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Gemma E. Smyth

University of Windsor, Faculty of Law

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ARTICLES

The Mental Health of Women Pursuing and Working in the Legal Profession: A Research Proposal
Donna Eansor

Considering Democracy and ADR: Diversity Based Practice in Public Collaborative Processes
Gemma Smyth

A Case Against Biometric National Identification Systems (NIDS): "Trading-Off" Privacy Without Getting Security
Bijon Roy

The Great Compromise: Labour Unions, Flags of Convenience and the Rights of Seafarers
Shayna Frawley

The Canada-U.S. Safe Third Country Agreement: Why the U.S. is Not a Safe Haven for Refugee Women Asserting Gender-Based Asylum Claims
Sonia Akibo-Betts

Critical Commentary: Social Inequality and Youth Sentencing
Nikki Kumar, Chantelle Lapointe, Diana Lumba & Francesca Maio

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CONSIDERING DEMOCRACY AND ADR: DIVERSITY BASED PRACTICE IN PUBLIC COLLABORATIVE PROCESSES

Gemma Smyth*

This article critically examines various public participatory conflict resolution processes and the rhetoric surrounding their ability to increase participatory democracy. The author questions the assumption that participatory democracy is an adequate goal for both North American governmental policy, and particularly for ADR practitioners. The author suggests drawing from diversity-based democratic theory to inform ADR processes. Finally, the author provides concrete suggestions to improve public participatory processes using diversity-based practices.

Cet article examine les différents processus publics et participatifs de résolution de conflit et le rhétorique concernant leur capacité d'augmenter la démocratie participative. L'auteur examine la supposition que la démocratie participative est un but suffisant pour la politique gouvernementale américaine et particulièrement pour les praticiens de mode amiable de règlement des litiges. Finalement, l'auteur fournit des suggestions concrètes pour améliorer les processus publics et participatifs avec des pratiques basées sur la diversité.

I. INTRODUCTION

Rhetoric about increasing participation in public processes is emerging in North America as one of the newest and most popular trends in governmental policy making,¹ particularly in the era of the 'democratic deficit'.² The reason for this

* Gemma Smyth B.A., LL.B., LL.M. is the director of the University of Windsor Mediation Service and sessional instructor at the Faculty of Law, University of Windsor. The author thanks Adam Vasey, Dr. Julie Macfarlane and Elana Fleischmann for their helpful comments on earlier drafts of this paper.

¹ The public participation movement in Canada can be traced to the 1920s and 1930s in rural Nova Scotia, where farmers communicated their concerns through radio, and formed credit unions; by the 1970s, citizens became politically active in public construction projects and environmental issues. In the 1990s, public involvement in municipal planning and decision-making particularly through stakeholder groups burgeoned. However, at the same time, evidence mounted that Canadians were becoming disillusioned and cynical about public participation, especially in decisions about major issues. See D. M. Connor's study entitled "Public Participation in Canada: Development, Current Status and Trends" at www.islandnet.com, accessed January 26, 2004. In the United States, the ideals of participatory governance found expression in federal and state laws as early as the 1960s. Integration of collaborative processes in governmental procedures has blossomed in the U.S. and Canada, used in environmental, intergovernmental and civic planning. See especially R. Lake, ed. *Resolving Locational Conflict* (Center for Urban Policy and Research: New Jersey, 1987), and L. Susskind and J. Cruikshank,

deficit³ has been commonly noted as public disengagement and apathy regarding politics locally and nationally. Others have argued that, far from being apathetic towards politics, citizens are instead frustrated and angry about their inability to participate effectively in public processes.⁴ In response, politicians and public policy authorities have proposed reforming the electoral system so the number of votes received better corresponds with the number of parliamentary seats.⁵ Along with electoral reform, Western governments are increasingly using public participatory processes in institutional decision-making. Facilitation, mediation, and negotiation play growing roles in providing processes by which to engage people in the discussion of both public and private conflicts. Some commentators posit that such processes have the potential to increase both the quantity and quality of democracy, even in traditionally non-democratic societies.⁶ Recent research appears to affirm that democratic institutions which use conflict resolution processes do indeed increase participation, strengthen civil society and address social justice concerns.⁷ However, the use of Alternative Dispute Resolution (ADR) processes has also been critiqued as increasingly exclusionary, expert-driven, and undemocratic.⁸ Before

Breaking the Impasse: Consensual Approaches to Resolving Public Disputes (Basic Books, Inc.: U.S.A., 1987).

² Recently, the Ontario Liberal government formed the "Democratic Renewal Secretariat", apparently to increase citizen engagement. Federally, the Liberal government has noted the "democratic deficit" in parliament and endorsed increasing the power of backbenchers as a remedy. Prime Minister Paul Martin has mentioned the Canadian democratic deficit many times in public addresses.

See <http://www.gov.on.ca/MBS/english/government/minscomingsoon.html>, and *National Post*, "Paul Martin's democratic deficit" Sat., April 3, 2004.

³ The term 'democratic deficit' was first written in the "JEF Manifesto", adopted by the JEF Congress in Berlin in 1977.

⁴ See especially R. Harwood, *Citizens and Politics: A View From Mainstreet America* (Prepared by the Harwood Group for the Kettering Foundation: Bethesda, MD, 1991).

⁵ The Law Commission of Canada's report, *Renewing Democracy: Debating Electoral Reform in Canada* (Law Commission of Canada: Ottawa, 2002) reviews the state of "political malaise" in Canada and proposals for electoral reform, aimed primarily at proportional representation. Interestingly, all three major political parties support electoral reform.

⁶ See B. Mayer, *The Dynamics of Conflict Resolution* (Jossey-Bass: San Francisco, 2000).

⁷ See especially R. Putnam's critique of American civil society and recommendations for its renewal in *Bowling Alone: The Collapse and Revival of the American Community* (Simon and Schuster: New York, 2000).

⁸ See especially R. Hofrichter, *Neighbourhood Justice in Capitalist Society: The Expansion of the Informal State* (Greenwood Press, Inc.: Westport CT, 1987); E. Brunet, "Questioning the Quality of Alternative Dispute Resolution" (1987) 62 *Tul. L. Rev.* 1; P. E. Bryan, "Killing Us Softly: Divorce Mediation and The Politics of Power" (1992) 40 *Buff. L. Rev.* 441; O. Fiss, "Against Settlement" (1984) 93 *Yale L. J.* 1073; D. Greatbatch and R. Dingwall, "Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators" (1989) 23 *Law and Soc'y Rev.* 613; T. Grillo,

wholeheartedly endorsing conflict resolution processes as a panacea, conflict resolution theorists and practitioners must first think more deeply about the relationships between conflict resolution processes and political praxis, and simultaneously define and challenge fundamental assumptions about democracy, particularly in light of serious concerns about the use of conflict resolution in dispute with public policy implications. While many conflict resolution practitioners seem to advocate participatory democracy specifically, this paper posits that before endorsing this particular form, ADR theorists and practitioners should investigate wider conceptions of democracy, as well as their cultural specificity, to more fully realize the best quality of participation in Western democratic institutions. This paper also examines the potential of diversity-based political theory to inform the design of more effective public dispute resolution processes, and provides a number of guidelines and suggestions to develop more inclusive and diversity-based public collaborative processes.⁹

II. WHY THINK ABOUT DEMOCRACY, DIFFERENCE & ADR?

On a macro level, political participation has been generally shown to produce nations that are more economically and socially viable. For example, Robert Putnam conducted an extensive study on political participation in Italy. He found that “the regions faring best, democratically speaking, had a common history of popular participation in local decision-making; those performing poorly tended to be marked by a legacy of centralization”.¹⁰ This paper will not be an exercise in comparative politics; it will suffice to say that research in this area shows that grassroots institutions, particularly those with fixed forms of conflict resolution systems, gravitate less towards military action and generally foster a more active civil society.¹¹

“The Mediation Alternative: Process Dangers For Women” (1991) 100 *Yale Law Journal* 1545; S. Engle Merry and Neal Milner, eds., *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (University of Michigan Press, Ann Arbor, 1993); L. Nader, “Controlling processes in the practice of law: hierarchy and pacification in the movement to re-form dispute ideology” (Fall 1993) 9 *Ohio St. J. on Disp. Resol.* 1.

⁹ This is not to say that ADR processes are the best ways to address all issues and disputes, or the only way. Rather, a reality of modern politics is the rapid decentralization of decision-making, thus increasing the number of potential sites for direct citizen participation. If marginalized groups are excluded- or do not choose, or are unable, to participate- they may be abandoning a site of empowerment or, at the very least, an opportunity to participate in policy formulation. Likewise, constructively discouraging participation through ethnocentric models of ADR robs citizens of the benefits of diversity in their own communities.

¹⁰ A. Hadenius, *Institutions and Democratic Citizenship* (Oxford University Press Inc.: New York, 2001) at 87. Hadenius compares various institutions in Europe, India, Africa and Latin America, including institutions focusing on conflict resolution.

¹¹ *Ibid.*

Governments and institutions have increasingly used ADR procedures as ways to resolve public and private disputes, and to receive public input. Participatory processes are common in environmental and land use planning disputes and public interest debates. Increased use corresponds with greater racial, religious, ethnic and cultural diversity in Western society, and more attention to the importance of understanding diverse interests. Arend Lijphart emphasizes the important role of collaborative processes to reduce ethnic and race-based conflict, one of the most important rising causes of war; he argues that ADR mechanisms are ways to engage elites in society in intergroup consensus mechanisms rather than competition in which the elites generally prevail.¹² Thus, elites are more likely to hear and act upon diverse needs, rather than hear only the voices of the dominant group. Amy Gutmann also notes that, along with traditional justice mechanisms, societies need “morally defensible conditions” and “morally defensible processes” to respond to conflict in politics, which she argues can be achieved through ADR.¹³ Although this paper does not address the morality of ADR processes, it does argue that the process and substance of publicly debated conflicts with an emphasis on diversity results in better discourse, greater understanding of the ‘other’ and, often, a more genuinely inclusive civil society.

Substantively, it is by now a truism that conflict resolution practitioners play a powerful role in influencing the content, form and style of communication;¹⁴ the use of experts, giving standing to particular parties and not to others, and limiting or defining participation illustrates obvious procedural power. More subtle exercises of power appear when deconstructing some of the current understandings of key concepts which frame conflict in an exclusionary manner. This exclusion has occurred discursively and institutionally many times throughout history, as democratic governments marginalize entire sectors of their citizens through policy, language, and law.¹⁵ As Anne Phillips writes:

The questions of democracy and difference are ones that are at the heart of contemporary dilemmas in democracy- and, on an international scale, have their

¹² A. Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies* (Oxford University Press: USA, 1994), and *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven: Yale University Press, 1999).

¹³ A. Gutmann, “How Not to Resolve Moral Conflicts in Politics” (1999) 15(1) *Ohio St. J. on Disp. Resol.* 1.

¹⁴ See S. Cobb and J. Rifkin, “Practice and Paradox: Deconstructing Neutrality in Mediation” (1991) 16(1) *Law & Soc. Inquiry* 35.

¹⁵ This ‘marginalization’ can go so far as government-sanctioned genocide. See especially William Conklin, *The Phenomenology of Modern Legal Discourse: The Juridical Production and the Disclosure of Suffering (Applied Legal Philosophy)* (Ashgate Publishing Co.: Burlington, VT, 1998).

counterpart in the fragmentation of older empires into smaller nationalities and the rising threat to national minorities.¹⁶

So, not only is it important to focus on the statistically tangible benefits of institutionalized conflict resolution mechanisms (such as less war, higher citizen satisfaction, and so on), it is also imperative to examine the *substantive* results of such mechanisms. That is, we must question *who* is participating (and who is not), *how* they are participating, *what* their participation means and what effects it has. If we take seriously the concept that democracy occurs in the home, the street, the workplace, and the neighbourhood – also key sites of conflict – the potential for conflict resolution practitioners to play a role in substantively considering difference and privileging diversity is extraordinary.¹⁷ In the following section, I will synthesize commentary by ADR theorists linking public participatory processes and democracy.

III. *PERSPECTIVES ON COMMUNICATION, CONFLICT RESOLUTION & DEMOCRACY*

Conflict resolution literature notes several critical areas in which intervention might qualitatively improve democracy: in the community, in government, and in private institutions. Although these areas overlap, focusing on one area produces very different conceptions of the political dimensions of participation, and appropriate intervention. Conflict resolution theorists also present varying ideas about which theory of democracy is most appropriate to reach procedurally and substantively better conflict resolution processes and more sustainable agreements. As well, theorists debate which methods best improve and deepen democracy: Is a trickle-down effect sufficient? What kind of community intervention is appropriate? To what level is institutionalization necessary, and when does it become dangerous? How much does procedural change tackle grassroots problems? The history of conflict resolution theory¹⁸ serves as a starting point to examine some of these arguments, all focusing on connections between political theory and conflict resolution.

¹⁶ A. Phillips, *Democracy and Difference* (Pennsylvania: Pennsylvania State University Press: University Park, 1993).

¹⁷ Later in this paper, I will examine arguments regarding the appropriateness of mediators adopting a social justice role.

¹⁸ This paper does not address strict conflict theory, which has also added significantly to understandings of social interaction and conflict. Sociologists often point to C. Wright Mills (*The Sociological Imagination*) as one of the founders of sociological conflict theory.

Carrie Menkle-Meadow points to the less often recognized “intellectual founders” of ADR as associated with political theory, namely, Jurgen Habermas,¹⁹ Amy Gutmann²⁰ and Dennis Thompson.²¹ These democratic discourse theorists examine communications through “ideal speech conditions”, in which full and unadulterated participation can be reached via unobstructed examination of all points of view, a project reflected in much ADR theory. Gutmann and Thompson particularly encourage social involvement in democratic institutions beyond voting by focusing on procedure and new forms of process.

In the 1920s, Mary Parker Follett, herself trained as a political scientist, focused on relationships between politics, business and conflict. Her work- now viewed by public administrators and conflict resolution practitioners as revolutionary- encouraged creative management, and integration of differences in institutions.

In the mid 1970s through the 1980s, critics of ADR also connected democratic and conflict resolution theories, examining the depoliticizing elements of conflict resolution. Richard Abel²² critiqued the proliferation of informal mechanisms as problematic alternatives to the traditional justice system, questioning the social significance of such changes. Abel asked whether the new informal mechanisms “...equalize the positions of disputing parties or do they aggravate existing inequalities? Do they provide greater opportunity for popular participation in handling disputes and redressing grievances or do they curtail citizen involvement?”²³ Richard Hofrichter²⁴ problematized the potential for ADR to extend the power of the state farther into the private lives of citizens, particularly via community or neighbourhood mediation centres. In her thesis *Shadow Courts* Christine Harrington²⁵ made similar arguments, positing that ADR mechanisms have

¹⁹ Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse of Law and Democracy*, trans. by William Rehg (Cambridge: MIT Press, 1996).

²⁰ Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996). See also Amy Gutmann, “How not to Resolve Moral Conflicts in Politics” (1999) 15(1) Ohio St. J. Disp. Resol. 1.

²¹ Carrie Menkle-Meadow, “Mothers and Fathers of Invention: The Intellectual Founders of ADR” (2000) 16 Ohio St. J. Disp. Resol. 1.

²² Richard L. Abel, “The Contradictions of Informal Justice” in Richard L. Abel, ed. *The Politics of Informal Justice*, vol. 1 (London: Academic Press, 1982) 267.

²³ *Ibid.* at 270.

²⁴ Richard Hofrichter, *Neighbourhood Justice in a Capitalist Society: The Expansion of the Informal State* (Westport: Greenwood Publishing Group, 1987).

²⁵ Christine B. Harrington, *Shadow Courts: The Ideology and Institutionalization of Alternatives to Court* (Westport: Greenwood Press, 1985).

the potential to obscure advances in social justice made by the courts. Most compellingly, she framed the growth of ADR as the “loss of a forum for political action and struggle.”²⁶

Another important critic of ADR, Laura Nader, strenuously argued that ADR is in fact anti-democratic and hegemonic. She went beyond Marxist arguments of class and state hegemony, and critiqued the ethnocentric nature of ADR, stating “ADR diffusion is not the diffusion of alternative mechanisms of dispute resolution; it is merely the diffusion of Western harmony ideology.”²⁷ Nader argued the language of harmony and consensus in fact hides the repressive nature of ADR (what Pinzon calls “The Oppression Story”²⁸). These criticisms continue to be some of the most debated and influential among ADR theorists and practitioners.

In 1989, SPIDR (The Society for Professionals in Dispute Resolution) held their annual conference entitled “Dispute Resolution and Democracy in the 1990s: Shaping the Agenda”. There was very little work done explicitly linking democracy and ADR, but much to do with mediation and negotiation projects surfacing around the world at the time. Implicit was the assumption that ADR projects and democratization were synonymous. The only papers that directly addressed democracy and ADR considered community mediation programs, which had been criticized for potentially bolstering the existing power of the state rather than empowering community members. The solution proposed by Harry Mika and Kathleen Utecht was, in their words, “to propose that we consider an agenda of our own making, one that capitalizes on the potentials of our practice and the collective reapportionment of responsibilities, resources and skills to the ends of creative self-management and problem solving in our communities.”²⁹ So, instead of a larger institutional response, the authors proposed community-based conflict resolution; while in effect a larger political outcome is possible through this form of grassroots action, the lack of organizational or institutional analysis is notable.

More recently, conflict resolution practitioners have begun explicitly linking democracy and conflict resolution practice. Conflict Resolution Network Canada has

²⁶ *Ibid.* at 171-172.

²⁷ Laura Nader & Elizabeth Grande, “Current illusions and delusions about conflict management – in Africa and elsewhere” (Summer 2002) 27(3) *Law and Soc. Inquiry* 631 at 632.

²⁸ Luis Arturo Pinzon, “The Production of Power and Knowledge in Mediation” (1996) 14(1) *Mediation Quarterly* 3.

²⁹ Harry Mika and Kathleen Utecht, “The Prognosis for Informal Dispute Resolution in Local Communities: Rethinking the parameters of organizational responses in the 1990s” in Cheryl Cutrona, ed., *Dispute Resolution: Democracy in the 1990s: Shaping the Agenda, Proceedings of a Conference Held October 19 -22, 1989* (Washington: SPIDR, 1989) at 235.

“encouraged those involved in the reconstruction of Iraq to remember the *fundamental principle of participatory decision making that forms the basis of conflict resolution processes and of democracy: everyone who is affected by a decision should be involved in its making*” [emphasis added].³⁰ In this brief statement, the Network appears to refer specifically to participatory democracy, and its transference to a traditionally non-democratic state.

Bernard Mayer makes overt connections between participatory democracy, social justice and conflict resolution in the conclusion of his book, *The Dynamics of Conflict Resolution*:

Another way in which our field is on the cutting edge of trying to improve the world has to do with the deepening of democracy and the struggle for social justice... In fact this is participatory democracy... In order for participatory democracy to work... the tools of the conflict resolution field are critical. In order to allow democracy to deepen without overwhelming people with process or the “c” work [consensus], the contributions of this field are essential.³¹

Mayer sees conflict resolution professionals as “designers of practical democratic processes,” which are capable of developing peace, social justice and democracy.³² Mayer’s comments are a significant departure from other commentators as he equates conflict resolution and participatory democracy with social justice. He believes that increased participation through empowered decision making will lead citizens to “find effective ways of demanding a socially just and economically wise approach to the distribution of social benefits.”³³ For him, citizens fundamentally desire more participation. Instead of focusing on substantive education, Mayer concentrates on the *tools* the conflict resolution profession can provide which will enable participation, and thereby democracy. However, he shares with other authors the belief that democratization projects around the world may benefit from conflict resolution skills, presumably as developed and understood in North America.

In *Affirming Diversity through Democratic Conversations*, the authors link discourse theory and democracy. Stephanie Kimball and Jim Garrison posit that values of democracy can be located in the interpretation of communications. In a particularly optimistic tone, they write, “in a democracy meanings are co-produced... democracy values differences and resists the urge to measure people against some arbitrary cultural standard and, thus, enables people to create themselves through

³⁰ Kathleen Cleland Moyer and R. Schmidt, “Building a civil society in Iraq,” online: Conflict Resolution Network <<http://www.cnetwork.ca/front.asp>>. Accessed July 16, 2003.

³¹ *Supra* note 7 at 243-245.

³² *Ibid.* at 246.

³³ *Ibid.* at 246.

encounters with others.”³⁴ The authors point to “multicultural conversation” and the tools of empathetic, open listening to engage people in the construction of their own realities, rather than a reality constructed by dominant values and norms. While the authors delve into a poststructuralist analysis of communication and democracy, they do not challenge traditional participatory democratic concepts.

Other authors have referred to mediation specifically as a tool to increase democracy. Kenneth Cloke writes “[m]ediation is a voluntary and democratic *method* for resolving interpersonal and organizational conflicts...” [emphasis added].³⁵ He does not refer to the public democratic effects, but the democratic nature of the process itself. Martha Weinstein also notes the democratic potential of mediation and its inherently democratic characteristics. She cites the success of mediation between social service workers to address issues of racism in their workplace; in her view, mediation gave a voice to marginalized workers of colour, and by extension increased democratic communication (presumably by means of some form of social democracy through participation). Weinstein is very explicit in her advocacy, stating, “[w]e [as conflict resolution practitioners] have the freedom to craft democracy and create a meaningful justice using mediation.”³⁶ There are certainly elements of mediation which mirror participatory democratic theory, as individuals rather than institutions are charged with making decisions and engaging with issues that affect them. However, Weinstein also appears to see the value of democracy to traditionally marginalized groups. This idea is more reminiscent of diversity-based and pluralist conceptions of democracy; however, advocates of radical pluralist politics would likely argue she does not adequately place a positive obligation on practitioners to understand and meet the needs of disenfranchised individuals. Nor does she address the potentially problematic nature of confidential ADR processes, particularly when the conflict touches on issues of human rights with greater socio-legal implications.

Also worthy of note is Lawrence Susskind who, while providing guidelines for facilitators and mediators on public policy conflict resolution, pointedly notes “ours [the authors’] is not a nostalgic call for more direct democracy. Nor do we suggest that those with statutory authority should abdicate their rightful role as decision makers. Instead, we advocate a redefinition of both leadership and

³⁴ Jim Garrison & Stephanie Kimball, “Hermeneutic Listening in Multicultural Conversations” in Victoria R. Fu & Andrew Stremmel, eds., *Affirming Diversity Through Democratic Conversations* (Ohio: Prentice-Hall, 1999) 15 at 27.

³⁵ Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (San Francisco: Jossey-Bass, 2001).

³⁶ Martha Weinstein, “Mediation: Fulfilling the Promise of Democracy” (2000) 74 Fla. B.J. 35 at 37.

responsible citizenship,"³⁷ as though these concepts are not inextricably entwined both practically and theoretically! So, Susskind does not draw theoretical connections between democracy and conflict resolution, but remains focused on technique and case-based analyses.

In sum, most theorists and practitioners, some focusing on ADR specifically, appear to connect participatory and deliberative democracy and discourse without association to ADR process, or those who associate democratic and ADR theory without breaking down concepts of democracy. If, as these authors believe, ADR theorists and practitioners are framers of democracy and "meaningful justice,"³⁸ mediation theorists and practitioners must think more about some of the underlying theories they adopt about the socio-political role of mediation, negotiation and facilitation. While negotiation and consensus building tools are incredibly important in facilitating productive dialogue between individuals and groups, even minor variations in process and practice can produce quite different types of interactions. Even if mediators in a confidential process use very similar conflict resolution skills as facilitators in public dialogue, the *effects* of such discussion are profoundly different, particularly in a political sense.

IV. SYSTEMS DESIGN: WORKING WITHIN THE DEMOCRATIC PARADIGM

While critics note that democracy is not in fact a universally applicable ideal, it currently remains the most practicable and potentially peace-promoting form of governance for Western states.³⁹ Axel Hadenius effectively summarizes the key benefits of democratic governance.

In its most inclusive form, the interactive state is democratically founded. Its structure, marked as it is by power division, rule-governed governance, and an autonomous civil sphere, has laid the basis for a growing pool of collective capacities in society, thus furthering democratic vitality. With its good economic performance, moreover, this form of government has encouraged the development of resources-political human capital- at the mass level. Hence in both respects, as regards the evolution of democratic citizenship, democracy is able, *with the right institutional framework*, to reinforce its own preconditions. Herein lies its relative strength [emphasis added].⁴⁰

³⁷ Lawrence Susskind & Jeffrey Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (U.S.A.: Basic Books, Inc., 1987) at 11.

³⁸ *Supra* note 37.

³⁹ It should be noted that democratic nations tend to war with one another less than dictatorships, communist or socialist states; however, recent history has shown that democracies are also very willing to go to war with non-democratic states particularly.

⁴⁰ *Supra* note 11 at 264.

This 'institutional framework', of course, is the subject of much debate, and can be the source of active inclusion or insular power brokering. ADR mechanisms are one part of this framework, and as conflict resolution theorists demonstrate, are also viewed as democratic mechanisms to facilitate participation. Given the criticisms of various forms of democracy, how can theorists and practitioners apply alternative views of democratic participation using meaningful ADR processes? One conception of public deliberative processes draws on diversity politics and EPG (Empowered Participatory Governance),⁴¹ and considers critiques of both. Before surveying diversity-based public collaborative processes, it may be useful to survey typical conceptions of systems design in public ADR processes. Although there are many unique approaches to systems design, some of the most instrumental authors described below have developed standard accepted models. While the authors' models are more complex than described here, this paper will note aspects as they relate to diversity in ADR systems design and practice.

A. *Ury, Brett and Goldberg*

Ury, Brett and Goldberg developed Dispute Systems Design (DSD) in the 1980s to resolve inter-organizational and industry-wide disputes. Ury, Brett and Goldberg's approach⁴² reflects Fisher and Ury's work on interest-based negotiation.⁴³ Very generally, the authors provide six main tenets of systems design:

- 1) focus on interests,
- 2) build in 'loopbacks',
- 3) provide low cost rights and power back ups such as arbitration,
- 4) build in opportunities to consult and provide feedback,
- 5) arrange steps from low to high cost, and,
- 6) provide motivation, skills and resources.⁴⁴

These tenets appear to be applicable to many types of conflicts from workplace to environmental. However, their book ignores those who have little voice or no voice in conflict, but play an important role in the systemic nature of conflict and its resolution. The authors provide no steps to consider culturally-based

⁴¹ See Archon Fung & Erik Olin Wright, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (New York: Verso Books, 2003).

⁴² William L. Ury, Jeanne M. Brett & Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco: Jossey-Bass, 1988).

⁴³ Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed. (New York: Penguin Books, 1991).

⁴⁴ *Supra* note 43.

disputes, or to include marginalized voices. This is not to say these ideas have been ineffective; to the contrary, many have significantly changed the disputing culture of businesses and institutions. However, not taking a diversity-based approach can in fact *increase* alienation and conflict within an organization.⁴⁵

B. Costantino and Merchant

Cathy Costantino and Christina Merchant in their book *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations*⁴⁶ make a concerted effort to formulate a more inclusive and systemic version of Fisher, Ury and Goldberg's work, but continue to rely on an interest-based approach.⁴⁷ The authors advocate a less linear, more organic approach to conflict management.⁴⁸ While they encourage stakeholder participation, it is unclear how pro-active the facilitator may be in seeking out participants, or what exactly allows parties to be defined as 'stakeholders'. Costantino and Merchant recognize that conflict is site- and context-specific; however, their analysis is limited to parties' roles as employees, managers, co-workers, and other inter-organizational roles. The authors do not venture outside the confines of tools such as Myers Briggs Type Indicator to discover personality or orientation to conflict (which is so often directly linked to culture), and appear to rely on managers to discern when conflict becomes a problem. At the same time, the authors advocate empowerment as one of the positive elements of ADR; as they write:

[s]elf direction and governance, total quality management, and other participatory models for employee involvement have encouraged the inclusion of disputants in the dispute resolution processes affecting them... ADR permits the disputants to craft their own solutions to disagreements.... The disputants own and control the ADR process and often craft solutions unique to their circumstance.⁴⁹

At the same time, the authors write that ADR may be inappropriate for the disempowered if they have been given no choice or do not understand their rights, or

⁴⁵ Ury has commented on diversity and ADR in later work, but has not systematically incorporated diversity in a theoretical model.

⁴⁶ Cathy Costantino & Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco: Jossey-Bass Publishers, 1996).

⁴⁷ It should be noted that Costantino and Merchant write about organizational conflict management systems, not necessarily public disputes; however, their ideology has often been applied to public disputes, and thus bears some discussion.

⁴⁸ *Supra* note 47 at xv.

⁴⁹ *Ibid.* at 36.

are without representation;⁵⁰ they do not, however, provide options to remedy these issues.

Costantino and Merchant's greatest departure from Ury, Brett and Goldberg is their critique of the DSD Model (described briefly above). They criticize the model as being patriarchal since the process designer/facilitator acts as expert; they also argue that the model takes a linear rather than holistic or systemic approach to conflict. Costantino and Merchant also note the model's lack of concentration on preventative measures to keep conflict from re-surfacing, and its failure to consider pre-existing organizational dynamics which may sabotage or otherwise impact implementation of any design.⁵¹

C. *Carpenter and Kennedy*

*Managing Public Disputes*⁵² presents practical and often effective ideas for designing and conducting public collaborative processes. They branch out from the traditional DSD model as they argue that governments, and other individuals involved with public issues can and should act as facilitators, though they may not be classically 'neutral'. Carpenter and Kennedy note the importance of "[a]ge, sex, race, professional status and previous relationship with an interviewer" as relevant during the fact-gathering stage of a process, particularly in how much information an interviewer will collect. As well, the authors encourage party participation in the creative and actualization processes. As with the above authors, Carpenter and Kennedy are not pro-active with regards to diversity and difference; that is, they provide no mechanisms to include traditionally marginalized groups, nor alternative conceptions of their model which may be more inclusive.

V. *SUMMARY*

The evolution of public collaborative process research and design has seen an increase in inclusiveness, flexibility and attentiveness to systemic disputes. As the above summarizes, Ury, Brett and Goldberg make no mention of considering difference or cultural diversity; Carpenter and Kennedy make passing mention of these concepts, and Costantino and Merchant include slightly more in-depth considerations of diversity. However, none of these designs have incorporated diversity as a central tenet, or even a serious consideration. Other recent systems designers such as Slaikeu and Hasson,⁵³ Rowe⁵⁴ and Lynch,⁵⁵ although adding

⁵⁰ *Ibid.* at 43.

⁵¹ *Ibid.* at 47-49.

⁵² Susan L. Carpenter and W.J.D. Kennedy. *Managing Public Disputes: A Practical Guide to Handling Conflict and Reaching Agreements* (Jossey-Bass Publishers: San Francisco, 1988).

⁵³ R.H. Hasson & K.A. Slaikeu. *Controlling the Costs of Conflict: How to Design a System for Your Organization* (San Francisco: Jossey-Bass, 1998).

significantly to procedural outlooks on systems design, also fail to account for diversity in any systemic manner. Following are three conceptions of processes, one designed for environmental disputes, one for planning, and one for governmental decision-making, all which consider diversity and difference to a greater extent. These will form a theoretical and practical starting point for actualizing a diversity-based public collaborative process.

A. *The National Roundtable on the Environment and the Economy*⁵⁶

The 1996 Roundtable on the Environment presented guidelines to inform environmental conflict resolution processes in Canada. The Guidelines⁵⁷ and full document present a unique approach which takes diversity more seriously than earlier process designs. First, the authors outline three primary reasons why inclusiveness is a good idea: credibility of the process, representation of all key interests and increased chances that any agreement reached could be effectively implemented.⁵⁸ They also note potential negatives of an inclusive model: too many parties are involved, increased potential for parties to sabotage the process, and that inclusiveness defeats the purpose of representatives elected or appointed to manage such projects (i.e., undemocratic).⁵⁹ They advocate voluntary participation by groups and individuals who *design their own consensus building processes* and have *equal opportunity* to participate through training, access to information and expertise, and resources to ensure meaningful participation. While the authors do not advocate privileging difference, they pay particular attention to acceptance and respect of diversity. However, there is no categorical reference to what diversity really means other than "different values, interests, and cultures," and reference to differences between Aboriginal and non-Aboriginal groups via examples.⁶⁰ This definition is so

⁵⁴ M. Rowe, "Dispute Resolution in the Non-Union Environment: An Evolution Toward Integrated Systems for Conflict Management?" In *Frontiers in Dispute Resolution in Labor Relations and Human Resources* (East Lansing: Michigan State University Press, 1997).

⁵⁵ Jennifer Lynch, *CCRA: Contemporary Conflict Resolution Approaches* (Ottawa: Canada Customs and Revenue Agency, 1998).

⁵⁶ G. Cormick et. al. *Building Consensus for a Sustainable Future: Putting Principles into Practice* (Ottawa: National Roundtable on the Environment and the Economy, 1996).

⁵⁷ Canadian Round Tables, *Building Consensus for a Sustainable Future: Guiding Principles: an initiative undertaken by Canadian Roundtables* (Ottawa: Canadian Round Tables, 1993).

⁵⁸ *Supra* note 57 at 26.

⁵⁹ *Ibid.* at 28.

⁶⁰ *Ibid.* at 69.

broad it encompasses virtually every kind of difference from mundane to fundamental, thus minimizing the special impacts of various kinds of differences.

Despite this drawback, the authors provide some key procedural and substantive suggestions on how to more effectively mediate or negotiate between diverse groups. First, they suggest establishing commitments to respect, sharing knowledge and devoting time to the process.⁶¹ The authors also suggest providing workshops to break down barriers, exercises such as role plays to help parties better understand the other side, working groups, formulating informal relationships, and using mediation.

Perhaps most important is the authors' acknowledgment of the value of difference, and the need to respect others' values and interests. In this way, the authors posit that parties can come to longer lasting and more satisfying agreements. This process is particularly noteworthy for its relatively pro-active stance on diversity, a significant departure from other process designers.

B. 'Activist Mediation'

Another attempt at more responsive conflict resolution with diverse parties is 'activist mediation'. John Forester and David Stitzel adopt this concept in public sector disputes, particularly municipal planning. They reject the argument that planners cannot act as mediators because they are not neutral.⁶² In fact, they argue that "[neutrality] distracts our attention from the skillful, ethical judgments every mediator must make in practice."⁶³ Forester and Stitzel argue that activist mediation is more effective when dealing with power imbalances than 'neutral' mediation. This is not to suggest the role of activist mediator is simple or perfect. Forester and Stitzel argue that in fact there are four primary goals which must be balanced in planning particularly: maintaining working relationships with the parties, serving the interests of the city, responding to political interests of elected representatives, and helping the parties reach 'win-win' agreements.⁶⁴ Versions of these goals are transferable onto other public ADR processes, though in many disputes, there may be complex public

⁶¹ *Ibid.* at 73.

⁶² Their argument is that planners are not neutrals because they are employed by the city, state/provincial or federal government and may have their own agenda because of their understanding of the dispute.

⁶³ John Forester & David Stitzel, "Beyond Neutrality: The Possibilities of Activist Mediation in Public Sector Conflicts" (July 1989) *Negotiation Journal* 251 at 251.

⁶⁴ *Ibid.* at 257.

interest issues which further complicate the role of the activist mediator.⁶⁵ Even in planning disputes, the planner or alternate facilitator may perceive interests far beyond the municipality in which the planning occurs. Thus, as Forester and Stitzel state, the activist mediator “*has an internal strategic negotiation to perform* between the service of conflict goals, and he or she can do it in various ways, well or poorly.”⁶⁶

Again, the authors do not define the types of differences or disputes they envisage which would require activist mediation, and in fact they do not make any arguments based on cultural, racial, or gender diversity. However, the concept of activist mediation (or facilitation) remains important as it questions a key concept in mediation theory barring or discouraging mediator activism, which potentially supports the use of diversity-based and political practices in conflict resolution. Activist mediation has its detractors; Thomas Colosi argues against ‘activist’ mediation, stating that parties will not trust a mediator the second time a meeting occurs if he or she expresses a viewpoint or appears to advocate the interests of a particular party.⁶⁷ It is important to distinguish between arguments made on behalf of a party and procedural and substantive attention to power dynamics. In the Forester and Stitzel view, activist mediation does not include acting as counsel or representative of a group or party. Rather, the authors reject strict adherence to traditional conceptions of neutrality, acknowledging that the mediator or facilitator cannot and should not be blind to his or her past experience and expertise.

C. *Difference Theorists*

Difference theory presents challenges for participation in public processes, as it concentrates very specifically on traditionally marginalized groups. Iris Young, a principle innovator of the ‘politics of difference’, calls for procedural change to ensure marginalized groups are better represented.⁶⁸ Young emphasizes the potential of direct interaction of parties rather than faceless bureaucratic decision making, which she believes moves parties from self interest to group interest, or to a greater understanding of a just result. Most importantly, face to face interaction allows

⁶⁵ Susskind and Ozawa also see an activist role for the mediator, largely because of the specific nature of public sector disputes in which parties are often not as readily apparent, and in fact may be reluctant to participate.⁶⁵ See L. Susskind and C. Ozawa, “Mediated negotiation in the public sector: Mediator accountability and the public interest problem” (1983) 27 *American Behavioral Scientist* 255-279. Susskind particularly supports the concept of activist mediation in public disputes.

⁶⁶ *Supra* note 64 at 258.

⁶⁷ T. Colosi, “Negotiation in the public and private sectors” (1983) 27 *American Behavioral Scientist* 229-253.

⁶⁸ I.M. Young, “The Ideal of Community and the Politics of Difference” in L. Nicolson, ed., *Feminism/Postmodernism* (London: Routledge, 1990).

different groups the opportunity to change or at least inform the more dominant group.⁶⁹ Young sets out several innovative proposals for effectively implementing diversity politics; public funding must be available so groups can meet, formulate and solidify their ideas. This process, she argues, may provide a space for internal disagreement which in turn may lead to better representation of sub-groups. Additionally, groups should have the right to formulate their proposals and groups *must* be heard by decision-makers, perhaps as a mandated meeting process. She also recommends certain groups be given veto powers on public policy issues central to their interests.

These proposals are obviously difficult to implement, as they challenge fundamental liberal-capitalist political practices and ideologies. Further, Young sets out a specific list of marginalized *groups*, which may itself be problematic when internal division arises. However, Young's key argument is clear: treating everyone equally has simply produced cemented hierarchies. The only way to realize a semblance of true equality is to institute proactive policies to more effectively recognize the needs and interests of marginalized groups.

In sum, innovations and practical and theoretical concepts from the National Roundtable on the Environment and the Economy, activist mediation and difference theory incorporate some values relevant to a wide variety of political participants. All theorists suggest important changes to current public participatory processes and recognize that there are both procedural *and* substantive changes which need to be made. These processes and theories form a starting point by which to develop diversity-based collaborative, deliberative public processes.

VI. *INCORPORATING DIVERSITY-BASED PRACTICE IN PUBLIC ADR PROCESSES*

For citizens, groups and nations, ADR processes can educate and in some cases transform relationships, practices and policies, but in most cases they cannot and need not change fundamental aspects of disputants' culture. The goal of diversity-based practice is not to eradicate culture; and indeed, any facilitated or mediated process cannot be fully free of cultural influences, nor need they be. Instead, practitioners must allow marginalized cultures to be heard and they must facilitate co-produced meanings in an inclusive manner both procedurally and substantively.

⁶⁹ As Anne Phillips notes, it is problematic when we assume *both* groups need to change equally, as the marginalized group has already had to adopt the cultural norms of the dominant group, and, being in a less powerful position, have already had their ideas challenged or suppressed. The marginalized group often then voices their interests as 'rights' rather than wishes or interests, alienating the dominant group and leading to increased division. *Supra* note 17 at 158-160.

There are limitless sites which could strengthen diversity-based practice. As Michael McCann writes, “[s]ystem-wide patterns of hegemonic order are always maintained by a complex, volatile process of multiple, site-specific accommodation between domination and resistance.”⁷⁰ To access these sites, practitioners and theorists must continuously and systematically re-evaluate accepted norms and internal biases and prejudices, including conflict resolution practice, as it has traditionally been taught in Western cultures.

I have addressed some of the theoretical norms of democratically-informed public collaborative processes; this theory also has implications for practical processes. Procedural or institutional change has historically been used in liberalism as the primary way to instigate and conceive of change. It is far from ideal, as top-down decision making reflects a viewpoint often far removed from the realities of marginalized groups. However, procedural change is one of the most tangible ways to realize change. Thus, the following model presents theoretical and perhaps ideal processes divided into procedural stages, with additional commentary on substantive change, with a view to challenging some accepted ADR practices in order to more fully realize diversity-based practice.

VII. BACKGROUND/IDEOLOGY: WHAT IS DIVERSITY-BASED PRACTICE?

Before describing how diversity-based practice can work, it is important to examine what diversity means, and what it means to be different. The meaning of diversity can be deconstructed into identifiable physical characteristics and those which are hidden from sight or sound. It appears easy, if not essentialist, to rely on physical characteristics as the primary indicator; however, it remains that discrimination based on skin colour, for example, plays an important role in how a person is treated. Taylor Cox and Ruby Beale define diversity as “a mix of people of different socially relevant group identities working or living together in a defined social system.”⁷¹ Cox and Beale divide diversity into categories: class, religion, ability, gender, weight, race, language, religion and age in the first, and other less tangible characteristics, such as perspective and political affiliation in the second. For the purposes of diversity-based practice, there is little utility in dividing difference into hierarchies; rather, the important elements of diversity are those which lead individuals to align themselves with a particular group. Diversity-based refers to a practice which emphasizes diversity as a positive and healthy force, while also acknowledging the social realities of difference; that is, certain types of difference have led particular individuals and groups to be marginalized

⁷⁰ Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

⁷¹ T. Cox and R. Beale, *Developing Competency to Manage Diversity* (California: Berrett-Koehler Publishers, 1997).

economically, socially, physically and psychologically. Diversity-based practice rejects an equality approach, instead advocating the need to support the expression of diverse opinions and needs through proactive practice.

An important goal of the diversity-based public collaborative process is to develop space for participants that is as free as possible from hegemonic power structures. However, the social, economic and political realities of any implemented decisions stemming from the facilitated process cannot be ignored. So, it is necessary to find a balance between keeping the process diversity-based (which runs counter to many Western social norms), while remaining aware of the social realities and structural impediments which may alter implementation of any decisions. At the heart of diversity-based processes is the recognition that everyone does not come to a discussion equally resourced, and that the equal treatment of everyone does not address systemic inequality.⁷² Thus, an equity-based (rather than equality-based) and party-centred approach forms the basis of this process.⁷³ Diversity-based process also recognizes that legislative or bureaucratic 'top down' change is not sufficient; however, grassroots change without institutionalization may lead to fleeting change dependent upon individuals rather than institutions. While the degree of institutionalization is debatable, some degree is necessary. In this process, the role of the citizen is neither purely as an individual, nor purely as a group member. Alliances to both individual and group concerns must be considered. The role of the citizen must be a fluid concept for the facilitator in order to consider the nuanced interests of participants. Adopting principles from EPG, diversity-based practice requires that reform must be based on actual concerns of a community, and that consultation and action are based on deliberative decision-making processes. Following are some traditional procedural steps in beginning a public process, and accompanying suggestions for practice. This method can be used at various stages in decision-making processes, or as the central decision making forum.

A. *Selecting the Mediator/Facilitator*

Public participatory processes take on many forms depending upon the issues, parties and the economic, social and political climate. Thus, some of the following steps may be preempted by an existing institutional requirement. I will

⁷² As Nader and Grande write, "Band-Aids are useful, but not when they are proposed in lieu of remedying institutionalized discriminatory practices that may result from treating everyone as if they are equal when they are not". *Supra* note 28 at 24.

⁷³ Equity-based practice itself has a multitude of implications for practice. The concept of equal time for each participant, for example, does not meet the needs of marginalized groups who must express their views to participants and perhaps leaders who do not understand fundamental elements of their culture. Participants under-resourced by means of education, status, ability or wealth may require additional time to express their concerns. The concept of equal 'time' is itself a foreign concept in some cultures for whom time is a more fluid concept.

assume that the parties have some input into the selection of the facilitator, and that the selection is not from a specific list or roster. I also assume there is a culturally dominant group which generally controls governing institutions or often acts as a power broker; likewise, there are accompanying less powerful groups and individuals who have access to different (and often less institutionally-recognized) sources of power.

In order to best promote diversity-based processes, the individual appointed or elected by the parties should be a member of- or highly conversant in- the culture, language and customs of the more marginalized group(s) within the consultative process.⁷⁴ This is of paramount importance as the history of government and institutional consultations with women's groups, First Nations, the homeless or the working poor has fostered a climate of distrust and disrespect.⁷⁵ Credibility, particularly with less resourced parties, may be the key to developing constructive dialogue – or any dialogue at all. While credibility is an often recognized prerequisite for effective facilitators, it is often dependent on authority recognized by the dominant culture such as education, elite connections, position of authority, or other traditional locus of power. Thus, in diversity-based discussions, cultural fluency should be requisite. John Patrick advocates the importance of a mediator or facilitator who is familiar with the cultures of participants. As he writes, they "...need to understand the issues within their community, including issues of discrimination and oppression, if they are to intervene effectively."⁷⁶

The role of the facilitator will also vary depending upon the needs of the parties. Instead of taking a primary role as sole process designer or expert in some substantive area, the facilitator will need to allow parties to control how the process is conducted, with close attention to the use of power and the allotment of resources as signs of hegemonic practices. Further, settlement cannot be the facilitator's primary goal. While the purpose of public collaborative processes is often to obtain input into a decision, it can also be to arrive at mutually agreeable solutions to a problem. If the facilitator is overly fixed on the goal of resolution, there is a tendency to ignore or sidestep difficult issues of systemic prejudice, unfair practices, or consequences of

⁷⁴ While I advocate representation of diversity in the choice of facilitator, I also recognize the essentializing nature of this choice. Of course, no individual should be required to represent his or her gender, race, religion, or other group affiliation; at the same time, without proactive policies encouraging diversity and representation, it is unlikely marginalized groups will achieve an equal voice in public collaborative processes.

⁷⁵ See L. P. Rankin and J. Vickers, *Women's Movements and State Feminism: Integrating Diversity into Public Policy* (Ottawa: Status of Women Canada, 1996) at 59.

⁷⁶ J.C. Patrick, "Equal Opportunities and Anti-Discriminatory Practice" in M. Liebmann. *Community and Neighbour Mediation* (London: Cavendish Publishing Ltd., 1998) at 3.

resolution. Settlement-focused facilitators or mediators are also more likely to exhibit autocratic behaviour which:

inhibits the development among citizens of both the desire and the capacity to take part in the form of conflict resolution required for democracy. In such a setting, autonomous organization is counteracted, and no arenas exist for interaction or for free conflict resolution...⁷⁷

While clearly there is utility in settlement, there can also be dangerous consequences; thus, the facilitator must attend to the dual nature of agreements not in only in outcome, but also in their making.

Actual selection of the facilitator or mediator can be done in a number of ways: the dominant group could select from a roster provided by the other parties, selection could proceed by consensus, or elders could be appointed through culturally-specific selection processes. If it is necessary to work from a government roster, the roster committee should ensure that a wide gamut of individuals is at the parties' disposal; if there is no one available, parties need to be able to go off-roster.

B. *Who Should Participate?*

In diversity-based practice, it remains that those affected by a decision should be central to its making.⁷⁸ However, people who are 'affected' by a decision can be defined narrowly- as in direct stakeholders, or broadly- as in entire communities, peoples, or nations. Often, so-called 'stakeholders' are themselves defined by a governing body dominated by traditionally accepted power brokers. For some marginalized communities, a collectivist approach to decision-making often means more people are defined as 'affected' than in an individualist, capitalist culture. These people may be elders in the community, family members, elected, or appointed or recognized community decision-makers. Thus, selection of participants should not be the sole discretion of the facilitator. At the same time, if particular parties are excluded, the facilitator must have the authority to rectify omissions. This hopefully ensures that parties traditionally excluded from decision-making but who are nonetheless directly or indirectly affected by decisions, have the option to be involved in the process.

The facilitator also needs to challenge traditional categorizations of parties. For example, labour and management are two generally stock groups in negotiations. Systems designers need to problematize these groupings, as women, ethnic minorities

⁷⁷ *Supra* note 11 at 86.

⁷⁸ M. Marty and J. Modell, "The First Conflict Resolution Movement, 1956-1971: An Attempt to Institutionalize Applied Interdisciplinary Social Science" (Dec. 1991) 35(4) *Journal of Conflict Resolution* 720-758.

and other groups have been excluded (consciously and unconsciously, procedurally and substantively) from both labour and management, thus alienating them, and excluding important viewpoints.

If it becomes necessary to use representatives during the process the same problems can arise; that is, the more powerful or recognized members of represented groups are often selected. Thus great efforts must be made to include the 'other within the other', those who define themselves as members of a participant group, but hold additional and sometimes conflicting views or interests. A related criticism of public collaborative processes is the domination of 'experts' in a particular field, encouraging intellectual or professional discourse. While some theorists have encouraged accessible public discussion, the facilitator and participants must simultaneously challenge the social privileging of certain types of knowledge and experience. For example, a farmer living in a region for thirty years is an expert in the topology and growing conditions in a disputed area. A person living on the streets and accessing local shelters is an expert on the gaps in provision of housing in a community. Recognizing and accessing the existing skills of participants, and emphasizing local and possessed knowledge as 'expert' will contribute greatly to the quality of discussion and decision-making.

Inevitably, one or more parties or groups will be more familiar either procedurally or substantively with the facilitation process. This is generally government or institutional representatives whose job it is to deal with public decision-making and negotiations, although there are often professional advocates on all sides. When this repeat player syndrome arises, parties tend to make more assumptions, use terminology with which only they are familiar, and sometimes pre-empt facilitations because their previous experience has shown them the process does not work. While it is often valuable to have experts, legal representatives or repeat players at the table, their dominance can be problematic when attempting to access diverse views and options. This can be more difficult when the facilitator is a person from a traditionally marginalized group who may be stereotyped by some participants as inexperienced or lacking in knowledge or power. The facilitator may also fall prey to stereotyping as 'one of us' (a member of a particular group) or 'one of them' (a member of another, opposing group).

Therefore, while this process advocates inclusiveness and a place where diverse interests should be welcomed, the facilitator will have to be highly cognizant of who speaks, what role the speaker plays within a group, and who is ignored. As well, the facilitator needs to be prepared for both support and opposition based on his or her personal characteristics and assumptions about these characteristics. While there is inevitably an element of uncertainty in any facilitated discussion, ideally the facilitator should be aware of these pressures and resolve them prior to starting any formal process.

C. Facilitating Participation

Participation by as many interested individuals as possible is a primary goal of this process. Forms of participation and their quality are variable; however, there are many methods which can effectively allow citizens to participate in decision-making processes. Although face to face communication is preferable, it is often not possible for participants with demanding personal commitments, or health or economic pre-emptors. Quite effective communication can be facilitated via telephone or Internet conferencing, written submissions, videotape or voice recording along with more traditional live discussion. If participants are willing and able to attend facilitated meetings, it is essential that funding be made available to those who cannot afford to attend. To lower costs and facilitate attendance, it is preferable to hold meetings closer to the homes of participants with fewer resources. If the process occurs over several months or years with participants in geographically remote areas, it is advisable to change the location of the meetings to allow more diverse attendance.

There are also practical considerations which can preclude participation. Translators, childcare, religious holidays and customs including fasting and time are obvious examples which must be considered. Participants must be permitted to express their own needs and interests – whether selfish or altruistic – in their own words and in their own way.

To form a diversity-based practice, definitions of evidence have to be expanded to accept and respect oral history or storytelling as valid methods of communication. Specific cultural and spiritual symbols and practices may make certain parties feel more comfortable, and in fact enhance understanding.⁷⁹ Modeling respect for these practices may increase goodwill, and add a symbolic voice to the proceedings.

The goal of participation in diversity-based practice is not necessarily 'empowerment', which suggests the participants do not have their own sources of power or are in need of help. Keeping in mind postmodern critiques of power as commodity, it is important to allow parties to seize traditional and non-traditional sources of power. They may then be freer to construct their own interactions with fewer hegemonic values and assumptions placed upon them.

⁷⁹ During a recent public meeting with First Nations in attendance, the facilitators from the UWMS placed a bowl of water and a candle in the centre of the table symbolizing the two earth elements, fire and water. They emphasized journey and hunting metaphors and encouraged storytelling by using an expanded vision of relevance (i.e. oral histories, symbolic elements).

It is also important that the participants in the process feel heard by people whom they view as having power. Frustration mounts when political and institutional decision-makers either are not invited or are not at the table. As outlined above, Young suggests mandating that outcomes of facilitated processes be presented directly to decision-makers, and that a positive obligation be put upon them to at least consider any findings or results.⁸⁰ Although new public issues always arise, this should not affect the essential nature of collaborative processes to facilitate increased understanding among diverse groups.

D. Pre-Facilitation, Pre-Negotiation Planning

As with most facilitated processes, the facilitator or mediator needs to meet with both sides before the process begins to establish rapport and to receive input on how the parties would like the process to take place. These meetings should use an expanded view of what constitutes interests (as defined by Fisher and Ury); they should address cultural symbols, practices or specific needs which could enhance participation. This might mean structuring a process very different from typical public discussions. In order to counteract some of the problems which arise due to the suppression of potentially public issues in confidential portions of the collaborative process, information and honesty are necessary. The parties, particularly those who could be most affected by this problem, should be informed by the facilitator about the problems associated with confidential processes, the potential 'depoliticization' of issues, and the lack of legal precedent. Efforts need to be made to inform other participants of the specific nature of the upcoming process. While each group will have different needs, accommodating as many as possible, with emphasis on diversity is a central component of diversity-based practice.

E. Incorporating Diversity-Based Processes

The diversity-based process may be part of a larger decision-making process. Lowry, Adler and Milner suggest four points of entry for participatory group processes in planning.⁸¹ The first is an *ad hoc* process, in which a facilitator participates in one meeting focused on a particularly controversial aspect of a project. The second, an appendage process, involves the addition of a public participatory process to an existing technical process. This may be especially useful to flesh out ideas, develop options, or train participants. Integrated processes, as the name suggests, are established parts of a planning process. Finally, in partnership processes, "significant authority is delegated to (or assumed by) a group of people who represent different community interests to develop public policy in a certain

⁸⁰ *Supra* note 69.

⁸¹ K. Lowry et al., "Participating the Public: Group Process, Politics and Planning" (1997) 16 *Journal of Planning Education and Research* 177-187 at 180.

area."⁸² Of course, the more central diversity-based processes are to decision-making bodies the more effective they can be. A partnership process envisages citizens as full participants in the collaborative process, including process design. Lowry, Adler and Milner found that in most *ad hoc* or appendage processes, the vast majority of agenda issues were decided by the facilitator or agency in advance without input of the participants. They found that the "emphasis [was] on problems and solutions rather than values or principles."⁸³ While not every suggested item needs to be on the agenda, it is important first to get input from the participants as to what they would like to speak about, particularly the concerns of non-elites. Failing to do so can hijack a collaborative process from the outset, as a pre-set agenda without wider citizen input can appear to serve bureaucratic interests, negating the purpose of the process.

F. *The Facilitated Process*

Regardless of preparation, there will be individuals and groups in the facilitator process who are unable or unwilling to participate for any number of reasons. There are, however, a number of additional procedures which can expand opportunities and fora in which to participate. The processes recommended by the Roundtable on the Environment and the Economy are applicable options. The authors suggest having smaller workshops to break down barriers, using role plays to broaden perspectives, and establishing working groups. Nurturing informal relationships, as the authors suggest, may also be valuable.

Should one of the goals of the process be to form an agreement, ideally a consensus process is preferable. If a vote is required, the facilitator may consider adopting Young's suggested veto power given to marginalized groups who do not agree with decisions.⁸⁴ The act of making an agreement is practiced in many ways in various cultures; by a handshake, the exchange of money, a contract (verbal or written) or promise of tangible or intangible personal service. Using the preferred form of agreement may ensure greater commitment to the outcome of the process.

Most importantly, if decision-makers are to take diversity seriously, diversity-based public collaborative processes need to be institutionalized. Although a one-off process may be useful to gain input into a specific decision, it is more useful to ensure diverse input into as many public decisions as possible. Of course, there is always a risk that institutionalization leads to domination by elites. In theory,

⁸² *Ibid*

⁸³ *Ibid* at 182

⁸⁴ *Supra* note 69

this risk can be counteracted by the very purpose of public collaborative processes – diversity-based participation.

VIII. *SUBSTANTIVE CHANGE: SOME EXAMPLES*

Although procedural changes can be adopted, the more difficult aspect of diversity-based practice is substantive change. Substantive change needs to take place at fundamental levels of ADR theory, education and practice. I have advocated that practitioners be members of, or conversant in, the culture of the more marginalized party or parties. This should be possible in the vast majority of cases, but this does not abdicate the responsibility of other practitioners to raise awareness of diverse interests, practices and needs. At the very least, students and practitioners of ADR need to be introduced or re-introduced to concepts of diversity as they relate to ADR practice, and the intersections of diversity in political, social, religious and economic practices. This means more than learning techniques to ‘balance power’; it requires new conceptions of the ‘other’ not only in the ADR process, but in the social contexts in which the process takes place. As John Paul Lederach writes, “the connection of social conflict and culture is not merely a question of sensitivity or of awareness, but a far more profound adventure of discovering and digging in the archeology of accumulated shared knowledge common to a set of people.”⁸⁵ The practitioner mirrors, reinterprets, and echoes social norms and prejudices, and models them back at the disputants, who themselves present part of their own reality. The social constructionist viewpoint dictates that the mediator or facilitator can access and sometimes de- and re-construct the ‘reality’ of disputes through language to which is attached specific meaning. Showing how certain concepts in conflict resolution theory are influenced by the dominant political ideology in North America, liberalism, and how they might be re-imagined is fundamental to diversity-aware practice. Fully incorporating diversity-based practice requires a conceptual shift which can be accomplished in a number of ways, an important way being an examination of the use of language and storytelling.

A. *Storytelling and Language*

Communication through storytelling is a cornerstone of facilitated and mediated processes, likely one of the most important sites of substantive change in practice. Cobb and Rifkin deconstruct the stories told in mediation as potentially hegemonic processes.⁸⁶ The first storyteller sets the terms of the story, morally,

⁸⁵ J.P. Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* (New York: Syracuse University Press, 1995) at 16.

⁸⁶ *Supra* note 15 at 56.

discursively, chronologically and often metaphorically. The next storyteller has already been "colonized by a dominant story," leaving him or her to deflect criticism, respond to hurtful or inaccurate remarks, and to – if possible- redefine the terms of mediation. The mediator is also responsible for the transformation and redefinition of the story. Cobb and Rifkin conclude that "[t]he mediators' psychological vocabulary favors a focus on individuals and obscures the role of discourse in the session; the mediators cannot witness their own role in the creation of alternative stories, nor can they address the colonization of one story by another."⁸⁷ So, not only is one party more likely to be co-opted by the other, the mediator is blind to this abusive exercise of power whether intentional or unintentional.

Storytelling is one of the key ways groups can communicate the impact of public policy on their daily lives. Following Cobb and Rifkin's study, there will always be one party whose story defines key terms and issues for the process at the expense of another. Is this always a bad thing? On its face, Cobb and Rifkin's study refutes any possibility of true neutrality or even impartiality. However, when taken in the context of diversity-based practice, it may be a site by which historically marginalized groups can have their story heard and define the terms for at least some issues. So, for both procedural and substantive change, attention to narrative or discourse is extremely important, as it forms the essence of the collaborative process.

B. Neutrality (being diversity-neutral is an oxymoron)

Another key concept popular in traditional ADR practice is neutrality, which I argue is another site for substantive diversity-based change. One of the most commonly critiqued norms of liberal-based practice is the concept and practice of 'neutrality', discussed earlier in the context of activist mediation. Let us conceive of any single mediation or negotiation as a 'mini cultural unit' where social norms and divergences are played out according to the parties' perspectives which, taken in concert, may be unique but are, in fact, highly influenced by identifiable social and psychological phenomena. Liberal ADR theory dictates that the conflict resolution practitioner be neutral in the communication exchange and that while the mediator recognizes she or he brings biases and expectations to the table, these can be put aside. The concept is useful – it guards against an understandable urge to take sides, agree or disagree, and make baseless judgments while observing conflict. However, as Forester and Stitzel write, "[t]o be neutral in the face of inequalities of power promises not indifference to outcome, but acquiescence to the perpetuation of power imbalances, to the perpetuation of a status quo of inequalities."⁸⁸ Bush writes, "[t]he orthodox theory [of mediator neutrality] may simply not apply when mediators face the practical test of sitting passively by and watching a disadvantaged party willingly

⁸⁷ *Supra* note 15 at 60.

⁸⁸ *Supra* note 64 at 260.

accept a grossly unfair settlement."⁸⁹ Cobb and Rifkin argue from a poststructuralist standpoint that the *rhetoric* of neutrality masks the *practice* of neutrality in mediation. In their study of fifteen mediators, Cobb and Rifkin noted a distinct gap between standard definitions in ADR theory and practitioners' understandings of neutrality, including neutrality as 'impartiality' and neutrality as 'equidistance'.⁹⁰

For practitioners concerned with issues of diversity, the language of neutrality in public dispute resolution processes acts as a fundamental means by which to engage or subvert participation, particularly participation of marginalized groups. Thus, traditionally understood neutrality is abandoned as it is not only impossible but, in fact, a danger in many contexts. The political theory discussed thus far can guide a reexamination of neutrality. Diversity politics forces practitioners to question concepts such as the primacy of the individual and to examine the social contexts which inform the parties' participation in and understanding of conflict. These social contexts are not the same or even comparable.

The reality of social inequalities and inequities can be countered to some degree with public participatory processes by abandoning neutrality and by practicing equity instead. An equity-based approach is twofold. First, the facilitator will need to re-examine generally accepted procedural requirements such as giving equal time to each group or party. Second, the facilitator will need to pay more attention to the power dynamics between the groups than to his or her appearance of neutrality. Rejecting strict neutrality leaves the facilitator open to criticism from those who feel he or she is biased, and from those who feel neutrality is an accepted procedural safeguard against power abuse. These criticisms are important, but do not negate that ignoring diversity, and treating everyone the same, is in fact denying a form of justice to already marginalized participants.

There are a myriad of other concepts which undermine diversity-based practice including the Western ideals of autonomy and self-determination, and the legal concept of what constitutes informed consent. The most useful message for practitioners is the importance of deconstructing commonly-held assumptions and concepts in conflict resolution. Again, concepts such as neutrality and autonomy have helped set ADR apart from courts and have helped assure traditionally conceived procedural fairness; these concepts, however, have cultural baggage which can alienate parties in a process intended to do the opposite.

⁸⁹ B. Bush, "Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation" (1987) 37(1) *Journal of Legal Education* 46.

⁹⁰ *Supra* note 15.

IX. CRITICISMS & RESPONSES TO DIVERSITY-BASED PRACTICE

The potential criticisms of diversity-based practice correspond to those leveled against ADR processes generally, and against diversity politics specifically. It is arguable that diversity-based systems have the potential to meet superficial needs of marginalized members of society, but in fact further mask what Nader calls "ADR's true purpose" of "vanishing... power and politics."⁹¹ A similar argument posits that the inclusion of traditionally marginalized groups can make administrators and governments appear inclusive, legitimizing the public consultative process among both the general public and the target groups. To ADR critics this is more offensive, as governments specifically co-opt the very people who are most at risk.

This argument is reminiscent of the "false consciousness" debates of radical feminists, in which a woman who denies her oppression is deemed to be so deeply deceived by her oppressor (male-dominated society) that she is not- and cannot- be aware of her own subjugation. This argument— while an interesting cautionary note — acts to 'vanish' the ability of disempowered persons to make choices (consent), discern their own marginalization, and act in their own interest. Certainly no process is able to fully erase hegemonic power structures, and no process can provide the 'ideal speech conditions' to promote dialogue free of societal influences; however, diversity-based practice is at the very least an attempt to counter these structures and influences.

More interesting is the question of institutionalization; if public collaborative processes are institutionalized as they have been in certain cases, does this inevitably lead to serving the interests of the dominant group by allowing a particular group to become 'expert' in the process and control its legislation? That is, does institutionalization automatically serve majority interests, or the interests of small moneyed groups? This is a complex question. In practice, diversity-based processes should be designed to be sufficiently diverse (centred on the cultural specificities of the participants) to counter the repeat player syndrome which plagues so many institutionalized ADR processes. The facilitators should also turn over enough to keep the process keenly attuned to diverse groups and interests. However, if one group pays for, or is charged with designing and passing legislation to institutionalize public collaborative processes, there is clear cause for concern.

Another argument posits that a diversity-based approach, that is, one that privileges some over others, is fundamentally undemocratic, particularly in the traditional liberal democratic view that all citizens should be treated equally. This argument has been soundly refuted by the authors mentioned earlier in this paper, who maintain that all citizens are *not* equal, and that the only way to achieve some semblance of equality is by creating opportunities for marginalized persons to

⁹¹ *Supra* note 28.

participate in culturally-specific ways in social and political institutions. So, while seeming on its face to privilege some over others, the substantive result is to provide conditions in which greater equality is possible.

There are numerous other arguments which can be presented countering diversity-based practice.

X. CONCLUSIONS

Conflict resolution theorists and practitioners have painted ADR processes as potentially bolstering participatory democracy; while ADR and participatory democracy have some similar goals, this paper advocates investigating more pluralistic forms of democracy to improve the quality of public participation in public collaborative processes. Specifically, forms of diversity politics can theoretically and practically inform systems designers instituting processes in which diverse, wide-spread input is important. Given the explanations and critiques outlined in this paper, does the diversity-based public collaborative process model provide pro-active and preventative safeguards for parties with diverse needs and interests? ADR critics argue the procedural safeguards in court processes protect the formal and procedural rights of disputants; this paper posits that using a diversity-based model can counteract this problem by:

- 1) discussing political and apolitical elements of using ADR processes in public disputes in order to inform the parties as much as possible about the benefits and drawbacks of mediated, negotiated or facilitated processes,
- 2) using a facilitator who is thoroughly aware of the specific cultures of participants, including customs, religious symbols and practices and worldview,
- 3) avoid focus on settlement.⁹²

Second, does this model have the potential to increase or deepen the quality of democracy and, if so, what kind of democracy? This paper posits that not only does ADR have the potential to deepen participatory democracy, it can and should be more effective for marginalized groups. This paper has advocated some of the following steps to encourage a diversity-based process:

- 1) using an equity-based approach; that is, not assuming that all parties are equal, but simultaneously rejecting that marginalized groups have no power,
- 2) easing participation by marginalized groups; this can include funds, closer location, childcare, respect for religious and cultural holidays,

⁹² Some processes, or political climates, might require settlement. Even then, I suggest the mediator/facilitator should avoid *focusing* on settlement until as late in the process as possible.

- 3) capitalizing on existing skills of participants and putting less emphasis on experts and education,
- 4) privileging difference and diversity,
- 5) including as many participants as possible, and making the process as accessible as possible,
- 6) re-examining the use of accepted ADR tenets such as 'expert', 'neutral', and so on,
- 7) ensure parties design their own process, especially in agenda formulation,
- 8) avoiding traditional categorizations, thereby allowing sub-groups to have a voice.

This model has made attempts to counteract micro and macro exercises of hegemonic power which can act to exclude persons who have been traditionally marginalized in facilitated public processes. Although some may argue treating some parties differently from others in a facilitated process may appear undemocratic on its face, the fundamental question is: can equality (or equity) be truly meaningful without mechanisms to represent group differences? This paper has posited it cannot; proactive, diversity-based participation is necessary to improve the quality of democracy in Western nations.