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2012

UC Irvine School of Law Legal Studies Research Paper Series No. 2012-69

Georgetown Public Law & Legal Theory Research Paper No. 12-159

Introduction & Coda, Multi-Party Dispute Resolution, Democracy and Decision Making: Vol. II of Complex Dispute Resolution

COMPLEX DISPUTE RESOLUTION: VOLUME II: MULTI-PARTY DISPUTE
RESOLUTION, DEMOCRACY AND DECISION MAKING Introduction and Coda (Carrie
Menkel-Meadow, ed., Farnham, U.K.: Ashgate 2012)

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Multi-Party Dispute Resolution, Democracy and Decision-Making Volume II

Edited by

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ASHGATE

Series Preface

The Complex Dispute Resolution series collects essays on the development of foundational dispute resolution theory and practice and its application to increasingly more complex settings of conflicts in the world, including multi-party and multi-issue decision-making, negotiations in political policy formation and governance, and international conflict resolution.

Each volume contains an introduction by the editor, which explores the key issues in the field. All three volumes feature essays which span an interdisciplinary range of fields – law, political science, game theory, decision science, economics, social and cognitive psychology, sociology and anthropology – and consider issues in the uses of informal and private as well as more formal and public processes. The essays also question whether the development of universal theoretical insights about conflict resolution is possible with variable numbers of parties and issues and in multicultural settings.

Taken together, the three volumes in this series present classic research essays on all aspects of complex dispute resolution and constitute an invaluable reference resource for libraries and academics in political decision-making, human rights, international relations and business and commercial law.

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Introduction

'If two heads are better than one, are three heads better than two?'

Anon.

Foundational Theory

All theories, but especially all social theories, are historically contingent or are at least situated in particular eras, with particular issues in contest. Much modern dispute and conflict resolution theory was initially developed through efforts made during the Cold War to study the conflicts between two axes of power, which inspired modern game theory, as well as through other efforts to understand the strategies to be used in 'two-party' contests of competition (and, later, coordination and cooperation, as well). It is probably no coincidence that the prize-winning game theory (Nash, 1950, 1953; Luce and Raiffa, 1957; Schelling, 1960), which initially focused on two-party strategic actions, was so evocative in the development of modern negotiation theory for, among others, lawyers and legal disputes and conflicts. Assumptions of scarce resources – for example, money, land, water and other resources including people, such as children in family custody disputes – that needed to be divided by two sides in conflict led to behavioural assumptions or prescriptive advice about how to 'distribute' such scarce resources between two 'warring' or 'competing' parties. Thus was born most conventional adversarial negotiation and dispute resolution theory – how one might best 'defeat' or 'maximize gain' against another single party, especially with lawsuits structured around plaintiff versus defendant.

From the late 1960s through the 1990s such assumptions of distributional allocation in dispute resolution were challenged, revisited and reassessed by a number of legal scholars (Fisher and Ury, 1981; Menkel-Meadow, 1984), psychologists (Rubin and Brown, 1975), anthropologists (Gulliver, 1979), economists, labour-management scholars (Walton and McKersie, 1965), decision scientists (Raiffa, 1982), and policy and city planners (Susskind, Richardson and Hildebrand, 1978), who mined conflicts and disputes for possibilities and opportunities for more optimistic 'mutual gain'. Although much of this work pre-dated the fall of the Berlin Wall in 1989, the more optimistic theories of the 1970s and 1980s suggested that not all negotiations had to result in binary win–lose or individual maximization outcomes. Rather, as suggested by the earlier work of Mary Parker Follett in the 1920s, (Follett, 1995), it was possible that when parties were in conflict they could 'integrate' their needs and interests by looking for trades of desired items, or by focusing on complementary, rather than conflicting, needs and interests. In Follett's classic stories, two sisters competing over a single orange learn that one wants the fruit and the other the rind (for cooking) or that temperature in a library can be regulated by opening a window in another room to avoid an undesirable direct draught (Kolb, 1995).

These 'solutions' to problems of conflict reveal that, by exploring underlying needs and interests, parties can search for creative ways of 'expanding' the resources they are seemingly competing over, or they may learn that because they value things differently, rather than in the same way, they can achieve 'gains by trade'. This more optimistic focus on creative solutions to situations of conflict (Menkel-Meadow, 2001a) has not only spawned a new interdisciplinary approach to conflict-handling, but has also inspired rigorous technical and humanistic study (as 'science' and 'art') of both the cognitive and behavioural aspects of conflict resolution. These theories built on a (at least temporarily) more optimistic view of international, business, legal and interpersonal relations which suggested that 'creating value' could be a just as likely negotiation outcome as destroying value in hard-fought and 'negative sum' high transaction-cost negotiations (Menkel-Meadow, 2006a, 2009). With the use of creative problem-solving by mediators, even highly contested family disputes led to a new outcome of 'shared' joint custody of children, rather than making one parent a custodial parent and granting the other only visitation rights as dictated by law. In international relations, the Sinai Peninsula was returned to Egyptian sovereignty, while maintaining Israeli security, by demilitarization and some neutralization of the land. Thus, more integrative approaches to negotiation have led to more creative, flexible, contingent (and therefore capable of being revisited) and sharing solutions.

Negotiation theorists and practitioners hoped to create a 'brave new world' of conflict and dispute resolution, as well as new approaches to joint-gain transactions and organizational creation. Some negotiation theorists and practitioners – lawyers among them – rethought how negotiated processes could actually lead to more substantive and procedural justice and fairness, as well as direct party participation in decision-making and policy formation (Menkel-Meadow, 1995, 2006b).

In the last few decades both legal scholars and practitioners have recognized that very few legal disputes have only two parties. Even the conventional plaintiff–defendant case in tort or contract often involves insurers, employees, suppliers, vendors, family members, partners in business or personal lives, so that almost no lawsuits are only 'two-party' conflicts. Virtually all legal matters implicate and involve more than two parties to the dispute, whether legally liable, or financially or socially affected by any resolution of a particular dispute. Modern forms of aggregate litigation (Burch, 2011), both in formal class actions or in less formal methods of group litigation, also require analysis as events of multi-party dispute resolution. Modern mass torts and disasters (such as environmental disasters, medical device malfunctions, 9/11 in the United States, 7 July 2007 in the UK and the BP oil spill in US waters) have spawned new forms of mass claims resolution, which include new forms of formal litigation and, more importantly, new forms of formal and informal claims resolution without courts. The recognition that some disputes or conflicts are iterative and repetitive within and among organizations (such as business and employment disputes) or involve hundreds or thousands of claimants (securities and consumer disputes, mass torts) has also spawned new approaches to dispute resolution called dispute system design or management of multiple repeat classes of disputes.

The Problem of Numbers: New Theory

As reviewed in Volume I, the outpouring of both intellectual and practical work in this new field of negotiation and conflict resolution produced a canon of new concepts to be explored and tested in both laboratories and real-world situations. It was not long before Howard Raiffa, a mathematician turned decision scientist and negotiation theorist, and others began to notice that *numbers matter* (Raiffa *et al.*, 2002). And numbers matter in important and different ways. The number of parties quickly challenged some of the basic canonical concepts in conflict resolution theory and practice:

- What happens to BATNAs (*best alternatives to negotiated agreements*) or WATNAs (*worst alternatives to negotiated agreements*) when there are more than two parties and there may be many more possible alternative arrangements (with some, but not all, of the parties involved)?
- How can ZOPAs (*zones of possible agreement*) be mapped on a two-dimensional playing field (or piece of paper) when adding parties to the mix makes many multidimensional zones possible?
- What happens when those ZOPAs do not overlap with all of the parties, but only with some?
- While two-party negotiations can be successfully accounted for by the concept of ‘*consent*’ or agreement when there is, by definition, no agreement if one party refuses to agree, what happens in a multi-party setting when some, but not all, consent? By what measure (or voting or *decision rule*) do we determine whether there is an agreement in a multi-party setting? Consensus, all, most, majority, plurality?
- What are the dangers in any agreement reached by only a few of the parties when others seek to sabotage the agreement (vetoes, ‘hold-outs’, saboteurs, defectors)?
- How is *enforcement* of, or *compliance* with, a multi-party agreement to be achieved? How might this be different from a two-party agreement?
- What happens when parties form *coalitions* or *alliances* to engage in group action and what happens when, after agreements to cooperate in such alliances are defected on, there is *betrayal* or *defection*? How are coalitions and alliances disciplined? How do we measure *trust* in multi-party situations? How *stable* are alliances and coalitions in multi-party settings?
- How are *information-sharing* strategies complexified when there are more than two parties asking for or giving information? What if information is distributed differentially to the parties?
- Power imbalances are difficult enough to manage in two-party settings, so what happens when there are *power differentials* among numbers of parties? Consider, in international negotiations, the developed and developing nations, the oil-rich and resource-poor, coastal versus inland nations and so on. And, within nations, consider indigenous groups versus settlers or colonizers or multi-ethnic/religious or other ‘cultural’ differences. Within more conventional lawsuits, consider the differences between those who can afford representation with resources and those who have none, as well as those between labour and management, differently endowed partners

in partnership dissolutions, creditors and debtors and so on.

- How does the *role of third-party facilitators* or helpers (mediators, arbitrators, even judges) change in conflicts or disputes with more than two parties? Consider the management of group or class litigation now allowed in many legal systems, mediation of multi-party environmental, community or regulatory disputes and facilitation of complex policy formation and implementation.
- Does it matter whether the parties have *iterative* (ongoing, repeat) *relationships* with each other or are simply dealing with a one-shot issue?
- What are different groups and parties like *internally*? Who makes decisions for each party? A single leader? A constituency with or without clear voting procedures?
- Who is the *representative* or *agent* (Mnookin, Susskind and Foster, 1999) of each party and what are they authorized to do? How do we know when a party or group has 'agreed' to something? What happens when a party or group has *internal dissension*? How can even single parties become multiple parties with negotiations that are both 'across the table' and 'behind the table' (with constituents) (Mnookin, Peppet and Tulumello, 2000)?
- Who talks when? How are complex multi-party or group negotiations structured? What *processes* are possible? Helpful, destructive?

Howard Raiffa, along with his colleagues at Harvard's innovative Program on Negotiation, including Nobel laureate Thomas Schelling, began (but never quite finished) an evocative questioning of how numbers of parties in negotiation might help us develop a fully elaborated theory (and practice) related to the number of participants in a negotiation. Beginning with the intrapersonal negotiations that we all have with ourselves – 'Should I do x or not? What happens when I want to do x, but instead do y?' (known as *cognitive dissonance*) – we can look at different conditions of negotiation when there is an *n of 2* (conventional two-party negotiation), *n of 3* (two negotiators with a mediator or other third-party assistant), *n of 5* (parties, lawyers or other representatives and a third party), more than 5, and ultimately more than 100 (most international negotiations, like most treaty negotiations nowadays, may involve as many as 200 negotiators and maybe more if one considers, as we do later in this volume, the negotiations of a full polity in democratic deliberation (Part III) or even larger, 'global' negotiations). Raiffa (like most of us who undertake practical work in these fields) has concluded that there are some sharp breaking-points in the conduct and process of conflict resolution with different numbers of negotiators. If there are more than about 100 people in a room, people do not really listen to each other without clear process management and amplification of attention, and any group of over 30 people suffers a reduction in individual participation (ask any teacher!). The number of participants in a group affects consensus-building, dissent, and disciplining of both individual and group behaviour as the essays in Parts I and II of this volume demonstrate (see Mnookin, Chapter 1; Sunstein, Chapter 4, Elster, Chapter 5 and Thompson, Chapter 6).

The number of issues may further complicate the questions above. In some situations, the more issues the merrier (since more issues means that trades are more likely to forge more integrative agreements); in other cases, if there are too many issues it might be more difficult to trade, especially if the various parties value those issues differently. Although some have

suggested complex metrics for quantifying preferences in complex negotiations (Brams and Taylor, 1996), the number of issues tends to (although not always) increase with the number of parties and this makes negotiation structure and management of both process and outcome more difficult (Lax and Sebenius, 2006):

- Should one start with the easiest issues or the most difficult?
- Should all parties be present for all discussions of all issues? When are private *caucuses* appropriate/dangerous? Is *transparency* in negotiation always advantageous? When not?
- Should one go to parties in agreement first (those who are ‘with us’)? Or should we try to win over our most difficult ‘enemies’ first? What are more optimal ways of *sequencing* multi-party negotiations (see Sebenius, Chapter 3, this volume)?
- Is trading or ‘*log-rolling*’ with some, but not all, of the parties permissible?
- Can issues not formally on the ‘agenda’ be used privately or with just a few parties, without involving everyone? How *public* or *transparent* should the agenda for multi-party negotiations be?
- Must there be *agreement on all contested issues* for there to be an agreement at all?
- Are all issues equally important? How should *priorities* be established with differential utilities or valuations by different parties in ‘mixed’ ‘co-opetition’ situations (Brandenberger and Nalebuff, 1996)?
- How can parties assure ‘*fair divisions*’ (Brams and Taylor, 2000) among many parties when allocating values (especially when the parties may have differential endowments and/or needs)? Are all issues for division *quantifiable*? *Divisible*? *Commensurable*? What do we do with *non-material* issues?
- How are *monetary and material issues* to be compared to (traded with) *non-material desiderata* (for example, identity, respect, dignity needs and values – the problem of *incommensurability*).

All of these issues (and more) suggest that much of the theory developed with two-party negotiation, even with the assistance of third-party facilitators (like mediators), may have to be re-examined in the different contexts of more than two or three parties. The complexities of these issues has led to the development of other new applied fields of research, study and practice – decision sciences, deliberative democracy, strategic planning and group facilitation.

The Challenges of Group Negotiations

When negotiations occur in settings of groups (even when there are only two groups in a more conventional, ‘two-party, one issue’ distributional setting) there are issues of group behaviour or ‘groupthink’ (Janis, 1982; Sunstein, Chapter 4, this volume) which can be enacted in different ways and affect the processes and outcomes of negotiation. Groups can come closer to each other or move each other to more extreme positions. They can fracture and cease to be a single cohesive group at all. Or, while remaining a group for negotiation or conflict resolution purposes (imagine a labour and management dispute, for example) they

can have several subgroups or issue-related constituencies. Representation of group interests is quite complex in even the simplest of negotiation settings, but all of this becomes even more complex when there are many groups in a negotiation, as is the case in all international negotiations, whether about war and peace, general diplomacy, trade, environmental issues, cooperation in joint ventures to eliminate or reduce threats (like terrorism and health), or joint efforts to engage in positive human endeavours (poverty reduction, resource exploration, cultural exchanges.) Volume III in this series will focus specifically on international conflict resolution processes.

Groups must decide how they will proceed in a conflict resolution setting – how to select representatives, how to hold them accountable, how to decide when and how concessions, offers and proposals are to be made and agreements reached. Thus, every negotiation or conflict setting which involves groups contains negotiations within the group, as well as with whatever parties the group is negotiating with. Although human beings need to work in collectivities to accomplish many of their aims, work in groups is difficult and clearly requires theory, management and feedback through study and adjustment.

From the earliest days of sociology and social psychology, the fields of human behaviour have recognized that one cannot simply aggregate individual human preferences and behaviours (Cohen, 2009). Groups themselves produce their own behaviours and dynamics (Simmel, 1955; Pruitt and Kim, 2004). To the extent that a vast literature has now developed on cognitive and social errors in decision-making and judgement in the behaviour of individuals (Bazerman, 2005), studies in behavioural psychology and social reasoning, in both laboratory and real settings (Tversky and Kahneman, 1974), are expanding our knowledge about how ‘non-rational’ choices and behaviours alter what more ‘rational’ analysts of human behaviour have predicted (Tversky and Kahneman, 1986; Arrow, Mnookin and Tversky, 1995), changing the very nature of what is considered ‘rational’ behaviour in group and conflict situations (Cohen, 2011; Mercier and Sperber, 2011). Instead of predicting or suggesting what ‘should’ rationally happen in negotiated situations (prescriptive perspectives on negotiation, with assumptions of rationality), we are now more likely to look empirically at what actually does happen in negotiations (descriptions of conflict resolution), especially after some of the assumptions of ‘rationality’ have been subjected to feminist and postmodernist critiques of the assumptions of ‘universalism’ and ‘rationality’ (Menkel-Meadow, 2001b and Chapter 7, Volume I; Young, 2002).

As scholarship and practice in negotiation and conflict resolution became more sophisticated and argued for a ‘scaling up’ of insights from the basic dyadic negotiation to group decision-making and deliberation about policy in the larger polity, the field of conflict resolution joined with developments in political science to form a new applied (and theoretical) field of deliberative democracy (Dispute Resolution Magazine, 2006, pp. 5–27; Cohen, 2009). The questions, first framed by political and social philosophers like Jürgen Habermas (1984, 1987), Stuart Hampshire (2000), Amy Gutmann and Dennis Thompson (1996) and Amartya Sen (2009), seek to explore how knowledge about conflict resolution, group and aggregated decision-making can be employed to provide for the best possible – but not the ‘best’ or ‘perfect’ (Elster, Chapter 5, this volume) – processes for policy formation in democratic societies (see Part V, this volume).

Efforts and Problems in Deliberative Democracy and Decision-Making as Multi-Party Negotiations

As originally conceptualized by political theorists, *deliberative democracy* focuses on the idea that there should be maximum participation in rule- and law-making by those who are affected by the rules and laws made by any polity. Although most political theorists have focused on the role of *rationality* or *reasoned persuasion* as the principal mode of decision-making in democracy, more recent work in political decision-making has concentrated on the 'a-rational' in terms of not only affective, emotional, ethical and communitarian (or value-based and religious) modes of belief and opinion (Elster, 1999), but also more instrumental and practical forms of preference bargaining or trading in how decisions are reached in groups (Menkel-Meadow, Chapters 13 and 18, this volume; Susskind and Cruickshank, 1987). The modern challenge for the field of democratic decision-making is how to combine different modes of discourse to form processes that permit these different modes to simultaneously contribute to group decision-making, making the decisions reached more legitimate and acceptable to the many who are affected by them.

Deliberative democracy has begun to combine theory with practice (Kahane, Weinstock, Leydet and Williams, 2010; Gastil and Levine, 2005; Susskind, McKernan and Thomas-Larmer, 1999) by examining the insights of multi-party dispute resolution and applying them to settings of group decision-making in the polity, whether in situations of general legislation and regulation or in more specific forms of conflict resolution and policy-making (as in strategic planning, environmental, community, health, budget allocations and multicultural disputes), as well as in any group governance situation (such as faculty meetings, corporate governance and non-profit organizations). Through this work, identification of different modes of decision-making or process pluralism has allowed both theorists and practitioners to structure different kinds of group decision-making processes for different purposes. Thus, the field is now more often called 'appropriate', rather than 'alternative', dispute resolution.

Methods of engagement in multi-party conflict resolution can vary from learning events like facilitated dialogue in which parties explore different perspectives on highly contested issues such as immigration policy, gun control, abortion, nuclear power and so on (see, for example, the Public Conversations Project at <http://www.publicconversations.org>) without coming to any particular conclusion or outcome other than mutual understanding, to formal debates in which parties simplify issues, often to only two sides, to hear argumentation and to vote or declare 'right or wrong' or a 'victor' on a particular issue, and to decisional processes, such as public policy consensus-building (see, for example, the Consensus Building Institute at <http://www.cbuilt.org> and America Speaks at <http://www.americaspeaks.org>) in which facilitated discussion, brainstorming, fact-finding and voting procedures can result in final (or advisory) outcomes for governmental bodies (Susskind and Cruickshank, 2006).

These efforts to enhance civic engagement in political decision-making attempt to combine discourses of reasoned persuasion, instrumental bargaining and trading of interests, and preferences and appeals to affective, emotional and ethical concerns, as well as to facilitate joint fact-finding and information acquisition.

Many of these processes are conducted in public, formally sponsored settings as in American 'negotiated rule-making' involving all stakeholders in regulatory drafting, with

expert facilitators (an expansion of the mediator role discussed in Volume I). Others may be privately sponsored (as when large organizations seek to take the 'pulse' of a local community for some development project). Still others may be jointly (public and privately) sponsored (as when America Speaks facilitated a mass town-hall forum meeting of over 4,000 citizen attendees to discuss possible plans for the redevelopment of the 'Ground Zero' site after the destruction of the World Trade Center in New York on 9/11 and a Global Forum at the 2005 World Economic Forum at Davos to identify the key issues facing the global community).

Governmental bodies may sponsor such meetings to gain bipartisan (or non-partisan in more diverse political party settings) assessments of political priorities, as in healthcare issues in the United States or economic or immigration policies in the EU. Combining informal meetings, facilitated small-group or focus group discussions with modern technology (use of computers for real-time polling) and even online discussions, these multiple methods of obtaining input and feedback in deliberation about policy have expanded and broadened the ways in which citizens can influence their governments and each other. In another form of multi-party political engagement, James Fishkin (2009) has pioneered deliberative polling in which a group of 'representative' citizens gather to deliberate, after receiving non-partisan factual information, and answer questions about policy matters over a full day or weekend of engagement, removed from more formal voting and also from uninformed spot opinion polling.

Multi-party negotiation theory provides the background against which parties to such events must decide on process ground rules (who may speak when, who is a proper representative of a particular constituency, what kinds of information should be discovered and shared) and decision rules for achieving a vote or agreement on an outcome. Expert facilitators of such events draw from mediation theory and practice (Menkel-Meadow, 2002) as well as from recent literature on the management of meetings (Schwarz, 2002), to structure, plan and guide large-group deliberation.

As the essays in Part II of this volume elucidate, voting rules for multi-party or group decision-making can be quite complex and require the facilitation and advice of those who are expert in the consequences of different voting choices – unanimity, supermajorities, consensus, simple majority and plurality – as decision rules all produce different kinds of processes and outcomes. Consider the different outcomes that might be achieved if everyone must agree or if only a simple majority must agree (allowing more dissent and perhaps more non-conventional, but possibly risky or contentious, outcomes).

Deciding who gets to participate (who are the stakeholders in any particular matter) and how is also part of the design of any multi-party process. Should insurers participate in any legal settlement discussion? Should children be consulted in divorce proceedings? How are future generations to be represented in environmental negotiations? These are all questions that implicate the ethics of practice in the multi-party dispute resolution field (Menkel-Meadow and Wheeler, 2004; Waldman, 2011). In many settings (for example, the treaty negotiation and formation processes discussed in Volume III) there may also be formal legal requirements for when such deliberative democracy events can have legal effect (ratification rules, necessity of approval by formal governmental body).

These efforts to combine deliberative democracy theory with conflict resolution practice are new and evolving. As constituted and used in a great variety of settings, there are also

critiques of such efforts. Iris Young (2002), among others (for example, Wilde, 2000, p. 238: 'the problem with socialism is that it takes up too many evenings'), has queried who will have time to participate in such events (not workers, not those with primary childcare responsibilities, not those without sufficient education or resources to participate). As a matter of democratic theory some have questioned how expertly facilitated meetings and negotiations can be justified if the 'experts' are not ordinary citizens – who (s)elects them? By what authority do they act in groups, perhaps disciplining those who violate ground rules? How is this democracy? (On the other hand, consider the same issues when parties choose mediators or arbitrators to assist them – choice and consent are considered the legitimating criteria in simpler forms of dispute resolution). Should there be different forms of process for constitutive, ongoing and continuing versus ad hoc organizations or government agencies (see Menkel-Meadow, Chapter 13, this volume)? What is the relation of deliberative democracy events to formal governmental decision-making – legislation, regulation, court adjudication? How are such methods of decision-making made accountable, both to those who participate and to those who don't?

Conversely, those who argue for deliberative democracy processes suggest (subject to empirical verification, see below) that decisions reached through such processes will be more legitimate and acceptable, and lead to more compliance because of the consent to, rather than the 'command' of, decisions reached. And, deliberative democracy, unlike formal governmental processes, assumes that decisions can often be made contingent and be revisited as conditions change and parties reconvene. As we will see in Volume III, these kinds of processes have also been used to develop new forms of governance and dispute resolution in transitions to democracies; these include truth and reconciliation commissions, new constitutional formations and hybrid forms of domestic and international legal dispute resolution, with new kinds of tribunals drawing from both domestic and international participation. Some of the deliberative democracy efforts have also been directed towards the creation of networks of global governance on particular issues such as environmentalism, corporate governance, labour and food standards, among others (Slaughter, 2005).

Designing and Evaluating Dispute Resolution Systems

The insights of multi-party or complex dispute resolution have influenced the design of a great variety of decisional processes, including those in the public sector reviewed above in democratic decision-making and the private sector. In recent decades new processes have developed, parallel to formal institutional processes in courts: mini-trials for private mediation in complex cases; summary jury trials for shortened settlement 'trials' in court (Menkel-Meadow *et al.*, 2011, ch. 12); claims resolution facilities for mass claims (Center for Public Resources, 2011) and for use within private organizations (employment and consumer grievance systems within private corporations); and public institutions beyond the reach of formal law (for example, employment grievance systems in international organizations like the UN, World Bank, EU, IMF, Red Cross and others which are not subject to domestic or any relevant international law). These new 'systems' of iterative dispute resolution involving repeat players in organizational and governmental settings, as well as in newer settings such

as human rights violations and multinational settings (explored more fully in Volume III). have created a new field of *dispute system designers* (Ury, Brett and Goldberg, 1988; Smith and Martinez, 2009) who, with expertise and knowledge based on the theory and practice of complex dispute resolution, now assist parties in developing dispute systems – or internal dispute resolution (IDR) (Edelman, Erlanger and Lande, 1993) – for specialized settings, often with ‘tiered’ choices of process which include direct negotiation, mediation and then some decisional process such as arbitration or private adjudication. These systems are established by contract, by employment or personnel manual, or even through legal legitimating devices. For example, the existence of an internal procedure for complaining about sexual harassment or other discriminatory employment practices has been considered as a mitigation factor in organizational liability for sexual harassment under US law (Polster, 2011).

As these systems proliferate, efforts to study their effectiveness, efficiency and legitimacy empirically (as well as philosophically) have moved on to assess how they operate. Do such systems reduce conflict in workplaces or other repeat player settings (Bingham *et al.*, 2009; Freeman and Langbein, Chapter 17, this volume)? Do they make access to justice more affordable and realizable? Do they create their own principles of resolution inside or outside the rule of law? Are they acceptable to participants? Are they ‘privatizing’ justice (Genn, 2009)? Do they in fact enhance the quality of decision-making or the realization of political participation (Ryfe, 2005)? Some of the essays in Part IV of this volume begin to address these efforts to assess and evaluate the effects of this new process pluralism. Whatever is presented here, there are likely to be new forms of complex dispute resolution developed in the future for new kinds, numbers and configurations of disputes and conflicts. It is hoped that the essays selected here can illuminate the significant issues to be considered in dispute system design and assessment.

The Essays

Foundational Issues in Multi-Party Dispute Resolution: How Is It Different?

The essays in Part I of this volume set forth the theoretical issues that have distinguished multi-party and multi-issue negotiation and conflict resolution from the foundational processes explored in Volume I. In Chapter 1 Robert Mnookin explicitly contrasts the canons of bilateral negotiations to what might have to be reconsidered in multilateral negotiations, exploring how many more barriers there may be to reaching multilateral agreements. Lawrence Susskind, Robert Mnookin, Lukasz Rozdeiczer and Boyd Fuller (Chapter 2) elaborate on what they have learned about the differences in multi-party negotiation from their teaching of the subject, thereby introducing the practical applications of what we are learning from theory development. Next, James Sebenius, also of the Harvard Program on Negotiation (and the Harvard Business School) explores, in Chapter 3, the important issue of how we must sequence our discussions with other parties when we have several parties to choose from. Do we start with those who are closest to agreeing with us, or do we try to win over our worst enemies first so that we can develop the coalitions and ‘patterns of deference’ that are

necessary in the making of multi-party agreements? Cass Sunstein's essay (Chapter 4) has been selected here to represent the growing social psychological study of how deliberations in groups can 'go to extremes' and produce 'groupthink' rather than moving more towards the 'average' or mean of the group. Good social science, then, informs us to beware of any assumptions about human behaviour and moreover requires the adjustment of process design in group deliberations.

Jon Elster's essay on the contrasts between the American and French constitutional formation process (Chapter 5) has become a classic in demonstrating how process design can affect outcome. American constitutional processes were 'second best' in that they were secretive, conducted in task and committee groups, and resulted in compromises (continuation of slavery and undemocratic selection and representation in the Senate). The French constitutional process, in contrast, was public, principled and conducted in plenary form – a more 'perfect' and principled process. But, as Elster argues, the 'second best' process used to form the American constitution has had much greater longevity (even with a bloody civil war and numerous amendments). Which multi-party deliberative constitutional process was better? Elster's work is a classic for considerations of modern complex negotiation and dispute process design and has deeply affected my own work in specifying the conditions for different kinds of dispute processes in different settings (see Menkel-Meadow, Chapter 13, this volume).

Practice: Complex Dispute Processes and Decision-Making in Action

Part II of this volume demonstrates how theories of complex dispute resolution are applied. In Chapter 6 Leigh Thompson explores processes of group decision-making – coalitions, voting strategies – with a series of vivid examples. In Chapter 7 Jane Mansbridge, an important political theorist of democratic and non-adversarial processes, and her colleagues, Janette Hartz-Karp, Matthew Amengual and John Gastil, report on some empirical valuations of how norms are created in deliberative settings. Next, Howard Raiffa and his colleagues (Chapter 8) rigorously present the consequences of different voting rules, demonstrating the fact that no voting system is perfect; they include a discussion of Arrow's and Condorcet's important work on how clear preferences cannot be obtained when there are multiple voters and show that voting preferences have different intensities and ordering. In another classic application of modern conflict resolution theory to important formative processes, Dana Lanksy (Chapter 9) analyses the American constitutional process through the lens of twentieth-century negotiation theory. Were the founding fathers aware of all the theory and practice in these books? Did they know what they were doing when they chose the processes described by Elster and created their ground rules and decision rules? Were they strategic in their design to achieve particular outcomes or did they separate what they thought were fair process considerations from the outcomes those processes eventually produced?

Moving on to a more modern but equally complex setting, Hephzibah Levine (Chapter 10) provides a rich case study of how facilitated consensus-building processes were used to achieve multi-party agreement in a highly conflict-ridden arena – negotiation of national park and private property rights in Northern Israel – demonstrating that even with high-conflict national and multicultural problems, 'smaller' incremental agreements can sometimes be

reached (see also Blum, 2007). Lawrence Susskind's and Jeffrey Cruikshank's excerpt from their 2006 book, *Breaking Robert's Rules* (Chapter 11), describes the rules for consensus-building used in the dispute between 'Olives and Pines' (discussed by Levine in the previous chapter), and suggests the substitution of simpler ground rules for deliberation than those of *Robert's Rules of Order* used in most parliamentary settings. Finally, John Forester, as a planning scholar, has long studied how these facilitative processes in complex decision environments actually work. In Chapter 12 he explores some of the ethical dilemmas faced by third-party facilitators (the mediators of Volume I and the multi-party dispute facilitators of this volume) as they grapple with promises of 'neutrality' in highly contested value disputes.

Deliberative Democracy and Consensus-Building Processes

Part III elaborates on the specific application of our multi-party dispute resolution knowledge to efforts to create more deliberative democracy in a variety of settings. Carrie Menkel-Meadow (Chapter 13) explores how lawyers serving as mediators in the polity might be especially good at managing the different kinds of discourse (rational-principled, interest-based bargaining and emotive-affective) necessary to resolve a variety of disputes in a variety of different settings (constitutive, permanent, ad hoc groups, open or closed settings and so on – see the chart on page 368 for an elaboration of Elster's observations on the effects of the structure of process on outcomes). In Chapter 14 Lawrence Susskind and Connie Ozawa provide one of the first assessments of how these processes actually work in public dispute settings. Finally, David Straus (Chapter 15) provides good practical suggestions for process and meeting management necessary to make democratic deliberative events function effectively.

Evaluations of Multi-Party Decision-Making and Deliberative Democracy

In Part IV several scholars begin to assess how knowledge about multi-party processes has actually been applied in several settings. William Potapchuck and Jarle Crocker (Chapter 16) discuss the importance of following through on implementation plans in any consensus-based agreement. Negotiation does not end with the signing of the agreement, especially in multi-party settings where one party can effectively sabotage the whole complex agreement achieved by many. In Chapter 17 Jody Freeman and Laura Langbein represent the growing and contentious literature on whether these deliberative multi-party negotiation processes can be used effectively within formal governmental regulatory processes. They respond to and explain a wide variety of criticisms that have already been levelled at these processes and provide their own arguments and empirical assessments of this conflict in the literature. Do 'negotiated rule-makings' actually reduce contested litigation? Are they more deliberative and representative? Do they utilize fewer resources? Are they efficient? Do they result in better-quality rules and regulations? Finally, Carrie Menkel-Meadow (Chapter 18) explores how efforts to use the kind of large-scale town-hall meeting favoured by deliberative democracy advocates failed mightily in the recent debates about healthcare in the United States. Menkel-Meadow strongly suggests that anyone who reads these volumes would know that facilitating such a major society-wide 'multi-party negotiation' required much more knowledge, skill

and experience than was exhibited in those political debates. She very much hopes that these volumes will provide some insight into how such events might be better designed, managed and evaluated.

Coda

A short Coda at the end of this volume provides a brief summary of, and introduction to, the way in which these issues are being explored in transnational and multicultural settings when dispute resolution crosses national and cultural boundaries and becomes even more complex.

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Coda

The essays in this volume suggest that the study and practice of multi-party dispute resolution is difficult and complex in that barriers to making agreements with many parties are significant and require rigorous analytic and behavioural attention, but also hopeful and optimistic when deliberation and agreement facilitate hard-won, but legitimate and value-creating outcomes. While pointing out the difficulties of coalitions, hold-outs, strategic voting, and cognitive and social errors in group negotiations and decision-making, the essays and authors represented here (and those for whom there was not enough room in these pages) do represent a hope that, with further study and practice, human beings will become more capable in advancing participatory decision-making and achieving better outcomes for human flourishing in any number of important human endeavours, including: healthcare (Marcus *et al.*, 1995); community life (Merry and Milner, 1993); organizational decision-making (Movius and Susskind, 2009); environmental policy formation (Bacow and Wheeler, 1984) and planning (Forester, 1999); the workplace (Kochan and Lipsky, 2003); family life (Harper, 2004); political decision-making (Erdman and Susskind, 2008); and more conventional legal disputes.

The development of the field of multi-party negotiation and dispute resolution as a practical arm of more theoretical hopes for more participatory decision-making in law, policy, community and work life is a testament to the desires of human beings to improve their interactions, on both a process and a substantive basis – that is, in terms of how we talk to each other and how we actually live with each other. As some practitioners in the field have said, we seek to look for both common and ‘higher’ ground (Dukes, Piscolith and Stephens, 2000) when we work together to integrate interests and needs so that group interests can be satisfied without necessarily compromising self-interests. Indeed, much of the field of modern dispute resolution is founded on the idea that ‘unnecessary compromises’ (Menkel-Meadow, 2006) are not needed to forge solutions to problems that can achieve added or joint gain. People negotiate precisely because they cannot do things on their own and need others to help them achieve their goals.

While adding parties to negotiation can, at times, make things more difficult and does add complexities to the conflict resolution processes, adding parties to a negotiation can often add resources, increase the number of ideas available and provide specialization or diversity of implementation. Indeed, a new body of significant theoretical (and applied) work has focused on the importance of the variety and diversity of ideas to solve governance problems and deal with complex social and legal issues – a ‘constitution of democratic experimentalism.’ (Dorf and Sabel, 1998). As one evocative trope in our field suggests, if you are going on a long overnight hike up a mountain you will probably want to be accompanied by many people with different expertises – a map-reader or navigator, a fire-builder, a cook, a storyteller, a medically expert person, a musician, a hunter (if necessary), a botanist to identify flora, a tall and strong person (to hang rucksacks in trees if there are bears) and, of course, a dispute

resolver to organize all these different people and ensure that they work effectively together. Multiple parties, issues and expertise thus diversify the ways in which we can organize human life, providing greater opportunities to achieve good instrumental results, but they must also be well coordinated from a process and planning perspective.

The field of multi-party dispute resolution, like its precursor in basic negotiation theory, seeks to examine whether there are basic ideas or memes that we need to be aware of in this work – concepts like coalitions, hold-outs, consensus, ground rules and decision rules – which are both processual and substantive. Can we improve any possible outcome by listening to what other parties want and trying to add that in? Can we think of multi-party negotiation as ‘additive’ and not necessarily compromising or distributive (Menkel-Meadow, 2006)? How must process be managed differently in multi-party settings? The following factors need to be taken into account:

- Meetings – all public or some private?
- Relations of parties to each other – trust, scepticism?
- Identification of stakeholders and representatives – who should participate?
- Information-sharing strategies
- Role(s) of third-party mediators, facilitators, deciders
- Voting rules
- How to manage multiple issues with shifting needs and interests of parties
- Decision or other outcomes? (‘Understanding’ or learning, rather than formal agreement, contingent agreements – when reopened?)
- How can these issues be simultaneously *planned for* and simultaneously remain *contingent* and *flexible* for maximization of idea generation?

This volume has illustrated many sites where such processes have been productively used to form public policy, resolve complex lawsuits and competing interests over scarce resources, and form new institutions, organizations and even nations (in constitutional processes). In Volume III we will explore how these processes have been, and can be, used in international settings to advance global problem-solving. We will also look at the particular problems of seeking to negotiate with parties from different cultures, nationalities and nation-states, further complexifying our already complex forms of negotiation, mediation, facilitation and dispute resolution. One of the major challenges facing this field is whether there are (as in negotiation theory) generalizable and more or less universal concepts that apply across different kinds of matters or whether complex, multi-party dispute resolution requires particularly context-driven theory and practice.

Multi-party theories and practice also have to deal with issues of instability and dynamic change. What happens when coalitions are abandoned or defected from? How do we assess whether we can trust someone who is working ‘with’ or ‘against’ us? How do people in groups regard each other – with motives of altruism and reciprocity, or of distrust and defection (Axelrod, 1984; Burch, 2009)? In what contexts do these orientations vary? Are there ways to enforce commitments made to or in groups? How can we structure contingent agreements so that we can build in reopener clauses when conditions change or parties’ needs and interests (or alliances) change? How do we monitor agreements – test and check their implementation,

punish or reward for compliance issues, evaluate and assess the effectiveness of particular solutions or agreements (Innes, 1999)? How do we handle the internal integrity of groups – what happens when groups start to divide or splinter in larger multi-party settings?

In their essay in this volume Larry Susskind, Bob Mnookin, Lukasz Rozdeiczer and Boyd Fuller (Chapter 2) suggest that in understanding multi-party processes it is important to always think about them from two perspectives – not only that of an interested party engaged in the dispute or negotiable issues at hand, but also that of a third party (outsider) tasked with developing a process to resolve or deal with the complex negotiation. This inside–outside perspective can further enrich both theoretical observations and practical interventions in complex dispute resolution. One of the basic purposes of this volume has been to suggest that all modern lawyers, politicians, organizational leaders and participants in group life should learn the theories about, and best practices for, good process design and facilitation. Empirical research does seem to suggest that when parties in conflict assist in the design of their own process they are more likely to judge the process as fair (Lind and Tyler, 1988; Burch, 2011) and outcomes are more likely to be complied with (Innes, 1999). We are all meeting managers now (Harvard Business School Press, 2006; Susskind and Cruikshank, 2006; Arthur, Carlson and Moore, 1999).

Those who have developed the outside planner–designer perspective have now produced their own set of concepts, memes and prescriptions for dispute system design, based on the insights gained from dispute resolution theory and its implementation in a wide variety of iterative and repeat conflicts of which only a few are explored here (Costantino and Merchant, 1996; Bingham, Smith and Martinez, 2012). Some of the issues that this field now addresses are: how much process is due each individual in an organizational setting; what variations and choices of processes there should be; and what are the relations of private justice or dispute resolution systems to more formal governmental institutions, including courts (in class action and other case management), legislatures (in policy and rule formation) and administrative tribunals (in negotiated rule-making exercises) (Harter, 1982; Coglianese, 1997).

As we increasingly live, work and have conflicts – as well as make peaceable and productive new relationships, transactions and entities (Peppet, 2004) – with each other in groups, it has become more and more essential that we understand the nature of group behaviour and group (and multi-party) conflict resolution. This volume has described and illustrated some of the key ideas and practice protocols for effective (and defective) group deliberation, conflict resolution and decision-making.

In Volume III we will apply what we have learned about these processes to situations of multicultural and multinational diversity, when the stakes for the continuation of human life on the planet make our need to engage in productive transnational and complex dispute resolution even more essential. Whether our observations, theories and aspirations to improve human communication, information-processing, creative problem-solving and collaboration can be ‘scaled up’ to the global level remains to be seen and evaluated. And, as always, we will have to ask whether it is possible to develop general principles, concepts and protocols of action that are generalizable or universal, or whether, in the transnational context, it will be even more likely that we will have to adapt our process learning to cultural and other diverse contextual variations.

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