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The Democratic Legitimacy of Government-Related Dispute Resolution

BY RICHARD C. REUBEN

THE ELECTIVE BRANCHES GET most of the attention when we think about democracy. But it's important to remember that one of the things that a democratic government provides is a number of structures by which disputes may be resolved peacefully.

Indeed, voting itself is one way of resolving conflict at a societal level. In the United States, courts historically have been the starting point for the resolution of individual, and sometimes social, disputes. Courts would seem to exude a great deal of democratic legitimacy, but why, and under what conditions? And what about other methods of dispute resolution: How do they relate to democratic governance, if at all?

In my view, dispute resolution is an important function of democratic governance, and when the government engages in, administers or endorses a dispute resolution method or process, we should expect it to operate in a way that furthers rather than undermines the larger goal of effective democratic governance.¹

This may seem intuitive, but its implications are profound for dispute system choice, systems design and evaluation. Designing and operating dispute resolution methods and systems to recognize and maximize their inherent democratic potential assures their democratic legitimacy.

The values of democracy

The democratic character of a dispute resolution method or system can be assessed by reference to the fundamental values of democracy.



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Elements of Democratic Legitimacy for Dispute Resolution

- Personal Autonomy**
The ability of individuals to make their own choices when resolving their disputes. This value pervades all of the other values.
- Political Participation**
The ability of individuals to take part in the dispute resolution process.
- Transparency**
The extent to which the dispute resolution process operates in public view.
- Accountability**
The degree to which a dispute resolution process and its participants may be held responsible for the process and outcomes.
- Rationality**
The extent to which the outcome of a dispute resolution process is consistent with law, social norms, or public or party expectations.
- Legal Equality**
The degree to which a dispute resolution process treats participants the same.
- Due Process**
The extent to which a dispute resolution process is procedurally fair.
- Social Capital**
Whether a dispute resolution process contributes to the larger society or system, for example, by fostering trust in an institution, connection among people, a spirit of reciprocity, or a sense of public spirit or civil virtue.

If those values are promoted by a dispute resolution method or process, it seems reasonable to infer that the method or process may enhance democratic governance, and be seen as more legitimate from a democratic perspective. On the other hand, if those values are thwarted by a dispute resolution process, then it seems fair to infer that it will diminish democratic governance, and be seen as less legitimate from a democratic perspective. This can be thought of as dispute resolution's democratic character, which is not a moral or normative judgment on the process. Rather it is an assessment of its capacity to enhance democratic governance, which may or not be fulfilled depending upon how the dispute resolution method is implemented.

The many traditional democratic values can be divided into three major groups: political values, legal values,

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and social capital values. Personal autonomy is a democratic value that pervades all three of these categories, and can sometimes have a trumping effect when there is tension between values.

Political values: These are the values that are perhaps most familiar when we think of democratic values, and include participation, accountability, transparency and

rationality. In the dispute resolution context, participation refers to the degree to which the process provides a party to a dispute the opportunity to actually participate in its resolution. Similarly, accountability refers to the extent to which the process, or the neutral as a proxy for that process, may be held responsible. Transparency refers to the degree to which the decisional process is visible to participants and possibly others. Rationality refers to the extent that the process leads to an outcome that is consistent with law, community norms or some other reasonable measure of the parties' expectations.

Legal values: These democratic values are particularly germane to dispute resolution processes, and include equality and due process. Equality generally refers to the equal treatment of parties within the dispute resolution process in terms of the application of relevant laws, norms or other standards. Due process refers to the procedural fairness of the process. Impartiality is a related value and derives from equality and due process.

Social capital values: Social capital values may be less familiar to some, but political scientists have found that they are just as important to the exercise of effective democracy as electoral politics. These can be thought of as cultural values, in particular the degree to which citizens in a democracy have trust in their public institutions, enjoy social connections with others, share a spirit of *esprit de corps* and engage in reciprocal beneficial behavior. In the dispute resolution context, the question would be whether a dispute resolution method or system fosters or frustrates these values.

The baseline: public adjudication

Under these measures, it is not surprising to find that public adjudication exhibits a strong inherent democratic character. Courts promote public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights, through jury service in the government

judicial adjudicatory processes, as well as through the articulation and maintenance of societal expectations with respect to the legal consequences of conduct that can guide private ordering.

Similarly, courts promote equality, due process and rationality by operating in accordance with specific rules of procedure, evidence, and substantive law that have been enacted pursuant to statutory or administrative prescription, or that have evolved over time at common law. There is also significant accountability and transparency in trial court decision-making through the availability of judicial review of trial-level decisions, as well as the public nature of trials and appellate argument. Finally, as instruments of the rule of law, courts help generate a rich reserve of social capital that further reinforces compliance with the rule of law.

Particular courts and court systems are likely to vary in terms of how well they satisfy each of these factors, and for these courts, the factors point to areas where improvement are appropriate if the courts are to achieve their maximum potential to enhance democratic governance.

Arbitration under the FAA

If public adjudication in the United States provides a baseline against which the democratic character of other dispute resolution processes may be measured, arbitration under the Federal Arbitration Act tends to fall short of the mark in many important respects. To be sure, arbitration permits party participation, arguably at a higher level than adjudication, considering that the informality of the arbitration process can overcome formal barriers to party participation, such as the prohibitions against hearsay evidence.

However, arbitration provides little in terms of accountability. Arbitration awards are generally not subject to the kind of substantive review that is available for decisions in public adjudication. Arguments for accountability through the

marketplace are undermined by the fact that many arbitrations conducted under the FAA are mandatory—that is, one of the parties is compelled into arbitration because of an arbitration requirement that the other party unilaterally imposed in the contract at issue.²

Similarly, transparency and rationality are not essential values of arbitration. Arbitrators are not required to articulate reasons for their decisions in the form of written opinions, thus precluding substantive judicial review and diminishing the capacity of a written opinion to enhance the legitimacy of the arbitral decision by virtue of the transparency of the decision-maker's reasoning. Moreover, arbitrators are not required to make their decisions according to rules of law, which, while wholly appropriate in my view, can make their awards appear arbitrary or capricious to those unfamiliar with the process.

Because of the enormous decisional discretion vested in arbitrators, arbitration does not, and arguably should not, provide any assurance of equal treatment of the parties, at least in the sense of the application of substantive rules. To the contrary, arbitration provides a highly individualized form of justice that is narrowly tailored to the specific circumstances presented to the arbitrator, who makes a decision according to whatever substantive standard he or she determines is appropriate under the circumstances, unless the submission to arbitration specifies otherwise. On the other hand, arbitration does provide for equal treatment in the sense of procedural due process, generally assuring that both parties within the arbitration will be treated equally with respect to the presentation of evidence to the arbitrator. While the practices of individual arbitrators in this regard may vary considerably, the market for arbitration cases and other reputational concerns tend to constrain abuse of discretion by arbitrators.

Arbitration is thus a process that does not have a high inherent democratic character. However, this

is where personal autonomy can have a trumping effect, legitimizing an inherently less democratic process. Parties may, and in some circumstances should, choose to waive the democratic failings of arbitration in favor of the other virtues the process offers. To be effective, the choice of arbitration must be real, not implied or imputed from consent to the larger contract.

Mediation

As a dispute resolution process that requires the consent of the parties before a dispute can be resolved, mediation may generally be seen as an inherently more democratic process than an adjudicatory process like arbitration. However, the enormous variety of styles, practices and applications of mediation raise uncertainty on several democratic elements—a dynamic that gives rise to some of the most significant, contentious and largely unresolved policy issues in the field.

In my view, democratic theory would suggest the answers to these fundamental dilemmas again may be ascertained by reference to the autonomy value – that is, the capacity for mediation to foster true and meaningful autonomy for the parties in the resolution of their disputes.

The political democratic factors present a particularly mixed bag, in part because of the adaptability of mediation to unique circumstances that makes the process valuable in the first place. While the mediation process allows for a high degree of participation by disputants, the transparency of the process greatly depends upon the particular mediation format that is used.

For example, many believe confidentiality to be a crucial value for mediation. Yet it comes at the cost of process transparency. As the Uniform Mediation Act and other state laws suggest, this is a trade-off most states are willing to make, at least to some extent.

But consider, too, questions over the appropriateness of caucus in mediation. From a democratic

theory perspective, noncaucus models are plainly more transparent than the arguably more common models in which private caucuses are used, and through which information crucial to settlement is deliberately shielded from one of the parties by the mediator and the other party, absent party consent to disclosure. Indeed, maintaining the appearance of neutrality while working effectively with private caucus information is a central challenge for practicing mediators who work with the caucus format. Surely this shield of the caucus works both ways, in that mediators will typically caucus with both parties. However, one should not confuse even-handedness with transparency. Caucuses shield information, and that is the antithesis of transparency.

Similarly, mediation is not a particularly rational process—certainly as compared with our baseline of

Mediation has a stronger inherent democratic character than arbitration. But how that character plays out in particular cases will depend upon how it is implemented.

public adjudication—because one of the strengths of the process is the ability of the parties to make decisions about the outcomes of their disputes according to values and standards that are uniquely important to them rather than according to predetermined legal, workplace or other standards. As a result, decision-making in mediation can be more of an idiosyncratic process, rather than one necessarily guided by more objective rationality. While this is entirely appropriate, it can raise an enormous practical challenge in assessing the substantive fairness of a mediated settlement agreement, particularly one that falls well short of what the law may provide but which may satisfy other interests of the parties, including just getting the dispute over with.

The mediation process is similarly ambiguous on the final political value, accountability. On the one hand, because mediation parties are not required to settle, they arguably have all the accountability they need.

However, this view does not take into account coercive pressures that the mediator can bring to bear on parties in mediation, particularly mediators who use a more directive or cajoling style, as well as other settlement pressures, such as time, resources and the need for a party to move on.

Moreover, this view focuses on particular disputes, and a look at the system as a whole underscores the lack of accountability in mediation. Mediators are not licensed or certified in most states, and so are not accountable to public oversight other than through private actions for malpractice or ethical lapses and through the reputational market for mediator services. Moreover, unlike most contracts, the results of mediated settlement agreements are generally not reviewable for substantive fairness, or even unconscionability. While in most cases there is no need for such

review, democracy's concern would be with those cases for which review is appropriate because of undue mediator coercion, incompetence or other reasons.

Finally, the mediation process raises similar democratic ambiguity on the legal values of due process and equality. A standard practice of mediators is to work with the parties to establish ground rules for the conduct of the mediation to which both parties agree, and this is strongly democratic in terms of assuring procedural due process. However, these components of democratic dispute resolution implicate concerns over mediator style in general and competence to manage power imbalances between the parties in particular. The traditional theoretical divide on mediator style is between facilitative and evaluative mediation, or what Professor Leonard Riskin has more recently termed "elicitative" and "directive."³

In my view, democratic theory holds no preference for one over the

other. Facilitative mediation has great power to enhance party autonomy in the resolution of a dispute, assuming the mediator is skillful in managing power disparities between the parties. If the mediator is not capable of managing a power imbalance effectively, however, the result can be the suppression of the meaningful autonomy of the low-power party, or, worse yet, the direct or indirect coercion of that party's choices.

Similarly, in the best of worlds, evaluative mediation can foster meaningful party autonomy by providing a hard-headed third-party assessment of a party's claims. In the worst, it can be just another tool of suppression and coercion, the antithesis of party empowerment. Particularly in more extreme situations, such a dynamic could raise significant issues regarding the substantive fairness of the mediated settlement agreements, as well as the equality of treatment of the low-power party.

In sum, mediation has a stronger inherent democratic character than arbitration. But as with arbitration, how that democratic character plays out in particular cases will depend upon how it is implemented.

Social capital values

We have not yet considered the social capital values for either arbitration or mediation. Assuming the choices made along the other dimensions have been more democratic, then it is fair to infer that the dispute resolution process itself may help to contribute to democratic social capital by fostering greater public trust in dispute resolution decisions, encouraging constructive social connections with others, fostering a spirit of *esprit de corps* and community engagement and by rewarding reciprocal beneficial behavior.

If, however, the choices made along the other dimensions have been less democratic, then it is fair to infer that the dispute resolution process itself may undermine the effectiveness of democracy. The picture is not pretty.

Emerging theory regarding trust in public institutions suggests that less democratic dispute resolution processes may carry significant systemic costs by eroding public trust in the rule of law as an institution. As the Rodney King riots suggested a decade ago, loss of public trust in the rule of law is not a trifling matter.

There are also important implications for the willingness of citizens to comply with the law voluntarily. As an empirical matter, the relationship between trust and rule-compliance has been studied extensively in the context of citizen compliance with legal rules. A leading researcher, New York University social psychologist Tom R. Tyler, has consistently found across studies that trust in legal institutions far exceeds other factors—including agreement in the substantive correctness of the law—as the primary determinant of the willingness to comply with legal rules.⁴

More specifically, Tyler's research suggests people are most willing to comply with the law when it is perceived to be legitimate in the sense that it is entitled to or deserving of compliance. Tyler has further found that the primary determinants of this sense of legitimacy or entitlement are the procedural fairness of the decision-making process and an underlying trust in the motives of legal authorities.⁵

Here the research is striking, showing that it is the integrity of the process by which the rule is developed and applied—the processes and behaviors of legal authorities—that determines whether these initially trusting expectations are met or defeated, not substantive agreement with the rule. What is equally striking is that the referent points that are most salient in making the determination of procedural integrity are generally consistent with the very factors identified above as being central to democratic legitimacy: whether the authorities allow people to influence the outcome (participation), allow people to speak and present evidence (participation), behave neutrally (due process), treat people with dignity

and respect (due process), explain judgments (rationality) and provide desired outcomes (rationality).

While striking, the consistency of these values as a baseline for assessment across contexts is not surprising. Rather, it bears testament to how deeply these fundamental democratic values are entrenched, and to how little difference context makes to our need for their fulfillment.

In sum, dispute resolution is a fundamental component of democratic governance, and it is important for the dispute resolution method or process to be designed or operated in a way that is consistent with traditional democratic values. Doing so will inure to the benefit of the dispute resolution process, and for the larger system of dispute resolution that serves and supports our democracy.

Endnotes

¹ For a more comprehensive, and footnoted, discussion of the issues raised in this article, see Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (Winter/Spring 2004) and Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11 (Spring 2005) (discussing issues in context of new, more democratic workplaces).

² Some would question whether these arbitrations in fact are mandatory. See, e.g., Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 105-10 (1996). For a response, see Reuben, *The Problem of Arbitration*, *supra* note 1, at 303-08.

³ Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 29-34 (2003).

⁴ The most significant of this research focused on citizen contact with police and courts as a proxy for what I describe here as the rule of law. See Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, U.CIN.L.REV. 847, 856-858 (1998).

⁵ *Id.* at 866. Interestingly, Tyler's research suggests that people tend to begin with a benevolent outlook about the noble motives of government officials with respect to law-making and application, which he calls an "illusion of benevolence" that is subsequently tested by actual contacts with government authorities. *Id.* at 868-869.