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Source: *Man*, New Series, Vol. 20, No. 1 (Mar., 1985), pp. 90-114

Published by: Royal Anthropological Institute of Great Britain and Ireland

Stable URL: <http://www.jstor.org/stable/2802223>

Accessed: 23-11-2017 14:57 UTC

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MEDIATION: A COMPARATIVE APPROACH

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We call any triadic dispute process that begins and ends at the initiative of the disputants 'mediation', but the significance of mediation varies enormously, both culturally and situationally. Comparisons of mediation can be controlled by focusing on the ways in which linkages among social fields contribute to the organisation of mediation within social fields. Two dimensions are focused on here: the basis of the mediator's neutrality and the mediator's normative style. Different combinations of these produce substantially different styles of mediation, called 'inclusive' and 'exclusive' here. While both may be equally legitimate and neutral, they have different implications for the relationship of mediation to wider social contexts.

Mediation is simple enough to describe: it is a triadic mode of dispute settlement, entailing the intervention of a neutral third party at the invitation of the disputants, the outcome of which is a bilateral agreement between the disputants (see Koch 1974: 28). Mediators, as opposed to arbitrators and adjudicators, have no authoritative sanctions at their disposal (such as threats of imprisonment or fines), although mediation by no means obviates social coercion (Merry 1982; Roberts 1983).

But simplicity of description belies the ethnographic and analytical complexities that beset anthropological studies of mediation. In the anthropological literature, mediation tends to be discussed either in contrast to adjudication (Gibbs 1967; Gulliver 1979; Nader 1969; Witty 1980) or as a contrast to dyadic processes (negotiation, coercion, avoidance, etc.) (Collier 1973; Koch 1974; 1979; Nader & Todd 1978). When it is compared to adjudication, mediation is the 'softer' mode: it is therapeutic (Gibbs 1967), conciliatory (Gulliver 1969), and flexible procedurally and substantively (Nader 1969). Specifically, mediation opens the possibility of disputants' acknowledging their shared liability, and the mutuality of the process is presumed to enhance the durability of the agreement. When mediation is contrasted with dyadic modes, different qualities of mediation emerge. Interest shifts somewhat from the impact of the process on the disputants to the role of the third party itself. The third party—the mediator—is seen as asserting his authority over the dispute in such a way as to facilitate or influence its outcome, and the relationship he has to the disputants becomes an important element of the process. While contrasts between mediation and adjudication generally stress the relative informality of the mediation process, comparisons with dyadic modes stress the potential retention of control by the mediator. The differences between these two approaches do not amount to a disagreement over the nature of mediation, so much as an indication of

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mediation's varied forms and functions. As Roberts suggests in his article on mediation in family disputes (1983), the range of processes included under the mediation 'umbrella', as he calls it, has produced a certain amount of confusion among planners and reformers concerned with implementing 'conciliation' programmes in Britain and, presumably, elsewhere.

Literature on mediation shows such a wide range of procedures, outcomes and contexts that the word itself represents something of a residual category, filling the gap between formal judicial institutions and systems of violent self-help. When writers need a foil for the Anglo-American legal system, they point to 'primitive law', 'customary law', 'kadi justice' and 'moots', all glosses for various forms of mediation. 'Mediation' by itself—to anticipate later discussion—might mean diversion from an American court of law in a regularly funded federal programme, or it might mean an occasional mitigation of circumstances that would otherwise lead to violent feuding between two agnatic groups in the New Guinea highlands. It might mean a de-escalation of tension, as in an out-of-court settlement, or it might mean an escalation of tensions, as when two disputants fail to reach an agreement on their own. It might mean a 'softer' process, as when plea-bargaining replaces judicial sentencing, or it might mean a 'harder' process, as when two neighbours bring their dispute to a mediation centre. It might mean that an apology will be accepted, or it might mean that an apology has already been rejected. It might mean a step down the road towards litigation, or it might mean a step back. And so on.

Mediation is clearly central to the maintenance of social control in many societies, and, just as clearly, some further differentiation of the concept is in order. In this article I examine two sorts of connexions between mediation and its socio-cultural context. The argument is that some of the cross-cultural and cross-situational variation in mediation can be understood in terms of the structural linkages mediators and/or disputants attempt to invoke in their own interests, and the normative terms in which these linkages are expressed. Important elements of dispute processing are obscured if such processes are considered as purely intra-community functions (see Snyder 1983: esp. 529–30). The language of mediation, and mediation itself, are not only reflections of the participants' understanding of their own local social structure, but also of their status in wider national contexts. I conclude that mediation situations are not automatically comparable and that productive comparative studies depend on controlling for these contextual factors.

Mediation and social organisation

Mediation can be distinguished from other processes of dispute resolution by examining the series of decisions that a mediation session represents, but mediation must be possible before it is plausible. This section reviews the sociocultural prerequisites of mediation in order to bring into focus, not only the analytical burden that the concept bears, but also the place of mediation amidst alternative processes of dispute resolution. Witty (1980) summarises a substantial literature on mediation when she suggests that the preconditions of successful mediation include a community that shares values, disputants who share a

commitment to settle the dispute, and a cultural preference for the procedures and likely outcomes of mediation. Competition of interest is more amenable to mediation than is 'dissensus' (disagreement over values) (Aubert 1963); this factor would add to the likelihood of finding mediation systems in social contexts heavily structured by interest groups. These characteristics do not so much define mediation as describe the range of contextual variables surrounding it. Indeed, some of the achievements often attributed to mediation may be functions of the cohesion of the community around certain focal principles that makes mediation possible in the first place.

Moore's (1973) discussion of 'semi-autonomous social fields' suggests that social cohesion is a process that develops over time around specific normative problems. The semi-autonomous social field is not a discrete organisational unit, but a community that is defined 'by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them' (Moore 1973: 722).

The reference to *semi*-autonomy is the key, because it emphasises the relevance of norms not only within groups, but between groups. Moore's article has had a wide impact but her propositions concerning semi-autonomy, or normative linkages *between* groups, have not received as much attention as her discussion of the genesis of norms *within* groups. Indeed, current studies continue to treat dispute settlement in general, and mediation in particular, as internal group functions (e.g., Newman 1983: 51, 70–5). One of the central themes of this article is that a group's external relationships are crucial to its ability to resolve disputes by mediation and, hence, to the comparison of mediation.

Studies of the transformation of disputes from dyadic to triadic processes suggest that effective triadic processes are not possible in the absence of institutionalised jural authority (Koch 1974; n.d.). Jural authority is not likely to be institutionalised in politically autonomous isolated societies with weak central government and no fixed succession to political office (Koch & Sodergren 1976: 447, 454). In such societies, with relatively low levels of socio-political integration, alternatives to warfare or violent confrontation exist only to the extent that prevailing interests can produce one or more spokesmen to mediate effectively. In his study of Jalémó (New Guinea), Koch showed that co-resident groups, exchange partners and groups united against common enemies were sometimes capable of exerting effective internal pressure on disputants to settle their differences (Koch 1974: 159). Failing a settlement, however, conflicts escalated to violence very rapidly. If high levels of violence and low durability of verbal modes of dispute settlement are the result of some sort of social structural deficit, it might prove constructive to look beyond the group itself for the reasons for this deficit (if that remains the appropriate term). Roberts (1979: 206) reminds us that all the small-scale societies studied by legal anthropologists 'are now to be found—those of them that survive in an identifiable form—within the context of some larger nation-state and subject to its legal system'. If we are to understand the absence of effective non-violent dispute settlement as a function of organisational inadequacy we must extend our notion of inadequacy to include the nation-states which have failed to

provide indigenous groups with adequate legal recognition or access. Legal isolation is likely to reflect other forms of distance (e.g., ethnic, linguistic, geographic) either separately or in combination. Returning to Koch's argument (that reliable triadic processes require a certain level of sociopolitical integration, which the Jalé did not have in 1974), it is possible to interpret his finding as an indication of the limits to a society's capacity to generate and enforce norms in isolation. What is it about *semi*-autonomy that enhances a group's sense of what Griffiths (1979: 365–8) calls 'collective goods', i.e., widely shared preferences which can be realised only through systems of collective control? A sense of society as an abstraction is perhaps the ultimate collective good (although Griffiths does not say this), and, for that reason, perhaps, society in the abstract connotes a certain level of coercive power and collective control that is absent from societies (e.g., the Jalé) organised in other ways. The Jalé do indeed have a sense of themselves as a distinct group, but this sense is, as Koch makes clear, of very limited value as a symbolic resource in dispute contexts. Koch sees this limitation as the limitation of Jalé interest groups.

Griffiths's argument is against instrumentalist legal theory. In taking the position that legal coercion is not a correlate of collective social institutions, but a feature of them, he comes very close to Merry's later assessment of the nature of mediation. Merry (1982) argues against the view that mediation is conciliatory and therapeutic, or, to put it more accurately, she holds that conciliation and therapy both involve coercion. She shows that, in widely divergent cultural settings, effective mediation involves coercion of the disputants by the third party. Mediation works not (or not only) because carefully nurtured disputants decide to be reasonable, but because they fear social censure and loss of support by important members of their networks, or because of other more direct threats on the part of the mediators themselves. As Griffiths's argument suggests, this kind of coercion is one side of the nature of consensus. Another example of the reserves of coercion behind other forms of persuasion is Bailey's finding that small decision-making groups strive for consensus when the majority does not have sufficient sanctions at its disposal to implement majority rule (Bailey 1965: 9). The consensual, or compromise, aspect of mediation (which by definition does not include enforcement) allows the disputants to blur not only their differences of interest (see Koch 1978) but also their differences of power (in terms of both its sources and its limits). Such ambiguities may constitute a strategic advantage or a practical necessity, a point we will return to later on.

Merry's essay illuminates the issue of how different degrees of autonomy might effect a group's remedial resources and the efficacy of the symbolism of 'collective goods'. By showing the relationship between mediation and coercion, she implies that a mediator's effectiveness is enhanced by gestures towards other available forms of authority (even society itself), his relationship to them, and his ability to mobilise them rhetorically. (Moore (1970b) and Mather and Yngvesson (1980–1981) discuss symbolic, political and sociolinguistic aspects of this point.) In isolation, a mediator's coercive resources are limited; when he can refer to sources of authority beyond himself, he adds to his repertoire of persuasive techniques. To put this another way, without belonging to an

institutionalised hierarchy of statuses, a mediator cannot readily convert the symbolic value of his own status into political capital.

It is not necessary to leave this point as an abstraction, since the twentieth century has witnessed a pattern of socio-legal change which has not only made such autonomous groups as the Jalé relatively rare, but which has also underscored the inseparability of dispute processing questions from questions of regional and national development. We can examine this pattern of change, since in practice the obverse of autonomy is contact with national administrators, their agents, or their influence. This fact constitutes a crucial dimension of cross-cultural comparison of law, since semi-autonomy necessarily means that a group is in some sort of active relationship with some exported form of European law, at the very least in the form of their nation's official law. I believe that this is the significance of Roberts's reminder (cited above) that in the modern world, the nation-state is an unavoidable context of any question anthropologists might have about the flow of power through local systems of law and social control. Accordingly, such comparative problems cannot be separated from the global patterns of change that, in practice, gave anthropological questions life in the first place.

Turning then to ethnology, one can identify other autonomous societies whose social control problems are or were similar to those of the contemporary Jalé. In 1937, Warner wrote of the Murngin that warfare was the crucial inter- and intra-tribal activity. An ethic of vengeance, fuelled, in Warner's view, by competition for women, made violent feuds frequent and prolonged (Warner 1937: 155). The lack of remedial alternatives meant that 'an isolated killing . . . usually resulted in the whole of northeastern Arnhem Land becoming a battle ground at fairly frequent intervals' (Warner 1937: 156). The major limiting factor appears to have been cross-cutting ties between clans; fighting did not occur within clans. Oliver reports a similar situation among pre-contact Tahitians (Maohi) (Oliver 1974: 987): 'The tribe was above all else a unit for waging war . . .' The Maohi were 'ruthless' and warfare was a matter of unrestrained killing until the parties' 'anger' abated, unless a stalemate led to withdrawal or truce earlier (Oliver 1974: 990). Most disputes were over land. Oliver notes that disputes could be referred to a chief or king but that most disputants went instead to neighbours for conciliation. He concludes that 'Maohi social relations encompassed a great deal of unresolved conflict and unrequited wrongs: a situation which for one reason or another tribal chiefs were unwilling or unable to reform' (Oliver 1974: 1063-4).

In his study of social change of Tikopia, Firth notes that a major area of change between 1928 and 1952 (the dates of his research) was in the population's awareness of Tikopia's Protectorate status and its significance in everyday social control (Firth 1959: 260-3). In 1928, the British Protectorate's 'main role to the Tikopia was as a distant sanction against killing . . . Visits of Government representatives were few and perfunctory and, in effect, Tikopia was left to be primarily responsible for its own affairs' (Firth 1959: 260-1). By 1952, when Firth returned to Tikopia, he reports that the population was well aware of law, and that both the Government and the mission had increased their power and influence considerably. Land disputes had increased in the 1950's and Firth

reports that disputes tended not to produce 'physical struggle'—a success of sorts—but left unresolved feelings of 'resentment, covert or overt' (Firth 1959: 169).

These reports suggest that, in the traditional systems of social control, violence was seen as an appropriate means of resolving anger, but they also show how difficult it was to contain violence, even when containment and a verbal settlement were desired. After contact, the first impact of European law seems to have been the successful control of violence although, as Firth points out, controlling violence alone may leave disputants frustrated with unresolved anger, i.e., unresolved disputes (see also Epstein 1974:37; Reay 1974: 237–8; A. Strathern 1974; M. Strathern 1972: 142–4).

Native populations were exposed to European law with various degrees of directness. Hogbin (1934: 229–30) reports that in 1915 King Mekaika was taken to Tulagi, the capital of the Solomon Islands Protectorate and 'for some months instructed in the principles of British justice'. Hogbin credits the king's legal education with facilitating the elimination of private vengeance among his subjects in Ontong Java.

An extensive modern account of a population's response to European law is M. Strathern's (1972) study of legal attitudes and practice among Hageners (see also M. Strathern 1974). Strathern's field research in Hagen was approximately twenty-five years after the first European patrols began to act as, among other things, third parties for indigenous disputants. Hageners, like the Jalé, had no traditional system of institutionalised authority and no jural offices (M. Strathern 1972: 5). By 1972 groups who, in the past, might have gone to war, acknowledged the state's punishment of offenders; thus one of the early accomplishments of augmenting the Hageners' remedial resources was a desirable (apparently in the view of everyone concerned) reduction in vengeance killings. Now, 'the Hageners have assimilated the notion of "law"'. As a concept, it is widely understood' (Strathern 1972: 4). Hagen *komiti* conciliate and arbitrate for members of their own subclans, but model their style of dispute-processing on their own perception of processing by state agents (Strathern 1972: 31). This is ironic, since the *komiti* and the other indigenous mediators, the councillors, have no judicial functions in the eyes of the state; however, the Hagerer officials and their constituents consider themselves to be deputies of the state (Strathern 1972: 120).

The perception—however erroneous it may be—on the part of *komiti* and councillors that they serve in the official judicial hierarchy has a pronounced effect on the way in which they deliver justice. For example, the traditional view of offences was that they wronged persons or groups, but there was no sense in which Hageners conceived of 'society' itself being wronged (Strathern 1972: 15). Now, *komiti* and councillors stress their own impartiality on the grounds of serving the public good (M. Strathern 1972: 99; See also Hogbin 1934: 230). Strathern (1972: 99) adds that 'claims to impartiality can be used rhetorically and are certainly not always taken at face value by the audience. They may, indeed, be brought in to draw attention away from bias'. Indeed, one major effect of the Hagen remedial agents' perceptions of their own relationship to the state seems to be in providing them with the rhetoric with which they seek to legitimate

their own performance. Hageners now distinguish between 'traditional oratory' and 'talk to do with courts' (Strathern 1972: 103).

Another principal effect produced by Hagen third parties' holding themselves accountable (which they are not) to the official courts is that they feel some pressure to deliver the courts' law. One councillor, explaining his consultation of official regulations and ordinances, said, 'If I were to make things up, people would feel it wasn't right and go and ask the government and the government would say, "What kind of councillor is he?"' Thus, this councillor understands his own role to be that of dispensing 'government law' (M. Strathern 1972: 121). There are nevertheless limits to *komiti* and councillors' abilities to act as adjudicators:

In reality, councillors and *komiti* still basically negotiate rather than adjudicate in matters of dispute. They have to fall back on the kinds of constraints which were effective in the past—pointing out the value of paying compensation, shaming offenders, thoroughly publicising causes of grievances, threatening more unpleasant reactions from others. And in appealing to points of procedure they are not merely following a set routine but trying to strengthen their bargaining position (Strathern 1972: 138).

Such appeals to procedure are more than just talk; Strathern's transcriptions of cases include examples of *komiti* and councillors dismissing cases, or restricting the disputants' presentations in various ways, on the grounds that the court would do the same (e.g., case 1, page 31). What is central, however, is that invocations of procedure constitute the Hageners' means of 'borrowing' power (to use Strathern's (1972: 149) term) from the Europeans.¹ The *komiti* and councillors' belief that they form the lower rungs of a single national judicial hierarchy lends them an important strategic resource that traditional mediators would never have had.

Strathern's findings offer a clear and concrete illustration of the practical meaning of the shift from autonomy to semi-autonomy. The shift is, in this case, experienced in new forms of argument and discussion, and new styles of interpretation, all of which potentially add to third parties' persuasiveness and control. In Hagen, these developments do not appear to have made a great difference in outcomes, but they have made a great difference in the kind of talk that goes on at hearings, and in the effectiveness of mediators.²

Underlying the *komiti* and councillors' success (in their own eyes) in adapting to the political vectors of European law is their acceptance of the state and official law. Where the indigenous response to contact or state intervention is less positive, third parties consciously avoid the appearance of belonging to the official hierarchy. Parnell's (1978) study of a Mexican township is an example of this situation; local officials' competition with the state's agents is reflected in procedural differences. This competition can be expressed in numerous ways, from localising the terms of the hearing, to invoking non-secular forms of authority. Such dynamics in mediation are taken up in the following sections. For the moment, the important point is that the way in which a jural community perceives its access to wider systems of authority has, potentially, a profound impact on the efficacy of mediators in containing and resolving disputes. That impact is felt in the kinds of reasons third parties have at their disposal in their

efforts to facilitate conciliation. The Jalé and the Hageners are contrasting examples from the same region of the kind of difference such access can bring (for a wider comparison within New Guinea, see Epstein 1974). These examples also illustrate the inseparability of questions of linkage from questions of western influence and official control.

The potentially (or ostensibly) conciliatory atmosphere of mediation should not obscure the fact that mediation is confrontative. The mere fact of a mediation session means that the disputants did not or could not obviate their conflict by unilateral or bilateral appeals for forgiveness. Koch *et al.* (1977) associate apology with a desire to prevent disruption of group solidarity. In their cross-cultural study, they conclude that, of the structural properties shared by the widely divergent societies they examined, the most important is 'the disruptive effect of the conflict on the solidarity of the disputants' group' (1977: 270). Their examples are the agnatic groups of the Jalé, friendship networks in urban Jeddah and village hierarchies in the Fiji Islands. Thus, if mediation entails an initial rejection of apology, then we can infer that the disputants are willing to risk a full-blown public dispute, and that the conflict has already spilled beyond the disputants themselves.

If the social costs of confrontation are not so high that they lead to apology, mediation is further clarified by contrasting it to a strategy of minimal social cost: avoidance. Avoidance is a dominant mode of dispute resolution only when severing the dispute relationship does not jeopardise other goals, e.g. subsistence. It is sometimes associated with situations in which neither disputant wishes to face losing in public. Avoidance is the predominant mode of conflict resolution in highly mobile societies, such as the United States (Felstiner 1974), and it is also found in societies (e.g., the Bedouin) with very low population density (Peters 1967). In general, avoidance is associated with social mobility first and rejection of confrontation second. To the extent that mediation is not preempted by avoidance, we can expect it to coincide with relatively reduced social mobility and acceptance of the risks of confrontation.

Arbitration and adjudication both differ from mediation in their formal assertions of control over the disputants, and in their power to implement control. In practice, there might be other differences also, and, as is well known, litigation is not a feasible option everywhere. These are the themes of an enormous literature.³ It is important to know the extent to which mediation is actively preferred to litigation, or accepted for want of alternatives. Recourse to mediation can reflect various distributions of power, and the varying extent to which groups are capable of creating power (in the sense of generating and enforcing norms).

All the preceding discussion can be summarised in the observation that while mediation can occur in any society, its significance is far from universal. If 'mediation' represents a wide range of procedures and styles around the world, it is because societies themselves differ, both in their own cultural preoccupations and emphases, and in the nature of their ties to external sources of authority. Cross-cultural comparisons of mediation might profitably recognise some of these differences.⁴ Specifically, the nature of the alternatives to mediation, and their costs, are an important element in our understanding of media-

tion. Further, mediation by its very nature draws our attention not only to intra-group relations, but also to intergroup relations. The nature of the links between one semi-autonomous social field and another is of the utmost importance. The comparison between the Jalé and the Hageners shows that mediation in isolated societies is not only less frequent and less durable than in those which are farther along on the continuum of 'semi-autonomy'; it also suggests that mediation in autonomous groups is qualitatively different from those whose access to external sources of authority (notably official law) is meaningful in practice. Mediation as a 'type' of dispute settlement should not be abstracted from these organisational and historical considerations.

Norms and neutrality

One of the very earliest achievements of legal anthropology was to demonstrate that societies are capable of normative order in the absence of laws or formal courts of law. Where mediation is institutionalised as a regular mode of dispute settlement, societies (e.g. the Tonga) can remain stable even in times of extreme social change (van Velsen 1964). Indeed, normative references made in the course of dispute settlement constitute the anthropologist's conventional rationale for studying disputes. Studies of the place of norms in mediation do not paint one picture, but several. One major analytical theme is the nature of the normative functions of mediation. On the one hand, legal commentators such as Eisenberg (1976) and Golding (1969) point to the legislative and judicial functions of mediation. On the other hand, anthropologists stress the differences between mediation and judicial forums, led by the examples of Gibbs (1967) and Nader (1969). The extent to which mediation and judicial activity differ was the subject of what remains perhaps the most interesting debate among anthropologists of law in recent years—between Gulliver (1969) and Moore (1970b) on the politics of norm selection by judges. This led to a second major theme in studies of mediation—the quality of a mediator's neutrality. A mediator might legitimately manipulate norms for strategic reasons, or he might cloak his personal interest in normative terms (compare Collier 1973 and Bailey 1978). Again, there is an interesting debate over the extent to which norms and interests converge or diverge in triadic processes; the controversy is framed as a question of the significance of distinguishing between what Comaroff & Roberts (1981: 262 n. 19) call explicit and implicit normative references. (Compare Hamnett 1977; Abel 1969; Gluckman 1973 for three different positions.)

Comaroff's & Roberts's distinction between implicit and explicit normative references derives from their study of Tswana dispute contexts and idioms. They explain the distinction in the following terms (Comaroff & Roberts 1981: 262 n. 19):

By 'explicit reference' we mean a normative statement which may be understood without reference to the facts or context of the case. An implicit reference is one in which facts are adduced in such a way as to be comprehensible only or directly in terms of an accepted norm.

In this article, I have adopted their language of explicit and implicit to refer to norms themselves, since I prefer to preserve the possibility that the norms and their mode of acceptance differ qualitatively (i.e., signify differently) between the two styles. The Tswana themselves distinguish a set of explicit norms, the *mekgwa le melao*, although their 'normative repertoire' (Comaroff & Roberts 1981: 70) is considerably wider, including not only the 'constitutive order' of the *mekgwa le melao* but also the transformational principles implicit in the 'shifting, enigmatic and managerial world in which persons repeatedly negotiate their relations in terms of a set of constant referents encoded in categorical labels' (Comaroff & Roberts 1981: 68–9). Comaroff and Roberts (1981: 59) caution strongly against assuming that norms explain everyday life in any direct way:

Normative expectations . . . represent the means by which interactional processes are meaningfully constituted as they unfold. The correspondence between norm and the substance of relations is, in other words, indexical and dialectical, not motivational.

Similarly, they note that although Tswana disputants and third parties organise dispute processing around norms, the relationship between norms and outcomes is 'complex' (Comaroff & Roberts 1981: 84). In developing this observation with regard to the Tswana, Comaroff & Roberts make the more general point that no anthropologist has ever adequately answered the following question: 'Given that substantive rules *do* rarely determine outcomes in a simple, mechanistic fashion, what underlies the logic of their utilisation and invocation?' (1981: 84). With the exception of their own book and Mather & Yngvesson's (1980–1981) hypothesis concerning the relationships of audiences to dispute processing, this assessment remains valid today. Mather & Yngvesson propose that speakers 'widen' and 'narrow' the actual or hypothetical audiences to their disputes by the way in which they frame their appeals; the invocation of norms thus has a performative aspect in identifying the framework within which speakers hope to legitimate their assertions (see also O'Barr 1982). Earlier, Moore had noted the complexities of the judicial selection of norms (but the point could apply to third parties generally) in her comment (1970b: 323) that 'norms are something less than automatic guides to decision'. Invocations of norms are political in that 'they tie a particular decision by a particular judge to the concept of order itself' (Moore 1970b: 342). Indeed, the notion that a mediator's interests supply him with his motivation in selecting norms for 'enunciation' has become almost axiomatic in comparative studies (see, for example, Gulliver 1977: 29). Normative references are not only evocations of particular arenas of society but also, simultaneously, of particular avenues of power and authority.

If Comaroff's & Roberts's question has gone largely unanswered, it is not because scholars in the field feel any less strongly than they about its relevance and urgency. Part of the difficulty may be in the widespread assumption that norms function in congruent ways cross-culturally, i.e. in overgeneralising. In their article on problems of comparison in dispute theorising generally, Cain & Kulcsar (1981–2: 385) raise the possibility that the very concept of 'the dispute' is inadequate:

The concept of dispute has typically been conducted inductively, by the method of abstracted empiricism; more naively, disputes have on occasion been treated as self-existent, as phenomena which do not need to be constructed theoretically but which self-evidently are.

I believe that Comaroff & Roberts and Cain & Kulcsar are pointing to different aspects of the same problem—that of overgeneralising the nature and functions of norms in organising conflict and dispute processes.

The importance of the distinction between implicit and explicit norms is not only that they are two means of achieving the same ends, but that they are potentially so different as means that they represent profoundly different approaches to the problem of maintaining social order. As the discussion of linkage in section 1 suggested, the ability of a mediator to invoke explicit norms is not simply a reflection of his rhetorical deftness, but, more importantly, of his assessment of where his authority comes from. Ordinarily, studies of dispute settlement are carried out in situations in which a mediator's authority derives from the 'collective goods' pertaining to a fairly extensive set of semi-autonomous social fields. This is not true of the Jalé, and, in former times, it was not true of other isolated groups. Thus, the fact that most mediators who become anthropological subjects have a fairly wide and flexible normative repertoire should not obscure the possibility that their effectiveness is not generated entirely from within their constituent group. 'Explicit norms' are not merely utterances of what is 'understood' as implicit norms. They *can* be, of course, but their efficacy does not lie—or does not only lie—in giving voice to what otherwise literally goes without saying. Their efficacy lies in their outward gesture, to the system or systems in terms of which their authoritativeness is legitimated, and whose actuality is realised in a set of articulated principles. It is this aspect of explicit norms that gives them their definitive and persuasive character: they are integral to a concept of society in the abstract, integral to the notion of 'collective goods' and the concepts of legitimate control associated with them.

The Tswana data provide evidence of the heightened power of explicit norms. Comaroff's & Roberts's (1981: 84–5) discussion of patterns of the invocation of norms by the Tswana focuses on speakers' construction of a 'paradigm of argument'. Most normative references are implicit, as 'disputants and others involved in a case simply talk about what happened . . .'; explicit normative references take on a tactical importance. Drawing on Comaroff's earlier distinction between formal and evaluative codes, they develop the distinction between implicit and explicit normative references in terms of their relative power. In dispute contexts, the formal code has an 'impersonal and authoritative quality . . . denoted by appeals to the transcendent legitimacy of shared values'. This is the domain of explicit norms. The evaluative code 'conveys the opinion of the speaker in the unmistakable terms of the first person singular'; this is the domain of implicit norms. The existence of the two codes 'distinguishes and insulates the authoritative enunciation of *mekgwa le melao* from the public negotiation of particular rights and liabilities' (Comaroff & Roberts 1981: 86). Later (on p. 104), they add that 'explicit normative utterances among the Tswana are associated with efforts to assert control over paradigms of argument'.

Thus, explicit norms are powerful in a way that implicit norms are not: they relate the dispute to a social order beyond and above (and including) the participants. Norms refer symbolically to the social field that knows them and to the way in which they become known. In the case of explicit norms, ultimately, the relevant social field is the state,⁵ and their use implies avenues of political understanding. For implicit norms, the relevant social field is the relationships in terms of which they are expressed. By stating that the ultimate social field of explicit norms is the state, I mean only that rules imply rule-makers, not that their invocation implies that the speaker identifies with the state in a direct way. Rather, my proposition is that the external sources of authority invoked in explicit norms are ultimately legitimated or not legitimated by the state, and that this is relevant theoretically in the analysis of even very small and isolated social fields. It is for this reason that, in considering the relationship of norms to neutrality, the selection and stylisation of norms (ranging from implicit to explicit) constitutes one important dimension.

What do explicit and implicit norms 'sound like' in practice? Explicit norms sound like what they are, or pretend to be: applications of rules. Without a vocabulary of explicit norms, a mediator is left only the language of personal interests as his basis for communicating with the disputants. Explicit norms are framed categorically: 'Brothers should help one another'; 'husbands and wives should honour each other'; and 'people should not use foul language' are all examples. So are what Comaroff & Roberts (1981: 262 n. 19) call direct and indirect formulations of 'explicit references': statements beginning 'it is the law that . . . ' or 'I ask whether it is improper that . . . ' Implicit norms are framed personally: 'I was sorry my brother neglected me'; 'My wife insulted me'; 'His language shocked me'. As the previous discussion is meant to show, the substantive equivalence of these two sets of statements should not distract from their important differences. Explicit norms are assertions that all members of the group involved recognise the rule as a rule. Implicit norms make no such claim: they are personal statements. A consensus around explicit norms is a consensus about the validity of a system of authority. A consensus around implicit norms signifies agreement about a set of 'facts' and their significance.

People cannot argue in terms of explicit norms unless those norms are widely known. In some societies there are explicit rules for some aspects of life: the Tshidi can recite rules of chiefly succession (Comaroff 1978), and rules of obligation among kin form the idiom of justification among the Ndendeuli (Gulliver 1971: 4). Gluckman's (1967) Barotse cases largely centre on kinship obligations. These are but three examples out of many available. On the other hand, Zinacantecs do not appear to wage their disputes in terms of exchanges of explicit norms (Collier 1973, especially 94–6), but, instead, in terms of factual aspects of their relationships. The American mediation cases reported by Felstiner & Williams (1978) similarly do not show explicit invocations of norms, but rather other sorts of verbal competition depicting failed relationships. Gulliver (1977: 30) notes that all disputes are not equally amenable to explicit normative discussion, even when explicit norms are available. Factual disputes—over property or boundaries for example—do not require normative attention. Further, raising explicit normative issues is not always in a disputant's

interest (see Bailey 1978), since a claim of consensus around a rule can fail where a personal appeal for redress might succeed. Finally, explicit rules may not exist in indeterminate areas of social life. But without explicit norms, a mediator cannot easily survive a specific sort of challenge to his legitimacy, i.e., a challenge to his impartiality.

Effective mediation certainly can occur without reference to explicit norms, but their presence or absence establishes different limits to what mediation can accomplish. When implicit norms are used, the dispute cannot be abstracted from the events that constitute it. Interpretations of the events leading up to the dispute become highly charged; the 'facts' themselves easily become matters of negotiation (see Bohannan 1957: 47–51). The significance of the facts, and the standards by which a 'trouble case' is evaluated, remain, however, 'understood' (M. Strathern 1974: 315; her reference is to the Hagen *komiti* hearings). More commonly, perhaps, a single mediation session fluctuates between implicit and explicit norms. For example, Gluckman's (1967) study of the Barotse shows the facility with which the *induna* could switch from implicit to explicit norms in guiding discussions of claims. Virtually all Gluckman's cases emerge as disputes over kinship obligations; at least, that is their preponderant idiom. The Barotse judges' consistent reiteration of the norms of kinship assumes both explicit and implicit forms. Sometimes they insist on the personal nature of the dispute; at other times, they phrase kin obligations as 'laws' (compare, for example, the Case of the Biassed Father, pp. 37–52, with that of the Headman's Fish-dams, pp. 178–91).

The second dimension of neutrality—as has already been hinted at in the discussion of norms—is the relationship that a mediator can or does choose to establish with the disputants. As Comaroff's and Roberts's extended ethnographic study of the invocation of norms (and it remains the only one) suggests, when explicit norms are powerful it is because they successfully ally the speaker with a system of authority that extends outside the immediate focus of negotiation. A parallel invocation of such authority is a third party's representations of the basis of his own impartiality. Impartiality can range from a disinterested involvement with disputants who are well known to the mediator to an indifferent involvement with neither disputant, i.e., purely *ex officio*. If disputants have a hierarchised range of remedial forums available to them (as do the Tswana, for example; Comaroff & Roberts 1981: especially 108–9), they are exposed not only to different levels of authority, but also, most likely, to different structures of impartiality. As with the distinction between implicit and explicit norms, the substantive equivalence of outcomes should not obscure the potentially profound differences between these triadic arrangements. A mediator who is involved with neither side derives his legitimacy from an institutionalised system of statuses that endow him with the authority to participate. Once again, we enter the realm of 'collective goods', society-in-the-abstract, and, more concretely, the offices of unofficial or official government. A mediator who is involved with both sides conveys no such message. If we once again set aside the fact that most ethnographic studies of mediation are carried out in situations where both types of impartiality are viable, we can appreciate the qualitative differences between them. To return to terms used

earlier, involvement with both sides entails only the minimal conditions of common interest, however ephemeral. Involvement with neither side, however, requires a degree of linkage among social fields so that the mediator has some official basis for proceeding. Indeed, the social organisational context of mediation, discussed in section 1, limits the mediator's choices along both dimensions of his neutrality (i.e., his successful invocation of explicit norms and his viable claims to a specific structure of impartiality). As we shall see, mediators can and do mix their messages, combining, for example, *ex officio* participation with discussion purely in terms of personal grief but, nevertheless, comparative study benefits from preserving an analytical distinction among these configurations. Thus, the remainder of this article develops within the framework shown in the diagram.

Two forms of mediation

Normative Basis Form of Neutrality	Implicit	Explicit
	<i>INCLUSIVE</i> —local linkage —least social structural demands	escalation strategy
Both Sides		
Neither Side	containment strategy	<i>EXCLUSIVE</i> —vertical linkages —most social structural demands

Weber's distinction among 'pure' types of domination indicates the inseparability of the invocation of norms from their authoritative context:

The 'validity' of a power of command may be expressed, first, in a system of consciously made *rational* rules (which may be either agreed upon or imposed from above), which meet with obedience as a generally binding norm when such obedience is claimed by him whom the rule designates. In that case every single bearer of powers of command is legitimated by that system of rational norms, and his power is legitimated insofar as it corresponds with the norm. Obedience is thus given to the norms rather than to the person.

The validity of a power of command can also rest, however, upon *personal authority*. Such personal authority can, in turn, be founded upon the sacredness of *tradition*, i.e., that which is customary and has always been so and prescribes obedience to some particular person. Or, personal authority can have its source in the very opposite, viz., the surrender to the extraordinary, the belief in *charisma*, i.e., actual revelation or grace resting in such a person as a savior, a prophet, or a hero (1978: 954, author's emphasis).

Weber (1978: 1006) goes on to explain that 'the meaning of norms is fundamentally different' between rational and personal systems of domination, in that only the 'fact' of the patriarch's power (personal authority) is set by rules, whereas the bureaucratic authority (ideally) operates by a rational system of explicit rules (Weber 1978: 1006–7). This crucial distinction is at the heart of the

significance of both dimensions of neutrality. Whether one accepts the distinctions along these norms (between implicit and explicit norms, and involved impartiality and *ex officio* impartiality) depends on the extent to which one accepts that 'culture' and 'law' differ. It is perhaps a testimony to the enduring influence of natural law that our terminology for the rule of law and the improvisations of daily life tends to make them appear to be merely differences of degree, when they are differences of kind (albeit related kinds, but that is the question). Weber (1978: 1111) notes the antagonism between bureaucracy and patriarchalism, but stresses that 'both are structures of everyday life'. It is this that makes their mutual embeddedness so important.

The passage quoted from Weber is a reminder of the extent to which anthropological discussion of norms in action is Weberian in tone, although the current categories do not map precisely onto his. More importantly, the passage also suggests what is at stake (in analytical terms) in such discussions. The rationalisation of legal processes involves a shift on the two dimensions of neutrality that we have been discussing. So far, we have been exploring the connexions between these dimensions and the links among semi-autonomous social fields. My purpose in the next section is to suggest that rationalisation entails a widening range of choices among means of organising and expressing neutrality. This process does not take place in a vacuum, but in the changing relationships of social fields which are, in practice, hierarchised. What widens the range of choice in remedial contexts is access to increasingly remote sources of authority and the absorption of their idioms of control. These are some of the issues at work in the two forms of mediation proposed in the next section.

Two forms of mediation

Let me now combine the themes of linkage and neutrality.

(a) *Inclusive mediation* Inclusive mediation involves a third party whose neutrality is based on involvement with both sides of the dispute, and whose normative references are implicit, i.e., adduced from factual constructions of the dispute relationship. The box around this and the other cells in the diagram inevitably misrepresents the potentially great fluidity among them all, but inclusive mediation can be bounded by circumstances in a way that the other cells cannot. The reason is that *any* social situation involving, minimally, three people speaking the same language can generate inclusive mediation. But as we have seen among the Jalé and similar cases, when mediation occurs under these minimal conditions (even granting the occasional success of trading partners or co-residents in mediation), it is likely to be very fragile indeed.

Inclusive mediation is, of course, also an option even for agents of official law, but when inclusive mediation is one choice among others, rather than being the only choice, then its significance emerges in a different light. When a mediator adopts an inclusive style, he cancels, or at least delays, the invocation of explicit norms that would 'lend' him a greater range of authority. Instead, he draws on his mutual experience with the disputants and/or their community, and, as the Lozi judges did in the Case of the Biassed Father, emphasises the continuities

between his own knowledge and approach and that of the disputants (see Gluckman 1967: 49). The knowledge of an inclusive mediator is local knowledge. Its application underscores both the mediator's local ties (i.e., a popular legitimacy) and, if not the disputants' control over the mediation process, at least their identification with it.

The therapeutic village moot (see Gibbs 1967) that is the model for neighbourhood mediation in the United States (Felstiner & Williams 1978: 224) has an inclusive third party (a weak one, in fact) who facilitates negotiation between the disputants. (For a description and evaluation of the federal and other experiments in neighbourhood mediation in the United States, see Tomasic & Feeley 1982). As Merry (1982) argues, this sort of mediation is appropriate to disputes where the disputants themselves have strong incentives to settle their differences. Where disputants' shared commitments are fewer, mediation collapses unless the mediator himself takes a stronger and more authoritative role or, following the argument in this article, where he can draw on more generalised and explicit normative themes to make the disputants more aware of the interest society takes in their problem. While American urban disputants may or may not be complete strangers, they are probably not bound to each other in the same way as the villagers from whom the model of mediation derives (see Galanter 1981: 17).

The mediators' training program that Felstiner & Williams (1978: 227–8) describe is especially interesting because it recreates an inclusive mediator *par excellence*. They quote the following passages from the training manual:

- How the session will be conducted: panelists will listen to everyone, then work with the disputants to explore possible ways to resolve the problem. It will be disputants themselves, not the mediators, who will fashion any agreement that may be made . . .
- Mediators' principal attitudinal objectives are to be as follows:
 - a. Non-judgmental. A panelist's own value system is irrelevant. Any agreement will be made by and for the disputants. It is their values that count.
 - b. *Willing to be educated by the disputants* . . . The disputants feel a need to tell their story to a willing listener . . .
 - c. *Slow to come to conclusions* . . . (emphasis in original).

Finally, mediators are encouraged to listen to the disputants, 'to show they understand what the disputant is expressing', and to encourage the disputants to speak freely with verbal and non-verbal signals. The third parties are discouraged not only from making explicit normative statements but also from 'stopping the disputant's flow of words'. These instructions, again, depict an inclusive mediator, committed to supporting *both* sides in their expression of their grievance and their search for a solution.

In contrast to the aims of the programme, however, is the message that disputants (and, to some extent, 'the system') are sending about the kind of mediation they want. Merry (1982) reports a Florida study that shows mediation to be effective in establishing long-term agreements involving 'disengagement, payment of return of money or property, or control of animals'—cases which, as Merry notes, 'can also be handled fairly effectively by adjudication'. Indeed, the system of mediation that she goes on to describe has the structure of exclusiveness (see the diagram, and discussion below) and strong linkages to the

judicial system of the state that are evident to everyone involved in the process. Cases are referred to mediation centres by the police, the courts and other agencies; the threat of returning them there is an instrument of persuasion. While the philosophy behind the mediation centres might be in part to shelter citizens from the formal authority of the state and to provide a supportive forum, in practice, American disputants do not seem to be seeking such shelter or support (see Merry (1979) for a discussion of how American disputants use lawsuits as sanctions in disputes that are essentially dyadic). Merry (1982) points to low case loads as an index of the lack of appeal mediation centres hold for the public. The cases in which American mediation is most effective are those that do not require explicit normative manipulation, i.e., those where the self-presentation of the system as inclusive rather than exclusive is not an obstacle to processing the dispute. In the other cases, perhaps one implication of Merry's findings is that disputants would prefer exclusive mediation, i.e. *ex officio* third parties whose articulation of norms would express the disputants' own sense of their rather remote relationships, organised by explicit normative principles, rather than by accommodation.

(b) *Exclusive mediation* Exclusive mediation involves a mediator whose neutrality derives from his knowing neither disputant, and whose references to norms are explicit. Although inclusive and exclusive mediation can operate in a single context (as all of the extended examples are meant to show), they convey different messages and draw on different symbolic resources. Exclusive mediation requires a degree of stratification and institutionalisation that the inclusive style does not. The reason is that a mediator can defend himself against charges of bias only if he qualifies for the office by meeting impersonal criteria, even if he holds the office only on an *ad hoc* basis. Also, having officially separated himself from the social context of the dispute, he has no vocabulary with which to pursue it unless it is an explicit normative vocabulary to which the disputants hold themselves (or are held) accountable.

As we have seen, a mediator capable of exclusive mediation can 'drop' into an inclusive style, a move that in effect contains the dispute (although not necessarily one that lessens tensions). Alternatively, a shift to exclusive mediation is a shift 'up', because it invokes whatever ultimate authority supports the mediator's explicit normative statements (see the diagram). (My distinctions parallel to some extent Roberts's (1983: 542–8) distinction between 'mediating' and the more authoritative 'umpiring'; however, I would distinguish further between the kind of mediating that can become umpiring, and that which cannot.)

Exclusive mediation is the more complex form of mediation both in terms of its structural requirements and the range of alternatives that shape its cultural significance. The sociopolitical context and other characteristics of exclusive mediation (reliance on explicit norms, professionalised and institutionalised third parties) suggest continuities between this form of mediation and adjudication which, indeed, other authors have noted (see, for example, Eisenberg 1976; Fuller 1971; Golding 1969). A range of flexibility from exclusiveness to inclusiveness can make mediation an important element of a unified hierarchy of jural

authority (for an illustration cast in somewhat different terms, see Canter 1978: 255, on the 'adaptability' of the traditional Zambian elite.)

Any exclusive mediator can adopt an inclusive style, but not all inclusive mediators can adopt an exclusive style. 'Neutrality' in the two styles is constructed on different structural principles. In societies where exclusive mediation is a possibility (e.g., in the United States), mediation might shift back and forth between the expression of interests and the enunciation of explicit norms, as strategy changes. On the other hand, in societies where exclusive neutrality is not possible, mediation is limited to the social fields and scale where it is effective, i.e., small ones. Indeed, the literature on peasant societies shows how ineffective indigenous modes of dispute settlement are in meeting certain types of demands (specifically, those generated by reductions in autonomy and the concomitant loss of control over local resources and institutions; see Abel 1979; Hunt & Hunt 1969; Starr 1978; Turton 1976 for examples).

Constituencies of the two forms of mediation

It is not enough, though, to explain differences in mediation by a consideration of how the third party identifies his own role. This analytic scheme has value only if the disputants, too, can be expected to operate differently in the different mediation systems. How might disputants express their response to the mediation systems that they create or that are created around them? First, we might look at their selection criteria for third parties, and, second, at the nature of their own participation, i.e., appeals they make to mediators (and, following Bailey (1973: 327), the compromises they reject) in an effort to conclude the dispute with minimal losses. Here, the discussion is limited by the available data. Some, but by no means all, ethnographers report mediation sessions verbatim, or even in paraphrase form. Most, in accord with their own needs, describe complaints and outcomes (see van Velsen 1967), rather than the process itself. Verbatim data are cumbersome to collect, but they are extremely valuable because they reveal so much that is otherwise hidden about the relationship of the disputants to their forum—who they think the mediator is—even when that relationship involves dissembling.

Selection criteria appear to be of two sorts. Some mediators' roles come with their offices—e.g., the mediators at the American neighbourhood justice centres, the Leopard Skin chief of the Nuer (Evans-Pritchard 1940), the mayors of Zinacantan (Collier 1973) or 'Ralu7a (Nader 1964), the induna of the Barotse (Gluckman 1967) and so on. These office-holders have varying stakes and clout in each case they hear, depending on their authority and the coercive means they have available in their persuasive efforts. As third parties, they often shift back and forth between mediation and arbitration as they seek to exert their authority over intransigent disputants. A second set of criteria clusters around the classic notion of the 'respected elder', someone whom both sides agree is acceptable, but who holds no office and whose role is strictly *ad hoc*. Hamlet elders (in Zinacantan; Collier 1973), notables (among the Ndendeuli; Gulliver 1971), senior members of the lineage (among the Tonga; van Velsen 1964), spouses (between their affinal and natal lineages; Colson 1953) and other individuals

whose experience qualifies them as mediators are included here. The first set, then, revolves around political offices and their constituencies; the second revolves around a wide range of relationships between the disputants or their groups.

Disputants may or may not have much choice in the matter of who is available to mediate their dispute, but Bailey (1978) suggests that the strategic element involved in the choice revolves around the types of appeals that third parties can hear or respond to without compromising their own legitimacy. The more personal interest the third party has in the outcome of the dispute, the wider the range of normative themes the disputants may assent. In doing so, disputants risk a third party whose inclusive stance may mask an underlying corrupt interest, but they gain considerable freedom in the way in which they present their argument. The more public-interested the third party, the more restricted are the acceptable normative themes (Bailey 1978: 201).⁶

Bailey's hypothesis about normative dynamics in relation to implied audiences is especially relevant to this discussion of exclusive and inclusive mediation, because it suggests the ways in which arguments and the normative impact of a dispute can shift in ways that might be invisible if our attention focused on the substance of the outcomes alone. I argued earlier that exclusive third parties must have some explicit normative idiom as their basis for participating in a dispute. Bailey's suggestion is that exclusive third parties have ears for explicit normative appeals, i.e., appeals framed in terms of violated social rules, because such rules represent the public basis of their legitimacy. Inclusive third parties use and hear a different language: a language that describes relationships, i.e., biographical statements about relationships. The legitimacy of an inclusive mediator derives from those same relationships. On the other hand, a successful disputant before an exclusive mediator must be able to manipulate rules (a successful disputant before an inclusive mediator must be able to manipulate facts).

Facts and rules may be interchangeable, but they bear very different messages about the social boundaries of a mediator's legitimacy, the structural context of the dispute, and the social field that might have an interest in the outcome. Exclusive mediation, because its explicit norms at least pretend to speak to 'society', creates linkages between the disputants, their community, and their wider social context—specifically, linkages toward the sources of authority that generated the rules. Inclusive mediation, because it operates without explicit norms, is different: the linkages to the social fields beyond the disputants are minimised, because no idiom expresses them.

When inclusive and exclusive mediation are considered in context, the issue of linkage is again important. In situations where courts are available (accessible), disputants' invocations of explicit norms in effect assert that their arguments will have validity 'higher up' the judicial ladder; they are a claim to future success in an escalated conflict. Mediators' invocations of explicit norms carry the dual message of their own authority via their identification with the sources of power in society and an implicit threat to abandon the case to the courts if the disputants fail to come to terms. Mediation systems operate both between and within semi-autonomous social fields. Inclusive mediation defines the *boundaries* of

those fields more clearly than does exclusive mediation (because inclusive mediation uses an implicit, i.e., local, normative idiom). Exclusive mediation stresses *linkage* between groups. The importance of distinguishing analytically between exclusive and inclusive mediation is that they represent qualitatively different relationships between mediation and its wider social context. My argument has been that the institutionalisation and emphasis on explicit normative appeals involved in exclusive mediation underscores the external vertical links in a social system. Inclusive mediation veils those vertical links, either because veiling them has some strategic importance to the participants or because the participants themselves do not perceive the links in a manner relevant to the process of mediation, e.g., when they have no access to the state's judicial system or to other forms of authority beyond their own communities.

Even when disputants and mediators technically might have a choice as to which style meets their needs, the issue is not always only one of preference, but also of the social structural context in which the disputants live. Mediation systems differ not only in their internal structure and their structural relationship to their wider context (which are the dimensions we have been discussing), but also in the sorts of problems that people argue over. Abel (1979: 249) suggests that village jural mechanisms fail when the problem at hand involves control over events or persons beyond the village—for example, actions of the state, or the impact of the state's economy in restructuring relationships in such a way that the traditional local idiom (of either inclusion or exclusion) is no longer relevant. Abel's (1979: 249) comments refer to a Turkish village:

A village mechanism could *not* be adequate to allocate rights to land under capitalism unless it had the formal support of the national state, for state coercion is an essential foundation of private ownership . . . The legal and administrative processes of the national state are the means of contending with adversaries who enter the village arena from without, and or participating in the capitalist economy that is gradually penetrating, and supplanting, the traditional village economy.

While traditional rural procedures remain effective for the conflicts that erupt in their own idiom (status, honour, kinship, and so on, in this case), they fail when the idiom shifts to a national and international one over which third parties have no control.

The American situation is somewhat different from that of Turkey or Barotseland, in that the question is not so much of shifting from traditional to non-traditional forms of intervention (i.e., of cultural and institutional constituencies) but of the place of mediation in the disputants' perceptions of their overall options. Just as village mediation fails—indeed, even exacerbates conflicts—when the problem is essentially beyond the control of the disputants, American urban mediation seems to fail when the limitations of the process (i.e., restriction from stronger forms of participation by third parties) leave the disputants only a forum for reiterating their dispute, rather than an outcome that satisfies their desire for state-sanctioned authority.

Felstiner & Williams (1978: 243) head their list of findings in their American study with the important observation that 'disputants who exhibit a high degree of rights consciousness or whose attitude toward all dispute processing is

dominated by a court model (i.e., by a version of exclusiveness) will discount mediators as impotent judges and will feel that the anormative stance of mediation debases legitimate expectations'. 'Rights consciousness' is, perhaps, not only a matter of 'cognitive orientation' but of the normative demands imposed on the forum by the disputants' relationship, the dispute itself, and the disputants' awareness of and preference for other remedies.

Conclusions

I should like to make three points by way of conclusion.

(1) Questions of autonomy and linkage are of central importance in the comparative study of mediation. Essentially, the degree of autonomy a jural community has is the inverse measure of its relationship to the state-sanctioned system of authority. While that authority may not always be relevant in an active sense, it nevertheless plays a vital role in organising people's ideas about order and authority when they have even hypothetical access to its resources. The New Guinea highlanders that Koch studied (1974) were almost completely isolated from the institutions of the state, and reached the limits of the efficacy of their local system of authority very quickly. The Hageners had a relatively effective system of mediation, at least in part because, in the eyes of mediators and disputants alike, it was supported by the official legal system. The fact that local dispute processing was not in reality sustained by the national law has in part accounted for a resurgence of large scale violent disputes there (A. Strathern 1974; especially 270). On a larger and more elaborate scale, the Barotse judges were able to approach problems with maximum flexibility—moving easily from inclusive to exclusive mediational styles. Americans' attitudes toward access to courts are not yet well understood (see Nader 1980) but the data suggest that by the time disputants go to a mediation centre, their attitudes towards litigation determine how readily they achieve conciliation. These examples suggest why it is important to preserve an analytic distinction between inclusive and exclusive mediation: without some means of distinguishing various and varying levels of autonomy, we inevitably ignore questions of sovereignty, dependence, domination and subordination. Mediation is not only or merely an equal 'alternative' to litigation. The fact is that even where mediation flourishes, it has its limits in the nature of its subordination to a national system of courts. In many instances, too, the relationship of the mediation process to official law expresses a wider set of relationships, i.e., the legal status of indigenous or other cultural groups. These are essential aspects of any cross-cultural comparison of mediated dispute processing.

(2) The major distinction between inclusive and exclusive mediation is that, potentially, they imply very different contexts along the dimensions just discussed. Exclusive mediation, with its explicit normative referents and professionalised neutrality, implies the widest social field in which these norms and statuses are relevant. The outer edge of that social field might be conceptualised as the state, or God, or something else; the point is that its orientation is vertical, or outward. By contrast, inclusive mediation reiterates the face-to-face community; its orientation is local, or horizontal. In terms of outcomes, inclusive and exclusive

mediation might produce identical results, but with different rationales, implied audiences and ultimate accountabilities, i.e., entirely different significances. I do not mean to suggest that one should only enquire about the inclusiveness and exclusiveness of mediation; on the contrary, I hope that these concepts will contribute to an improved understanding of the ways in which cultural systems conceptualise negotiated social orders.

(3) The language of mediation is of great analytical importance. Paraphrasing Brenneis (1978: 159), 'talk indeed matters', and an analysis of the content and style of dispute discourse demonstrates more than 'the constraints and privileges associated with various offices and fora'; they are more than 'epiphenomena of the underlying political process'. The language of mediation is itself a political process. Mather & Yngvesson (1980–1981) propose a framework for analysing the relationship of the performative aspect of disputing to the transformation of disputes. They show how the social field to which disputes refer can be manipulated (narrowed or widened) by redefining the dispute itself—reclassifying its issues, and including or excluding particular audiences. Thus, within a single jural system, and even within a single situation, disputes can shift 'meanings' significantly in patterned ways. Mather and Yngvesson focus on language as a tool for manipulating context. They conclude (1980–1981: 821):

What is critical . . . is the character of law as *public discourse*, as an official language which legitimizes the relative power of individuals and groups in society (1980–1: 821).

That discourse has its limits in the normative systems of the society in question, and in the relationship of its jural institutions to their ultimate sources of authority.

Neutrality, like equality, can mean many things. Inclusive and exclusive mediation are two styles of mediation, two potential relationships between the structural context of mediation and mediation itself. As categories, they combine considerations of the normative referents of the case and the mediator's relationship to the disputants. I do not mean the categories of inclusive and exclusive mediation to function as predictive models nor as societal 'types' but as flexible tools for evaluating the mediation process in relation to its limits and opportunities. My discussion has addressed particularly the question of the relationship between norms, neutrality, social linkage and mediation. In a more general way, it has addressed the question of what access to state judicial systems means in mediation. I have argued that the structural requirements of exclusive mediation orient its constituents toward vertical systems of authority. To the extent that relatively small social fields have legal recognition and access, such vertical systems culminate in the state. To the extent that they do not, exclusive mediation may prove to be brittle in large-scale conflicts that push a mediator beyond his own powers. Inclusive mediation, on the other hand, encapsulates its constituents within their ordinary knowledge and their own relatively small social fields. And inclusive mediation itself has to be differentiated, since when it appears as an alternative to exclusiveness, the strategic and structural implications differ radically from the inclusive mediation whose only alternatives are violence or fission. When these contexts are merged in the analysis of mediation, fundamental comparative issues are obscured.

NOTES

The original version of this article was presented to a class on mediation and negotiation at the University of Wisconsin Law School. I am grateful to Marc Galanter and his students for early helpful comments, and to Donald Brenneis, Paul Dillon, Richard Lempert and Sally Merry for criticism of subsequent drafts. Fred Aman, Andrew Arno, Jane Bachnik, Wynne Furth, Letitia Hickson and George Marcus were generous with their insights.

This article was written to honour the memory of Professor Klaus-Friedrich Koch.

¹ In the Minj area of the western Highlands, such tactics by 'bullying councillors' failed, as local knowledge of official law increased (Reay 1974: 238).

² This discussion is by no means a recommendation that adding to mediators' power should be an end in itself, nor that increasing mediators' authority always has positive overall results, nor, certainly, that such a bolstering of their role can only take place by 'shadowing' it with European legal procedure. These are complicated questions that lie beyond (albeit only just beyond) the scope of this article, which is limited to the problem of how to control cross-cultural comparisons of mediation. See A. Strathern (1974) and A. Turton (1976) for detailed examples of the failures of such developments, and, more generally, Barnes (1969).

³ For critical reviews in anthropology, see Nader 1965; Moore 1970a; Collier 1975; Snyder 1981. For recent ethnological and interpretive discussions, see Abel 1982; Assier-Andrieu 1983; Burman & Harrell-Bond 1981; Galanter 1983; Newman 1983.

⁴ Cain & Kulcsar (1981-2: 381-3) raise this problem more generally in their discussion of the 'transferability of institutions'.

⁵ Decisions by oracles and divination (cf. Peters 1972) and their importance in facilitating mediation are not discussed in this paper, in spite of their relevance. I do not mean to confine the meaning of 'norms' to the secular domain by any means. The Q'uran, 'God's Will' and the Bible are all sources of normative justification and persuasion (Bailey 1978: 201). I take 'norms' to mean simply cultural knowledge, offered with varying expertise and efficacy as justifications on occasions that call for definitions or negotiations of accountability (Greenhouse 1982).

⁶ Bailey's comments might appear to be at odds with my reference (above) to rationalisation as involving a widening range of choices in the problem of how to organise and express neutrality. They are not. Bailey is referring to a single third party, and my comment concerns aggregate systems.

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