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ORGANIZING THE ETHNOGRAPHY OF NEGOTIATIONS

*William L.F. Felstiner**

DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE. By *P.H. Gulliver*. New York: Academic Press. 1979. Pp. xxii, 293. \$19.

P.H. Gulliver is a first-rate ethnographer. His work on the Ndendeuli and Arusha of Tanzania is among the best and best known research in the anthropology of law since World War II.¹ Since leaving the School of Oriental and African Studies at London in the early 1970s, he has made a considerable effort to explore the abstract reaches of mediation and negotiation as a form of dispute processing.² That effort is capped by *Disputes and Negotiations*, the first volume in a series of Studies on Law and Social Control edited by Donald Black.

Disputes and Negotiations first evaluates many earlier efforts to distinguish negotiation from adjudication. I hope that its sweep and wisdom will put an end to a definitional exchange that is beginning to rival the struggle over the definition of law that plagued the preceding generation of political anthropologists. Gulliver argues that what distinguishes the two is the adjudicator's power to determine an outcome, and not whether the dispute concerns interests or values, zero sum or other results, multiplex or other relationships, or judicial or political process. This is also the dividing line that I suggested years ago.³ Of course, in one sense no definition of any social phenomenon can be correct or incorrect since definitions simply stand for what they are said to represent. If Professor X wishes to characterize dispute processing that produces zero-sum results as adjudication, and all other forms as something else, he cannot be labeled wrong in doing so. At worst, he has seriously increased the risks of misunderstanding because his definition excludes a considerable

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1. P. GULLIVER, NEIGHBOURS AND NETWORKS (1971); P. GULLIVER, SOCIAL CONTROL IN AN AFRICAN SOCIETY (1963).

2. See Gulliver, *Negotiations as a Mode of Dispute Settlement: Towards a General Model*, 7 L. & SOC. REV. 667 (1973); Gulliver, *On Mediators*, 1977 SOC. ANTHROPOLOGY & L. 15 (A.S.A. Monograph No. 14).

3. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC. REV. 63, 69 (1974); see also L. NADER & H. TODD, THE DISPUTING PROCESS — LAW IN TEN SOCIETIES 11 (1978).

amount of behavior that is generally thought to be adjudication, and includes a considerable amount that is not. The claim, then, that can be made for the definition proposed by Gulliver *et al.* is that it appears to include all of the behavior that in folk understanding would be considered to be adjudication and nothing more.

Disputes and Negotiations is not about negotiations at large, but about the negotiation of disputes. Gulliver defines disputes as disagreements that are transferred to a public domain. But what is a public domain, and what is the purpose in restricting the analysis of negotiations to those that involve an undefined public? It would be hard to derive an operational definition of public domain from the way in which Gulliver dances around the issue: Public is contrasted with private and dyadic. It "offers the *possibility* of appealing to other people and to the interests and norms of the community" (p. 75) (emphasis added). "There is, *in effect*, an announcement that there is disagreement" (p. 76) (emphasis added). There need not be a third party. "There is *some kind* of public recognition and cognizance of the matter" (p. 76) (emphasis added). But is the disagreement public if the disputants hire lawyers or consult a parish priest or a marriage counselor or the Better Business Bureau? Or, in this country, must parties turn to a government functionary or institution which publicizes its activity before their disagreement becomes a dispute? More important, I do not understand why Gulliver wants to restrict his "models" of negotiations in this way. To do so throws out the greater portion of the universe of negotiations and does so, if I understand the book, needlessly. With the unimportant exception that "private" negotiations may not require a forum since they can be conducted by mail or telephone, all of Gulliver's abstractions and analyses are as applicable to private as to public disagreements.

After these preliminaries, *Disputes and Negotiations* has a simple theme, richly and intelligently embroidered. Negotiations exhibit two patterns — an overall sequence and a constant cycle that is repeated within each stage of the overall sequence. Gulliver asserts that the eight stages of this sequence apply to negotiations about disputes regardless of who the disputants are, what the disputes are about, whether the disputes are processed ad hoc or according to a predetermined and fixed regime, or within whatever cultural settings the disputes occur.

A run-of-the-mill American negotiator would be surprised by two, at most, of Gulliver's eight phases even if he had never been to Africa or to graduate school. The obvious stages are fixing a place to meet, composing agenda by way of defining issues, making claims, narrowing differences, and reaching and executing an agreement. The order of these stages is equally unremarkable. To negotiate, one must communicate, and if that is to be done in person, the first step

must be getting the disputants to the same place at the same time. Once there, the disputants must talk about what they are going to talk about, say what they want or are willing to do, attempt to accommodate their differences, reach or fail to reach an agreement, and carry out or ignore the duties imposed by any agreement.

To these necessary stages Gulliver adds two others: "Preliminaries to Final Bargaining" and "Ritual Affirmation." The first is simply an early stage of bargaining in which issues are simplified, trade-offs are made, and general formulae for settlement may be constructed. Since Gulliver notes that this stage does not always occur, it is not entirely clear why he has bothered to formulate it as a stage separate from bargaining proper. No analytic capital is made of the distinction. Ritual Affirmation is the ceremony of success, stretching from kiss to beer drink to recorded deed. Because such rituals have greater symbolic importance in tribal culture, where disputes tend to be between familiars, anthropologists have paid more attention to them than have students of negotiations in the United States. Gulliver's suggestion that a written agreement, in addition to its instrumental uses, fulfills a strong psychological need for symbolic recognition of completed negotiations is worth further attention.

Within each stage, Gulliver posits a reactive cycle of information exchange and learning. Gulliver examines the range and complexity of this interaction through detailed attention to several activities — the receipts of information from the opponent and third parties, the manner in which such information is perceived and assessed, the reciprocal influences of the digested information and the disputant's strategic goals, the expectations of the other side's behavior, and the evaluation of issues and outcomes — all of which lead to a specific tactical decision and a similar half-cycle of information processing and decision making by the other side.

In this section — in fact throughout the book — Gulliver takes great pains to demonstrate that a chasm separates the utility maximization models of game and bargaining theorists from the universe of real people conducting real negotiations.⁴ He is, no doubt, both correct and effective in exposing the dimensions of this gap, but most of the effort strikes me as something of an attack on a battalion of straw men. I admit to knowing little about game theory. Like the coal miner in *Beyond the Fringe*⁵ who did not have the Latin for the judging, I do not have the math for it. But I know, and I know that Gulliver knows, that these models were not intended to capture the richness of conventional negotiations. The crucial question, rather, is whether deductions from these models will ever provide useful in-

4. Pp. 89, 91-93, 95.

5. *Beyond the Fringe*, Sitting on the Bench (phonograph recording, ca. 1962).

sights about such negotiations. Gulliver believes that they have,⁶ and he might better have left his discussion of these abstract theories at that simple point.

Gulliver's preoccupation with the shortcomings of game theory leads me to the central question of this review — that is, what is *Disputes and Negotiations* all about, whom will it help to do what? I get the impression that this is a question unresolved in Gulliver's own mind. In some places he is very careful. The book contains many caveats about the use of its propositions:

The developmental model of negotiation . . . is a generalized, ideal-type mode constructed after reality. It was not intended, as it stands, to describe or to be rigidly applied to any particular case of negotiations (p. 170-71).

The cyclical process, then, is much less tidy in practice than the model can indicate (p. 115).

The models . . . provide a tentative, working paradigm based as far as possible on real-life conditions and aimed at improving understanding of those conditions (p. 265).

My models, or paradigms, are intended as something like a first approximation, and there is no reason to think that my own particular approach and the emphasis it gives to certain kinds of factors will provide a complete treatment of negotiation (p. 265).

Yet in other places Gulliver is much less modest: the book presents "an operational scheme of analysis that purports to help explain the causes of convergence upon an outcome of negotiation" (p. 200); it offers "analytical tools with which to approach the closer examination of power in particular cases" (p. 207); and it provides an "improved understanding so as to develop more generalized, theoretical propositions" (p. 207).

Gulliver constructs what might be called weak models: that is, they approximate the phenomena of which they are a representation as closely as possible. Gulliver's models simplify and abstract only by eliminating the tendency of real situations to be repetitive, incomplete, and disorderly, and by omitting certain general categories of disputes — those involving more than two parties and those carried on privately. Even these simplifications strike me as grudging. Gulliver would like to incorporate all alternative forms of behavior into each of his stages and cycles. But recognizing such an effort as the path to excesses of complication and confusion, he is content with a liberal sprinkling of contingencies qualified by "sometimes," "usually," "frequently," and "not always."

These weak models, which are at times also called ideal types, are not used to develop testable hypotheses, as models and ideal types generally are. I do not want to overstate the argument. *Dis-*

6. P. 43.

putes and Negotiations does contain an occasional hypothesis. Gulliver postulates, for instance, that a mediator is most useful during the transition from one phase of negotiations to another, and that disputant attempts to cut short the overall sequence can lead to delays and breakdowns in negotiations. But for the most part, *Disputes and Negotiations* is atheoretical in that it provides a way to record behavior, but does not attempt to explain it. Nor does Gulliver predict, from a general framework, particular phenomena that researchers can look for in new studies. The developmental stages and repetitive cycles within stages that characterize negotiations are like many other stage and cycle sets. Animals, for instance, develop from fetus through birth, youth, maturity, and old age to death while experiencing shorter-term cycles of eating, sleeping, playing, and mating. The valuable contributions, it seems to me, are made, on the one hand, by those who record the behavior of specific animals or animal groups and, on the other, by those who use these empirical records either to explain the differences between animals or animal groups, or to identify the mechanisms that control those observed patterns that are common to many groups. An abstraction of stages and cycles which does not directly lead to explanation is useful only to the degree that it is not obvious. In that event, it can provide a new opportunity to order data and develop causal explanations. In this view, Gulliver's stages and information sharing cycles are more an elaborate tour de force demonstrating how to organize an empirical record of negotiations than they are a major contribution promising to explain observed behavior.

The limited analytic utility of Gulliver's conceptualization is suggested by the two case studies with which the book concludes. Of course, the recital of these cases, an Arushan land dispute and an American labor dispute, shows how close a fit there is between Gulliver's stages and cycles and the evolution of real disputes. I say "of course" because the model was developed from these and similar cases in the first place. Gulliver analyzes and compares these cases with considerable insight and imagination. In case analysis he has few equals among anthropologists. But that analysis, in the sense of explaining *why* negotiations proceeded as they did, is unaided by the stages and cycles model.

I will try to be precise. The Arushan dispute was between neighbors who each claimed title to a parcel of land that lay between their farms. They also complained about wandering goats, interruptions in the supply of irrigation water, child beating, trespass, crop and irrigation works damage, slander, and an illicit supernatural act. The disputants were joined in the moot by their lineage counselors and a set of patrilineal supporters. Although negotiations involving so many issues and actors are obviously complicated, Gulliver's system of developmental stages enables him to describe them efficiently.

Gulliver also identifies some of the reasons that the settlement took its eventual form:

- (a) D1 was willing to overlook the slander because his age mates assured him that they did not believe it.
- (b) D1 insisted on public acknowledgement of his water rights because of recent changes in his agricultural practices.
- (c) D2 became unwilling to acknowledge D1's water rights when he saw that public opinion on this issue was against him.
- (d) D1's group had divided doubts about the validity of his claim to the disputed land.
- (e) D2 was very proud of the workmanship in his irrigation gate and D1 did not recognize the importance of these feelings.
- (f) D2 was stubborn about any ritual performance because of (e).
- (g) The last break through was achieved through the efforts of members of both parties who were not closely related to the disputants.

Gulliver's insights into the dynamics of settlement come from external information about the disputants' objectives and the context of the dispute and from the structure of the moot. They do not seem to me to depend at all on his descriptive organization of the negotiations into developmental stages.

That the model is a useful tool in describing complicated dispute negotiations is clear. That it does not help explain success, failure, or the outcome ingredients of negotiations is not because Gulliver's is a first effort that requires further elaboration and will mature with expanded use. Despite his disclaimers on these grounds, Gulliver provides a rich and detailed stage and cycles model put together with considerable ingenuity and good sense. The flaw, I think, is in the design of the enterprise rather than in its execution.