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TOWARDS A NEW MODE OF CONFLICT RESOLUTION IN CIVIL MATTERS

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*William S. Richards***

The American litigation process has been criticized as an unsatisfactory means of resolving civil disputes, due to overcrowded dockets, high costs of adjudication, lengthy delays, and the necessity of legal counsel. In this Article, the authors provide a perspective on alternative modes of dispute resolution, using the concept of "synergy," or party involvement in the resolution process and result. After a comparative analysis of Cuban, Chinese, and Liberian models, the authors provide specific proposals for modifying the American adjudication process and, for appropriate cases, developing alternative methods of conflict prevention and conflict resolution.

Chief Justice Warren E. Burger in an address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice challenged Americans, and more specifically the legal profession, to reform its system of conflict resolution.¹ Chief Justice Burger called for fundamental changes as opposed to mere "tinkering." Although the Chief Justice directed his challenge to the entire judicial system, the resolution of civil disputes appears especially in need of reform. Major problems presently drawing criticism include the familiar litany of overcrowded dockets, the high costs of adjudication, lengthy delays before adjudication becomes final, the necessity of legal counsel, and the lack of binding alternatives to adjudication. These drawbacks have cut off the courts as a means of redress for resolving disputes involving relatively minor sums. Even when substantial sums are in dispute, litigation may drag on for years with litigation expenses substantially reducing the recovery. In short, the social costs of resolving conflict—in terms of time

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1. Address by Chief Justice Warren E. Burger, Agenda for 2000 A.D.—Need for Systematic Anticipation, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St. Paul, Minn. (Apr. 7, 1976), reprinted in XLII VITAL SPEECHES 450 (May 15, 1976) [hereinafter cited as Burger Address].

and money—have reached significant proportions, and further increases seem likely.

Furthermore, in a complex society, transaction costs² may reach unmanageable proportions.³ Like a city's street choking in rush hour traffic, it is becoming increasingly difficult in terms of both economic efficiency and human needs to get anything done.

Weaknesses in the adversary system, the bedrock of the Anglo-American judicial process, may underpin these problems. The adversary system undoubtedly offers some benefits, such as the opportunity afforded to each litigant to present evidence unfavorable to the opponent, thereby clarifying uncertainties. However, the adversary process embodies a number of deficiencies. Derived from the concept of a trial as a substitute for out-of-court brawls, the adversary legal system encourages attorneys to excel at competition and aim at victory, often at all costs. Rather than aiding a judge to discover "facts," skillful trial lawyers may proceed in just the opposite direction by concealing information, presenting material in a way which distorts information, and by using techniques of cross-examination to confuse, intimidate or embarrass witnesses.⁴

A number of palliatives have been suggested to remedy these difficulties. More judgeships could alleviate the overcrowding of dockets to a certain extent, provided the number of lawsuits and their complexity remain constant. Litigation costs could be reduced to facilitate access to the courts, but doing so would increase the number of litigants and perpetuate the overcrowding.

Part of the growing dissatisfaction with the courts centers on the length of time involved in litigation. Attempts to streamline justice, that is, to secure a speedy, final resolution of disputes, must be balanced against concepts of fair play. Litigants do not want a short speedy trial if it subjectively prevents them from presenting their respective side (or ventilating their feelings) to the best of their ability. In fact, the opportunity to give a full presentation may assume more importance than the actual decision. In Rabelais' *Gargantua et Pantagruel* Judge Bridlegoose commented on this peculiarity of human

2. Transaction costs include the expense of mediating conflicts between groups desirous of satisfying their needs on questions such as environmental problems and risks, as well as expenditures for programs protecting consumers and the environment, overcoming the social costs of the externalities of production and consumption, and achieving the requisite level of bureaucratic coordination. See K. KAPP, *THE SOCIAL COSTS OF PRIVATE ENTERPRISE* (1950); Mishan, *The Postwar Literature on Externalities: An Interpretative Essay*, 9 J. ECON. LITERATURE 1 (March 1971).

3. Henderson, *The End of Economics*, 6 *THE ECOLOGIST* 137 (1976).

4. J. FRANK, *COURTS ON TRIAL* 80-102 (1949).

nature.⁵ Judge Bridlegoose withheld making a decision until both sides could think of nothing more to say and then he decided the case with a roll of the dice.

The goals of fair play and an opportunity to be heard rest upon the assumption that the adversaries can equally afford the cost of litigation. In the United States, small claims courts in which the parties may or must proceed *pro se* have attempted to equalize the litigational power position and minimize financial advantage.⁶ But the equalization remains more theoretical than real even when court rules mandate that both parties proceed *pro se*. For example, a more affluent litigant can engage counsel for trial preparation outside the courtroom.

Well intentioned tinkering may partially alleviate the problem but fails to go far enough.⁷ More fundamental change remains necessary. Exploration and implementation of alternatives to the present method of conflict resolution in civil disputes must be encouraged by the bar if for no other reason than self interest. Problems engendered by the present judicial system may lead to a loss of credibility on the part of the judiciary and the bar, thereby forcing the public to seek other means for resolving disputes or to take the law into their own hands.

This article is intended not only to suggest possible solutions applicable for contemporary America, but also to spur others to analyze the problem of conflict resolution, assess the utility and applicability of techniques developed by other societies and cultures, and conceive alternate solutions. In particular, others may find the concept of synergy useful in analyzing problems and devising creative alternative prescriptions and recommendations.

A COMPARATIVE ANALYSIS

A perspective on alternative means of dispute resolution may be gained through a study of the systems of other societies. Characteristics such as the economic base of a society, the centralization of the economic and political system, and the degree of authoritarianism, all have an impact upon the viability of alternate means of conflict resolution. A seemingly "new" method may also build upon or modify a predecessor system.

5. Satire by Rabelais, excerpts found in *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 440-45 (M. Cohen & F. Cohen eds. 1951). Satire is a useful means of social commentary in that it can show the foibles of human nature in a humorous vein, making its observations much more palatable without compromising their validity.

6. L. Nader and L. R. Singer, *Law in the Future: What Are the Choices?* (paper prepared for a conference sponsored by the State Bar of California, September 12-14, 1975).

7. Burger Address at 6-7.

The usefulness of such a comparative examination and the applicability of alternative systems for the American situation turns on a series of questions: Have courts universally resolved certain types of disputes? How do the various means of conflict resolution fulfill psychological needs and why are some forms more effective than others? How much do culture and environment affect the forms of dispute resolution?

After briefly setting forth the concept of synergy as a benchmark against which dispute resolution systems may be assessed, the system of conflict resolution used by a "primitive" society, the Kpelle of Liberia, will be analyzed. In addition, the systems of two countries that have undergone significant structural transformations in the post-World War II period, Cuba and the People's Republic of China, will be examined.

Synergy

The concept of synergy is useful in analyzing societies and, more specifically, their systems of conflict resolution. A synergistic system attempts to transcend the polarity between individual selfishness and altruism.⁸ A high synergy situation exists if one person shares his or her material good fortune with another less fortunate and receives, in return, gratitude and respect. In short, mutuality of benefit keynotes a system of high synergy.⁹ Conversely, in a low synergy situation a person uses his or her material goods to amass more goods without regard to the other's immediate physical needs.¹⁰ By failing to share, the wealthier individual incurs the wrath and resentment of the less fortunate person.

Although an entire society may be characterized as having high or low synergy, the concept may also be applied to a particular institution, such as a conflict resolution system. Solutions may be arrived at consensually (high synergy) or imposed by an authority figure (low synergy). An adversary system of dispute resolution, such as used in the United States, possesses low synergy. Absent a compromise settlement, the adversary process is a zero sum system—one side must win and the other lose. Moreover, a judge imposes a solution; the parties do not come to an understanding of the needs of each side, and thus do not work out a solution themselves. Other dispute resolution

8. Maslow, *Synergy in the Society and the Individual*, 20 J. INDIVIDUAL PSYCH. 153, 155 (1964). See also Benedict, *Synergy: Patterns of the Good Culture*, 72 AM. ANTHROPOLOGIST 320 (1970); A. MASLOW, *EUPSYCHIAN MANAGEMENT* (1965).

9. Maslow, *supra* note 8, at 156.

10. *Id.* at 160.

systems, both primitive and contemporary, can be assessed in terms of their synergistic functioning.

Kpelle of Liberia

The study of a "primitive" society, such as the Kpelle of Liberia, affords the opportunity of discovering and analyzing alternative means of dispute resolution. "Primitive" does not necessarily mean "less complex." Such societies often employ quite elaborate conflict resolution systems and utilize various processes according to the type of dispute. The various forums and their interactions can be examined at a community level in a "primitive society" rather than at the broader, and usually more diverse, macro-level of so-called "advanced" societies.

The Kpelle of Liberia use a dual conflict resolution system—a regular court and a moot. The two Kpelle systems stress catharsis, but the choice of forum depends upon whether the parties desire reconciliation (in which case a moot is used) or a binding decision (in which case a regular court is used). Other factors which enter into the choice of forum decision include whether or not the parties must coexist together thereafter and whether a dispute is regarded as personal or more community-oriented because of the existence of familial and neighborly ties. The regular court system handles disputes between or among unrelated individuals; it is rarely used by the Kpelle to resolve family or community disputes. The litigants in a regular court dispute usually have no relationship that survives the resolution of a proceeding.

In a regular court, litigants air their grievances and a judge arbitrarily renders a decision. The case reaches a court only after a relatively long passage of time during which the parties have had an opportunity to air their emotions and fix their opinions concerning the dispute. Each side presents its version at a hearing in open court. The judge pronounces a decision based on a gut level reaction disregarding precedent.¹¹

Although not operating as a high synergy institution like a moot, the regular court enables litigants to have "their day in court" and resume their everyday lives. The adjudication relegates the dispute to the past. The testimony phase produces, moreover, a cathartic effect¹² on the parties by allowing them to express their aggressions

11. Gibbs, Jr., *Poro Values and Courtroom Procedures in a Kpelle Chiefdom*, 18 SW. J. ANTHROPOLOGY 341, 343-44, 347 (1962).

12. A catharsis involves a purification or purgation of emotions thereby leading to a satisfying release from tension. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 353 (3d ed. 1966).

and hostilities. Catharsis is most effective when attitudes have become fixed. The delay between the dispute and the trial permits emotions to cool and attitudes to become fixed. Because a third party (rather than the litigants) makes the ultimate decision, a sense of inner tranquility fills the parties, who no longer regard a matter as being in their hands. The feeling of inner tranquility, rather than futility, may emanate from the authoritarian structure of Kpelle society.

The Kpelle use a moot as the primary forum for resolving disputes between individuals who will have a continuing relationship after the settlement of the conflict. The moot resolves a total situation, not a single act. For example, breaches in family relationships are rarely attributable to a single event; such problems result from tensions brewing over a period of time.

The effectiveness of the Kpelle moot in resolving family and neighborhood disputes rests, in part, on informality.¹³ The complainant selects a relative, who is also a village elder, to preside over the moot which is held in the complainant's home. The parties invite relatives and neighbors to attend the proceedings. At a moot, each litigant is encouraged to speak freely and to discuss any matter whether or not directly related to the proceeding. Emotional outbursts during the moot are acceptable as long as they do not become totally disruptive of the proceedings or constitute personal verbal attacks on others. Outbursts release pent up tensions and yield considerable insight into the cause of an individual's troubles.¹⁴ The judge acts as moderator to prevent emotional displays from degenerating into a shouting match.

The presence of an audience enhances the therapeutic effect because the effusion of emotion generates empathy. The community feels entitled to contribute to the process because a dispute is likely to affect the community. Volunteer witnesses from the audience are encouraged to testify. By allowing the members of the community to state their opinions, a sense of catharsis also arises within the community.¹⁵

The non-binding judicial decision gains acceptance from a number of sources. The decision is accompanied by an explanation and lecture directed to both parties as to why they were wrong in behaving as they did. The judge couches the tone of the decision in precatory,

13. Gibbs, Jr., *The Kpelle Moot: A Therapeutic Model for the Informal Settlement of Disputes*, 33 AFR. J. INT'L AFR. INSTITUTION 1, 2 (1963).

14. *Id.* at 3, 5-7. The emotional outbursts act as a form of primal scream therapy.

15. *Id.* at 6.

but not condemnatory, terms.¹⁶ The mere fact that the parties felt that the matter was important enough to merit some type of resolution, as evidenced by their presence at the moot, contributes to the acceptance of the decision.¹⁷ Community pressure builds to abide by a decision if it is regarded as fair. Community pressure also tends to temper the judge's decision; the resolution must be a popular one.¹⁸

The Kpelle moot evidences a high level of synergy by performing a conciliatory function. Through a consensus regarding future actions, the resolution strives to produce a sense of satisfaction in all the parties, including members of the community who have taken sides during the formative phases of the grievance and who testify at the proceedings. Reconciliation of the parties who must coexist after the decision constitutes the primary focus of the moot, which seeks to involve members of the community in the decision-making process.

The moot would possess only limited utility in resolving disputes among virtual strangers. A pre-existing sense of community enhances the effectiveness of the moot. In most areas of the United States, for example, individuals barely know their neighbors' names, let alone care about their problems. In the United States, if a dispute is limited to a single incident, the breastbeating and outpouring of emotions characteristic of the moot would constitute a wasted effort because no one has enough invested in a relationship to be sufficiently concerned.

In addition, the Kpelle, a nonmobile society, lack many of the means of dispute resolution used in the United States. Because of their mobility, Americans use (at least in times of abundance) a low synergy institution—avoidance.¹⁹ Running from a problem may be far easier than risking a confrontation. Avoidance, however, fails to resolve the dispute which remains with the parties, at least in their subconscious. Avoidance generally will not produce a catharsis. But the Kpelle live in a nonmobile society. The desirability of clearing the air and starting anew are apparent.

16. *Id.* at 5.

17. *Id.* at 9.

18. *Id.* at 4.

19. For a debate on the merits of avoidance and mediation in the United States, with a discussion of the psychological and economic costs of avoidance, the coercive power of community and other groups through peer pressure, see Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 L. & SOC'Y REV. 675 (1975); Felstiner, *Avoidance As Dispute Processing: An Elaboration*, 9 L. & SOC'Y REV. 695 (1975); Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L. & SOC'Y REV. 63 (1974).

Cuba

Since 1966, the primary dispute resolution device in Cuba has been the popular tribunal. Civil subject matter jurisdiction is vested in the tribunals over torts (up to a maximum monetary limit), juvenile matters, personal quarrels, arguments, and grudges. The tribunals do not hear contract disputes, unless based on fraud or deceit.²⁰

Fidel Castro has ruled Cuba as an authoritarian centralized society, and only recently has undertaken a program of political decentralization.²¹ Although the popular tribunals infuse a certain degree of political rhetoric into their decisions, the tribunals comprise a decentralized system of conflict resolution. A popular tribunal serves a zone of approximately 4,000 to 5,000 people.

Personnel for the tribunal, who are drawn from a local zone, consist of an "asesore," who is a lawyer or fourth year law student, and six lay judges, only three of whom sit on a panel at one time. The asesore performs a supervisory function by assisting the judges on a point of law if they request it. The asesore's power over the judges comes into play at the appellate level when he or she can rectify abuses of judicial discretion.²² People residing in a zone elect judges whom the Communist Party has previously selected for three weeks of training in the concepts and techniques embodied in the judges' manual. This limited period of training comprises a judge's legal education. The lay judges, who continue to hold a regular full-time job during the day, serve without pay for an indeterminate period, which is theoretically as long as they continue to satisfy their constituency.²³

The chronology of a typical case is as follows. After the filing of a complaint with a popular tribunal, one of the judges, following the inquisitorial tradition, investigates the case, interviews witnesses, and examines other evidence. Each case usually is heard within two months of the alleged offense. At the formal hearing before the three judges, both parties present their versions of the dispute. The judges

20. Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317, 1321-22 (1969). The Tribunals continued in existence as late as 1971 (several years after their rumored demise). See E. CARDENAL, IN CUBA 39 (1974).

In 1974, a new judicial system was created in Cuba. N.Y. Times, Apr. 30, 1975, at 3, col. 1. Modifications in the legal system are detailed in the new Cuban Code of the Judiciary, currently being translated from the Spanish by the Library of Congress. The new Code is available at the Hispanic Law Division of the Law Library of the Library of Congress.

21. N.Y. Times, Apr. 30, 1975, at 30, col. 1; Feb. 16, 1976, at 8, col. 1; Feb. 17, 1976, at 2, col. 5.

22. Berman, *supra* note 20, at 1337-38.

23. *Id.* at 1335-36. The heavy hand of an authoritarian society, specifically the Communist Party, in controlling the selection and removal of lay judges must not be forgotten.

use the inquisitorial method of examination because it was felt that an adversary system would contravene the ideal of the people working in unison. The judges encourage testimony by volunteer witnesses from the audience who may illuminate a disputed factual issue. After the open hearing the judges retire to deliberate on the prior investigatory work and on the testimony before the tribunal. The judges then deliver a unanimous verdict accompanied by a lecture couched in precatory language.²⁴

The popular tribunals have departed from the Cuban civil code tradition. Use of equitable principles assumes paramount importance as the judges strive to conform their decision to the unique circumstances of a situation. In arriving at a decision the judges' manual guides the lay judges. The manual evolved from statutes selected from a pre-revolutionary legal code and other new statutory provisions designed to effectuate the realization of the socialist state together with commentary illustrating the application of the statutory materials. In the final form of the judges' manual, the statutory sections were expurgated leaving only the commentary which illustrates the application of legal principles while stressing the uniqueness of each case. The manual serves only as a guide. Neither statutes nor precedent constrain the judges except as they desire consistency among their decisions.²⁵

Limited appellate review exists in the Cuban dispute resolution system.²⁶ Only the verdict or the severity of the verdict, not procedural errors, may be appealed by a party or an *asesore*. The judges rendering the verdict hear appeals regarding severity, while an *asesore* and two other judges of the zone who did not sit on the panel hear appeals regarding the verdict that evening. Appeals are usually processed on the same evening as the original hearing.

The popular tribunals operate as a high synergy system on a number of levels. First, the tribunals provide a conflict resolution forum to individuals who previously could not afford access to the judicial process. There are no filing fees. An attorney is not needed. A tribunal's informal procedure enables parties to proceed *pro se*, without fear of running afoul of technicalities.

Secondly, the tribunals meet one night per week so that people in a zone can easily attend the public sessions. The public nature of the proceedings encourages empathy between the disputants and the audience characteristic of most high synergy dispute resolution devices.

24. *Id.* at 1344, 1345.

25. *Id.* at 1336-37.

26. *Id.* at 1345.

Another source of empathy derives from the use of lay judges. The disputants perceive the judges as human beings dealing with real problems and not robed persons who have lost touch with reality.²⁷ A corollary of empathy is the cathartic effect on parties and witnesses when testimony may be freely given.

Thirdly, use of lay judges who conduct informal proceedings in an unpretentious meeting hall serves to demystify the process.²⁸ The lecture accompanying the decision clarifies the reasons for the judges' conclusion, thereby facilitating an understanding of the decision.²⁹ This explanation meets the needs of the audience as well as the disputants. Since the proceedings are open to the public and constitute a form of entertainment, the judges' decision must meet with popular approval; the audience serves as an unofficial court of last appeal. The lecture also gives the tribunal an opportunity to digress on why the judges regard certain behavior as antisocial and to be avoided by everyone. Despite the political overtones, the judges place primary emphasis on the equitable resolution of the dispute at hand; the political object lesson occupies an incidental position. The lecture blurs the distinction between winner and loser since it usually chastises both parties, thereby taking note of the fact that the equities are rarely, if ever, solely on one side.³⁰ In short, the lecture emphasizes the mutuality of benefits and burdens, which are important elements of a high synergy system.

The benefits of the appellate procedure appear mixed. On the one hand, the appellate procedure avoids lengthy delays in reaching final adjudication. But appeals are cursory in nature. Because most appeals are heard by the same judges who rendered the verdict, doubt exists as to impartiality of the appeal process. The lack of impartiality weakens or defeats the underlying rationale for appeals, i.e., the desire to obtain an unbiased second opinion.

China

In the People's Republic of China, the primary mode of dispute resolution is mediation. Mediation resolves approximately 80% of all

27. *Id.* at 1318.

28. *Id.* at 1343.

29. A panel of three judges protects the disputants against bias on the part of any single judge. The requirement of unanimity in the announced decision strengthens the parties' acceptance of its binding nature. If dissenting opinions were permitted, a losing party might never regard the dispute as being resolved, even after exhausting appeal procedures. The losing party could point to the dissent in support of his or her position.

30. Berman, *supra* note 20, at 1329.

disputes brought before all conflict resolution bodies in China, with courts settling the other 20%.³¹

China has been and is a "shame" society rather than a "guilt" society. In a shame culture, the emphasis is placed upon society's judgment of one's actions. Individuals are "shamed" if they must admit publicly their failure to act appropriately. This type of culture differs from a guilt society, in which the underlying circumstances contributing to an offender's behavior are important. In a guilt society, the focus is on the individual and his or her conscience, not on humiliation before the society in general.³² Adjudication as a means of dispute resolution failed to take hold in China because adjudication constitutes an admission that the parties were unable to reach a mutually acceptable solution.³³ Such a device is unacceptable to the Chinese, who are vulnerable to the shame automatically arising from failure to resolve the dispute amicably themselves. Mediation avoids this public admission of failure.

In the past, a village elder conducted traditional mediation proceedings with the parties representing themselves, thereby avoiding the cost (and perhaps the contentiousness) of counsel. Mediation was conducted in an informal manner.³⁴ Mediation was often public and took advantage of the fact that China is a shame society. The mediator publicly admonished the parties, and the "offending" party was ostracized by the community until he or she atoned through various acts, such as paying for the tea consumed during the mediation, furnishing a feast or entertainment for the community, or whatever else seemed equitable under the circumstances. Social ostracism comprised an effective sanction in a decentralized, nonmobile society. The "offending" party was not required to compensate the "harmed"

31. J. Cohen, *Drafting People's Mediation Rules for China's Cities*, in *LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES* 312 (J. Hazard & W. Wagner eds. 1970). See generally S. LENG, *JUSTICE IN COMMUNIST CHINA* (1967); F. LIN, *CHINESE LAW PAST AND PRESENT* (1966); H. SCHURMAN, *IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA* (1966); Brown, Jr., *Present-Day Law in the People's Republic of China*, 61 *A.B.A.J.* 474 (1975); Cohen, *Chinese Mediation on the Eve of Modernization*, 54 *CALIF. L. REV.* 1201 (1966); Huang, *Reflections on Law and the Economy in the People's Republic of China*, 14 *HARV. INT'L L.J.* 261 (1973); Lee, *Chinese Communist Law: Its Background and Development*, 60 *MICH. L. REV.* 439 (1962); Li, *The Role of Law in Communist China*, 44 *CHINA Q.* 66 (1970); Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 *CALIF. L. REV.* 1284 (1967); Woodsworth, *Family Law and Resolution of Domestic Disputes in the People's Republic of China*, 13 *MCGILL L.J.* 169 (1967).

32. Weiss, *The East German Social Courts: Development and Comparison with China*, 20 *AM. J. COMP. L.* 266, 288 (1972).

33. *Id.*

34. *Id.* at 284.

individual. Reputation was important in a small community from which there was no viable means of escape.³⁵

After a brief and disastrous experiment with adjudication as the primary means of dispute resolution (from Sun Yat Sen's revolution in 1911 to the Communist takeover in 1949), the Chinese returned to mediation. Adjudication was costly and time-consuming, and the courts were poorly equipped, in terms of judicial and support personnel, to deal with the heavy caseloads.³⁶ In reinstating mediation the Communists imbued mediation with the new function of political behavior control while retaining its original function of educating people to live harmoniously.³⁷

Mediation committees were created for the factories, streets (neighborhoods), governmental agencies, and other social, economic, and political units.³⁸ The mediators, selected primarily from Communist Party membership, implement policies directed by the party. Such policies go beyond the parameters of "li," or customary law, which is based on the concept of people functioning harmoniously as a society. The mediators remain responsive to the public bureaucracy which prepares the slate of mediator candidates.³⁹

Mediation proceedings are held before a committee composed of three to eleven members of a "unit."⁴⁰ Membership of the individuals of the mediation committee and the disputants in a common social, political, or economic unit permits empathy and lends greater weight to the mediator's proposals for resolution. Group cohesiveness also strengthens the effectiveness of mediation.

The mediation proceedings are held at night or on holidays so as not to interfere with economic production.⁴¹ However, the underlying reason for such scheduling of procedures is probably that on-the-spot mediation, the previous method, caught the disputants and mediators in the heat of the moment, thereby compromising their ability to settle a dispute objectively.⁴² No appeal from mediation

35. *Id.* at 286-87.

36. Cohen, *supra* note 31, at 300.

37. Lubman, *Methodological Problems in Studying Chinese Communist 'Civil Law'*, in *CONTEMP. CHINESE L.* 233 (J. Cohen ed. 1967).

38. S. LENG, *supra* note 31, at 92.

39. Cohen, *supra* note 31, at 305.

40. *Id.*

41. S. LENG, *supra* note 31, at 92.

42. Although on-the-spot mediation has generally fallen into disrepute, the street committee mediators may still rush to a dispute and mediate on the spot. However, the success rate in such instances is quite low unless the parties themselves request the mediator to intervene. Lubman, *supra* note 31, at 1320-21. (Judge Bridlegoose in *Gargantua et Pantagruel* also commented on the inadvisability of attempting to resolve disputes before being asked because

exists, nor is there any need for it since the mediators have no official coercive power. Nevertheless, mediation is generally regarded as binding since the findings and the result must be registered. Although the dispute may be taken to court at any time, the courts, despite their general powers of review, usually limit their jurisdiction to reviewing abuses in the mediation process, such as fraud.⁴³

The Chinese system rates well on the synergy scale because mediation, which is sought by the parties, uses informal methods to arrive at a result which meets the needs of both sides. Dispute resolution is achieved without attorneys or legally trained judges, at low or minimal cost, and is speedy. Resolution is usually accomplished within seven to ten days after the matter is brought to the attention of the mediators. Open proceedings conducted by peers, which capitalize on the public pressures endemic to a shame society,⁴⁴ strengthen the synergic effect of the process.

Mediation in China functions among a large populace. In contrast to the United States, however, Chinese society is authoritarian, agrarian, technically less complex, nonmobile, and characterized by a sense of community and group cohesion. In short, strong informal sanctioning powers exist in the Chinese system.

Adaptation of the Chinese form of mediation to the United States would encounter several problems. First, mediation committees are vested with nearly unlimited flexibility,⁴⁵ which, when coupled with the admittedly political nature of mediation, makes the proceedings somewhat arbitrary. Second, the Chinese system is based upon the concept of shame, whereas the American adversary system is based upon findings of fault.

PROPOSED APPLICATION OF CONFLICT RESOLUTION DEVICES IN THE UNITED STATES

Although the problems of conflict resolution facing the United States cannot be solved by transferring a foreign system or techniques in toto because of deeply rooted social, economic, and political system differences, much can be learned from examining foreign sys-

the individuals regard the disputes as a private affair. READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY, *supra* note 5, at 443.)

43. Cohen, *supra* note 31, at 320.

44. Weiss, *supra* note 32, at 286.

45. The courts in China have the power to review mediation decisions, but statutory authority fails to indicate whether all such decisions are reviewable, a logistically impossible task, or under what circumstances decisions are or should be reviewed. Cohen, *supra* note 31, at 320.

tems. For example, the social order and conflict resolution machinery reflect and complement each other. High synergy institutions may develop more readily in decentralized economic and political systems⁴⁶ and in societies characterized by less emphasis on individual and economic competition and lacking wide disparities in levels of status, income and wealth holdings.⁴⁷ As Maslow observed,

What did matter was that the secure, high-synergy societies had what she [Ruth Benedict] called a siphon system of wealth distribution, whereas the insecure, low synergy cultures had what she called funnel mechanisms of wealth distribution. I can summarize funnel mechanisms very briefly, metaphorically; they are any social arrangement that guarantees that wealth attracts wealth, that to him that hath is given and from him that hath not is taken away, that poverty makes more poverty and wealth makes more wealth.⁴⁸

Assuming the improbability of significant changes in social structure and public attitudes and the inability of a conflict resolution system to initiate and effectuate such far-reaching shifts, Chief Justice Burger's challenge turns on an assessment of efforts at change within an impersonal, mobile, bureaucratic society which lacks a sense of community.

The preceding analysis of the Kpelle, Cuban and Chinese modes of conflict resolution develops three points. First, the present adversary process should be demystified. Procedures and laws should be simplified, or at least clarified, so that individuals might proceed without counsel; attorneys may become a disruptive influence.⁴⁹ With respect to court procedures, this would be a feasible project and a desirable one even if the purpose were not to permit persons to proceed pro se. Many lawyers, who are often confused by complex court procedures, would benefit from simplification. The task of simplification of the laws and regulations⁵⁰ may border on the impos-

46. For an analysis of possibilities of economic and political decentralization, see Solomon, *A Reply to Former Secretary of the Treasury William E. Simon: Towards a Theory of a Participatory Society*, 52 NOTRE DAME LAW. 624 (1977).

47. See Maslow, *Synergy in the Society and in the Individual*, in A. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* 203-05 (1971). See also Solomon, *Toward a Federal Policy on Work: Restructuring the Governance of Corporations*, 43 GEO. WASH. L. REV. 1263, 1337-38 (1975).

48. Maslow, *supra* note 47, at 203.

49. For a penetrating critique of attorneys, see F. RODELL, *WOE UNTO YOU, LAWYERS* (2d ed. 1957).

50. For an analysis of possible areas of simplification within the federal income tax system, see Bittker, *Tax Reform and Tax Simplification*, 29 U. MIAMI L. REV. 1 (1974). See also Roberts, *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325 (1972); Surrey,

sible if they are to be simplified to a degree such that lay individuals could both understand them and comprehend their ramifications. But legislation and administrative rulemaking may effectively lessen conflict by prospectively establishing clear-cut standards defining relationships, duties and obligations instead of the tradition morass of confusing and ambiguous legislation. Even an assessment, prior to enactment, of the impact of new legislation on the judicial system, in terms of an added caseload volume, might help.

Demystification may also be effectuated by requiring judges to cast aside their robes, the cult of superiority and judicial jargon.⁵¹ As Jerome Frank observed: "Unfrock the judge, have him dress like ordinary men, become in appearance like his fellows, and he may well be more inclined to talk and write more comprehensibly. Plain dress may encourage plain speaking."⁵²

Conducting judicial proceedings in more informal settings, perhaps in neighborhood courtrooms, in the home of a party, or in a community meeting place, and holding sessions at times suitable to participants, may promote a greater degree of freely given testimony which in turn may facilitate factfinding. But the advantages of informality must be balanced against the respect for the judiciary, particularly the efficacy of the sanctioning system. Religious institutions or community pressure previously resolved disputes which American courts today handle. Dissatisfaction with such means of resolving disputes resulted, in large measure, from a lack of coercive power to enforce decisions. The judicial system remains a popular dispute-resolving system because of its coercive sanctioning power. In a more relaxed judicial process, care must be taken to impress the parties with the solemnity of the system so that they will abide by a decision. This may be difficult to achieve, as evidenced by the juvenile court system in the United States where informality usually leads to bewilderment or contempt for the whole process.⁵³ Any system will probably include a considerable amount of ritual, such as the signing of agreements by disputants, to increase compliance.

Complexity and the Internal Revenue Code: The Problem of Management of Tax Detail, 34 L. CONTEMP. PROB. 673 (1969). See generally Cavers, *Simplification of Government Regulations*, 8 FED. B.J. 339 (1947). President Jimmy Carter has called for clarity in regulations promulgated by the United States Government. See N.Y. Times, Feb. 6, 1977 § 4, at 14, col. 1; *Turning Federalese into 'Plain English'*, BUS. WEEK, May 9, 1977, at 58.

51. J. FRANK, *supra* note 4. See also, Weinstein, *Let the People Observe Their Courts*, N.Y.L.J., Mar. 31, 1977, at 1, col. 1.

52. J. FRANK, *supra* note 4, at 259.

53. Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 CALIF. L. REV. 694 (1966).

A revamped conflict resolution system should draw on the concepts of synergy and attempt to bring the contending parties together with the process and the outcome performing at least four functions.⁵⁴ First, the resolution forum should enable both sides to determine their needs, fears and expectations and their different value orientations. In short, open, honest communication and discussion must be a goal. Involvement of the community through testimony of local individuals may prove helpful. Secondly, the remedial options, material and psychological, and the root causes of disputes⁵⁵ must be assessed carefully with an emphasis on the means to advance the well-being of all. A court may play only a limited role because of an inability to implement far-reaching social, economic, and political changes or to use technology imaginatively. Legislative and/or executive-administrative units may play a greater role—particularly in devising preventative measures. Thirdly, the alternative solutions must be connected with human concerns and emphasis placed on strategies to advance the well-being of the disputants and society as a whole. Rather than viewing a dispute in isolation, conflict should be perceived within a total social context. Lay people may function effectively as judges if provided with exposure to conflict resolution techniques; an individual trained in psychology or sociology would be useful. If lay judges are used, they should be imbued with the concept of social accountability and the social impact of the conflict resolution process. This could be accomplished through a screening test, such as those given to the judges on the Cuban tribunals examining their knowledge and application of the judges' manual. Finally, the disputants must see how a preferred solution will satisfy their needs. A synergistically-oriented conflict resolution system may place in grave doubt the efficacy and desirability of the adversary process.

54. J. CRAIG & M. CRAIG, *SYNERGIC POWER: BEYOND DOMINATION AND PERMISSIVENESS* (1974).

55. This points the way for policymakers to consider the structural changes requisite to a fulfillment of societal and individual needs. As C. Wright Mills noted:

Perhaps the most fruitful distinction with which the sociological imagination works is between 'the personal troubles of milieu' and 'the public issues of social structure.' This distinction is an essential tool of the sociological imagination and a feature of all classic work in social science.

Troubles occur within the character of the individual and within the range of his immediate relations with others; they have to do with his self and with those limited areas of social life of which he is directly and personally aware A trouble is a private matter: values cherished by an individual are felt by him to be threatened.

Issues have to do with matters that transcend these local environments of the individual and the range of his inner life. They have to do with the organization

Synergistic processes have been used to handle conflicts between the police and local communities in Houston and in Grand Rapids, Michigan.⁵⁶ Mediation, particularly the removal of each sides' frustration in its inability to communicate its viewpoint effectively, is starting to be used in the environmental field⁵⁷ and in certain experimental efforts to keep disputes out of court.⁵⁸ But for mediation to be effective each party must realize that it cannot win everything and that it may lose all. Mediation also requires assurance that an agreement will be implemented.

Care must be taken to focus on the negative aspects of a synergy model, however. First, the concept of synergy is based on an abundance of resources. As Maslow noted, "when we are healthy enough to perceive the higher unity, when the world is good enough and wealthy enough so that there is no scarcity, then we can see that our interests as human beings are pooled and what benefits one person benefits me or benefits anybody else for that matter. . . ."⁵⁹ A world of diminishing resources and energy challenges the underpinning of synergy. Second, the disputants may not identify with the mediator, because of race or class, among other factors, or the mediator may not identify with the disputants, thereby weakening the viability of the process. Although mediators may seek to establish modes of open communication and thereby bridge the gap between themselves and the parties, community residents probably make the best mediators. Third, structural and organizational problems may

of many such milieux into the institutions of an historical society as a whole, with the ways in which various milieux overlap and interpenetrate to form the larger structure of social and historical life. An issue is a public matter: some value cherished by publics is felt to be threatened. Often there is a debate about what that value really is and about what it is that really threatens it. This debate is often without focus if only because it is the very nature of an issue, unlike even widespread trouble, that it cannot very well be defined in terms of the immediate and everyday environments of ordinary men

C. MILLS, *THE SOCIOLOGICAL IMAGINATION* 8-9 (1959).

56. In Houston, for example, conflicts between the community and police were handled through implementation of a small group interaction program involving police and community members. Full opportunity for interchange of attitudes was provided at the group meetings. See Bell, Cleveland, Hanson & O'Connell, *Small Group Dialogue and Discussion: An Approach to Police-Community Relationships*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 242, 242-43 (1969). See also J. CRAIG & M. CRAIG, *supra* note 54; Allen, Pitnick & Silverzweig, *Conflict Resolution: Team Building for Police and Ghetto Residents* (paper presented at Seventy-Sixth Annual Meeting of the American Psychological Ass'n, San Francisco, California, Aug. 30-Sept. 3, 1968).

57. *Removing the Rancor from Tough Disputes*, BUS. WEEK, Aug. 30, 1976, at 50.

58. Hochberger, *A New Approach to Resolve Private Quarrels*, N.Y.L.J., May 4, 1977, at 1, col. 3; *Lawscope*, 63 A.B.A.J. 471 (1977).

59. A. MASLOW, *supra* note 8, at 96.

form a basis of what appears to be personal grievance. Disparities in economic and social power positions between disputants, engendered by varying levels of status, income and wealth, may reduce the effectiveness of a synergistic conflict resolution system. Finally, the effectiveness of any particular dispute resolution device varies according to the relationships between or among the parties and/or the type of dispute. Nonadversary, synergistic processes will be more useful in areas where the parties deal with each other on a continuing basis and where the latest incident is a symptom of a long-standing problem—such as marital fights, custody battles between divorced spouses, juvenile or landlord-tenant matters, and disputes between neighbors.

These factors must be taken into account in restructuring any conflict resolution system. For example, the modernization process and the concomitant increase in the complexity of society has forced China to deal with new types of disputes and more impersonal relationships. In contract disputes, the Chinese increasingly use negotiation, that is, the structuring of mutually acceptable contract provisions covering rights, duties and obligations, as a preventive measure. Arbitration is used as a conflict resolution device.⁶⁰ It involves quasi-adjudicatory methods and strives to attain a mutually acceptable interpretation of a contractual provision after an alleged breach. In the absence of such an agreement, an arbitrator formulates a binding solution. But arbitration possesses many of the same time and cost objections as traditional adjudication. Arbitration, moreover, requires a degree of expertise and knowledge commensurate with a dispute. Expertise in a variety of specialized areas and disciplines may constitute a prerequisite for innovative conflict resolution methods. Such expertise may be forthcoming through the creation of multidisciplinary panels.

Explicit recognition must be given to the uniqueness of each situation. The occidental (Roman) tradition strives to resolve disputes through the application of "impartial" rules of law. But mechanistic jurisprudence fails to consider two factors: (1) the "rules" are not likely to be neutral, but probably favor particular classes, groups or interests; and (2) courts individualize grievances by subjective fact-finding and through the use of an overall reaction (or Gestalt) to a total situation.⁶¹ The degree of flexibility possessed by Chinese mediation committees also contravenes a widely accepted Western

60. Lubman, *supra* note 37, at 249; Cohen *supra* note 31, at 328.

61. J. FRANK, *supra* note 4; Hutcheson, *The Judgment Intuitive: The Function of "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929).

ideal that predictability is a desirable component of a legal system, provided that predictability does not turn into arbitrariness through a purely mechanical application of legal rules.

A conflict resolution system which deals with the needs of the parties without reliance on formalities or precedent may prove effective in handling a number of grievances.⁶² The Cuban judges' manual, which encourages the desired flexibility in formulating a solution while being sufficiently definite to provide a certain measure of helpful standards to improve the degree of predictability, may point the way to future creative efforts.

In the United States, heavy reliance on precedent may be attributable to the prevailing system of legal education. The casebook approach encourages law students to glean a "rule of law" from a case rather than treating a case as an illustration of flexibility within a system. The use of precedent as a mechanical application of "rules" could be halted by encouraging students to focus on cases only as illustrations and by promoting a far-reaching contextual analysis of social policy and values.⁶³ Perhaps judges could take the lead in re-educating practicing attorneys to argue the uniqueness of each case and the underlying social policy questions presented, not merely the mechanical application of a rule of law.

As an alternative to, or in conjunction with, new modes of conflict resolution, more attention should focus on preventative measures, such as legislation and administrative rule-making. In transactions susceptible to planning, authoritative approval could be secured prior to consummation. Services of attorneys with planning and problem-solving skills would be required to structure and draft such transactions. For example, a court review, prior to a testator's death, of the formalities of execution of a testator's will, the precision with which a will is drafted, and the testator's mental capacity and freedom from undue influence would reduce the possibility for a post mortem will contest.⁶⁴ In corporate and securities transactions, judicial or administrative review could be secured prior to the consummation of a

62. The Greeks individualized cases with apparently excellent results. Calhoun, *The Jurisprudence of the Greek City*, 24 COLUM. L. REV. 154 (1924).

63. Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

64. See Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440 (1934); Fink, *Ante Mortem Probate Revisited: Can An Idea Have a Life After Death*, 37 OHIO ST. L. J. 264 (1976); Kutschen, *Living Probate*, 21 A.B.A.J. 427 (1935). See also Comment, *Testamentary Capacity in a Nutshell: A Psychiatric Reevaluation*, 18 STAN. L. REV. 1119, 1143-46 (1966) (proposing an ante mortem psychiatric examination of testators).

transaction.⁶⁵ Premarital compatibility counseling could be required prior to marriage. Mechanisms for the resolution of consumer disputes could be incorporated into written contract warranties.⁶⁶

Prior review systems pose several types of problems. First, advance approval may initially place a greater burden on courts and administrative agencies. But over the long run, such a system would unclog conflict resolution machinery by quickly resolving problems before they become full blown disputes. Repetitive problems could be disposed of speedily. The strain of resolving difficult gray area questions might prod the development of legislative and/or administrative guidelines. Second, prior review may be of limited utility for disputes concerning unforeseen events, particularly problems caused by contractual omissions. If the problems had been foreseeable, they could have been avoided by skillful counsel or by use of risk allocation machinery, such as insurance. Third, in the probate area, individuals who receive little or nothing under a will comprise the contestants. Advance approval would necessitate the joinder of all potential heirs with a testator's proposed disposition becoming known among this group. If confidentiality were to be maintained, the testator could be required to list his or her potential heirs and justify the distribution, or the lack thereof, to each. The concepts of due process, notice, and res judicata may need to undergo revision to make the prior approval binding on all parties, whether or not joined in an action.⁶⁷

In the area of transactions not susceptible to planning, particularly disputes concerning accidents, the allocation of responsibility for injury can be reassessed and imposed on the individual or entity best able to shoulder the burden, or on society at large. For example, in many areas of product liability, strict liability has been imposed to protect the consumer and to facilitate assertion of consumer rights. But the concept of strict liability remains an anomaly in a guilt-oriented society. A legislative solution, such as strict liability, will not comprise a complete conflict resolution system because of the existence of disputes regarding the applicability of the strict liability stan-

65. Solomon & Wilke, *Securities Professionals and Rule 10b-5: Legal Standards, Industry Practices, Preventative Guidelines and Proposals for Reform*, 43 *FORDHAM L. REV.* 505, 544-46 (1975) (proposal for Securities and Exchange Commission no-action telephone system to obtain a speedy administrative opinion as to a proposed course of action). See also Solomon, *Going Private: Business Practices, Legal Mechanics, Judicial Standards and Proposals for Reform*, 25 *BUFFALO L. REV.* 141 (1975).

66. For an analysis of the Magnuson-Moss Federal Trade Commission Act, see Rothschild, *The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests*, 44 *GEO. WASH. L. REV.* 335, 353-380 (1976).

67. Fink, *supra* note 64.

dard and the type and the extent of the remedy. Perhaps the parties to a suit for damages could submit the controversy to an administrative agency or to an arbitrator or mediator possessing expertise concerning that particular type of dispute. Agencies and arbitration/mediation boards could be set up to deal with disputes that courts of general jurisdiction are not competent to handle because of the complexity of the case or the specialized knowledge required. Alternatively, specialized courts could be substituted for agencies and arbitration/mediation in this scheme. Society must, of course, bear the costs of providing such specialized services.

Some disputes, such as divorce battles, could be regulated out of existence. No-fault divorce actions exemplify the trend to quasi-administrative proceedings.

Finally, traditional constitutional doctrine which focuses upon individual rights vis-a-vis governmental units could be supplemented (or even supplanted) by policies focusing upon the individual's relationship to organizations within the society.⁶⁸ Whether such a significant revision of constitutional doctrine and policy could be achieved is doubtful, but attention must be directed to the bureaucratic nature of the modern social order. Such structural issues remain high on the agenda for future policy-makers.

Access to a forum remains crucial to dispute resolution whether the forum involves adjudication, arbitration, or mediation. New forums or policy standards would fail to meet expectations if cost barriers exist. Two such barriers, filing fees and the cost of counsel, must be overcome. The governmental units should pay administrative costs out of general revenues and dispense with filing fees, thereby affording all individuals an opportunity to be heard. A private insurance system⁶⁹ (individual or group legal plans), a public system of compensation for attorneys (in a manner similar to the public sector reimbursement under the Medicare and Medicaid programs),⁷⁰ or the nationalization of the legal profession (by placing attorneys on the payroll of public sector organizations) may provide access to counsel for more individu-

68. For an analysis of a traditional constitutional rights issue using a holistic policy analysis based on individual and organizational needs, see Solomon & Hetter, *Affirmative Action in Higher Education: Towards a Rationale for Preference*, 52 NOTRE DAME LAW. 41 (1976). See generally Solomon, *supra* note 47.

69. See, e.g., *Insurance to Cover the Lawyer's Bill*, BUS. WEEK, Apr. 18, 1977, at 46; Pfennigstorf, *Legal Expense Insurance*, 23 AM. J. COMP. L. 451 (1975).

70. The constitutional right of an indigent to counsel does not extend to civil litigation. U.S. CONST. amend. VI. See Cole & Greenberger, *Staff Attorneys v. Judicare: A Cost Analysis*, 50 J. URB. L. 705 (1973); Preloznik, *Wisconsin Judicare*, 25 BRIEF CASE 91 (1967); Robb, *Alternate Legal Assistance Plans*, 14 CATH. LAW. 127 (1968).

als. A private insurance scheme suffers from the weakness that potential litigants may be unable to afford the coverage or that coverage may be unavailable to them. The cost burden of public systems, as well as the opposition of the organized bar, constitute difficult obstacles to their ready adoption. Reducing cost barriers will, however, increase the number of people seeking access to legal systems and thus clog the courts anew.

The appellate process remains a lingering problem. Under the present system, appeals are expensive and delay the finality of a decision. Speed and impartiality constitute two conflicting demands made upon the appellate process. Speed is facilitated by the original decision making body, which is familiar with the proceedings, hearing appeals from its own decisions. Such appeals could be heard immediately after the rendering of a decision. But, if appeals are permitted, speed or impartiality appear mutually exclusive. The solution may lie in restricting the grounds for appeal, especially with respect to appeals on procedural matters, such as in the Cuban system. Such a solution would require extensive re-education of the public and lawyers to the concept that appeals are a privilege, not a right.

CONCLUSION

The proposals which have been advanced for preventative legislation and bodies of limited jurisdiction to deal with particular types of disputes, in which governmental units will underwrite the costs of access and the expenses of the dispute resolving machinery, point to continued bureaucratization and estrangement from the public of the conflict resolution process. Access to competent dispute resolution bodies will be provided to the public, but a lack of identification with the process might be heightened because of the impersonal nature of specialized bodies which may neglect the psychological needs of the parties in the interest of fact finding and decision-making. Nevertheless, significant improvements are possible in low-synergy cultures like that of the United States. Through the demystification and reassessment of the adversary process, simplification of laws and procedures, and adoption of synergistic concepts, the ideal of expeditious, inexpensive conflict resolution systems which meet human needs may become reality.