjudication in regular state courts is not likely to be accessible in prevailing social and political circumstances. In these cases, the alternative process is "alternative" not to adjudication, but to coercion by the stronger party. For the weaker party in such a dispute, a process of mediation, or even negotiation, if it opens the situation to the view of the public or a mediator, and thereby makes room for social norms to operate, may be preferable[79].

The debate on these issues has been conducted almost entirely in relation to the various modes of state dispute resolution. The criticisms have been directed against processes which have been established by the state. "The state" in this case means the social groups which dominate,

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76. See L. NADER, *supra*, note 71, p. 275, 287.
77. K. ECONOMIDES, "Small Claims and Procedural Justice" (1980) 7 *British J.L. & Soc.* 111; R.L. ABEL, *supra*, note 72; *Id.*, *supra*, note 11; *Id.*, "The Contradictions of Informal Justice", in *Id.* (ed.), 7, Vol. 1, p. 267; S.E. MERRY, *supra*, note 21, p. 32, 39; R. DELGADO *et al.*, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution", (1985) *Wis L. Rev.* 1359; M.J. BAILEY, "Unpacking the 'Rational Alternative': a Critical Review of Family Mediation Movement Claims", (1989) 8 *Can. J. Fam. L.* 61; E.H. NORTON, *supra*, note 22; DENVER UNIVERSITY LAW REVIEW, *Quality of Dispute Resolution Symposium*, (1989) 66 *Denver U.L.R.* (n° 3).
78. R.L. ABEL, *supra*, note 72, p. 261; L. NADER, *supra*, note 71, suggesting at p. 286 that there are involved government strategies of pacification analogous to the British colonial policy of Indirect Rule.
79. See especially the instances discussed in L. NADER, *supra*, note 36.

or at least have the capacity to set in motion the state apparatus. These forms of alternative dispute resolution have been promoted on the ground that they have been designed for the use and benefit of underprivileged social groups, which by definition are groups other than those who establish and control the processes. It is not altogether surprising that state alternative dispute resolution processes do not liberate the underprivileged groups.

The limited scope of the debate has been noted by Galanter, who claims that "far more disputing is conducted within... indigenous [i.e. non-state] forums than in all the free-standing and court-annexed institutions staffed by arbitrators, mediators and other ADR professionals"[80].

The social functions of alternative dispute resolution may be different in the cases of processes established not by the state, but by social groups of limited extent for the use of their own members. These may well apply norms which favour certain sections of the group. But for groups of limited extent, their relationship as a collectivity with the outside world is important. The operation of dispute resolution processes within the group tend to enhance the group's autonomy at least in the negative sense that outside forces have less occasion to direct the conduct and relations of members. More positively, they may reduce conflict within the group, thus enabling members to benefit by acting with unity towards the outside world. Finally, the politically radical critics do not exclude the possibility that alternative dispute resolution processes may at certain historical junctures be effectively used to advance progressive revolutionary movements[81].

Outside the industrialised west value-debates have centred on the merits and demerits of indigenous customary laws and their related dispute resolution processes. The basic issues here concern the desirability or otherwise of fostering, continuing, modifying or suppressing aspects of earlier, indigenous cultures in social circumstances transformed by the impact of international capital. These debates turn on the broadest issues of political economy, to which issues concerning alternative dispute resolution are subordinate.

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80. M. GALANTER, "Introduction. Compared to What? Assessing the Quality of Dispute Processing", in *Quality of Dispute Resolution Symposium*, *loc. cit.*, *supra*, n. 77, p. xi, at p. xiii.

81. R.L. ABEL, *supra*, note 11, p. 11-12. A possibly more pessimistic view of the prospects is put by B. de SOUSA SANTOS, *supra*, note 34.