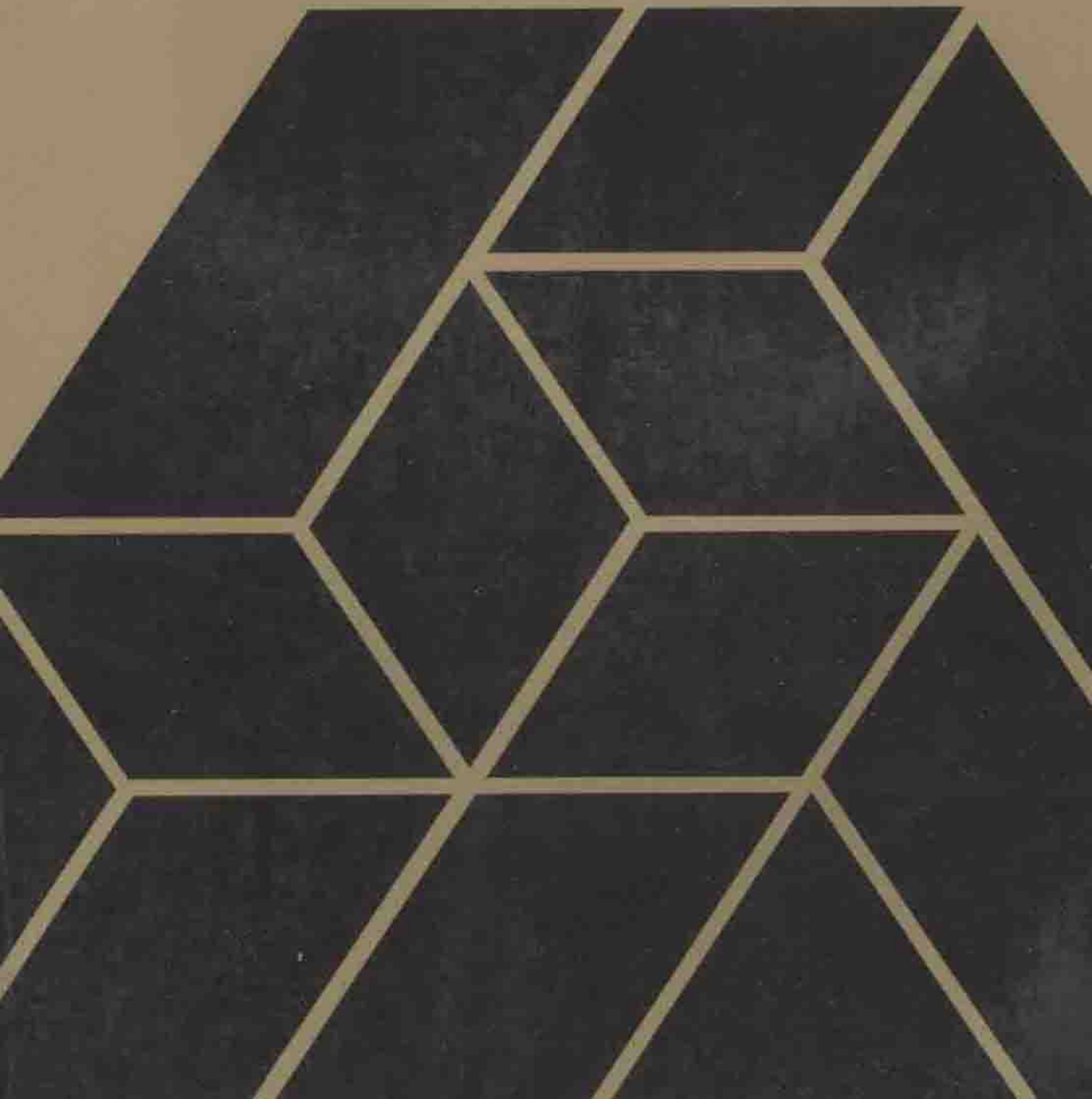
PERSPECTIVES ON CIVIL PROCEDURE

Geoffrey C. Hazard, Jr.
Jan Vetter



Perspectives on Civil Procedure

Geoffrey C. Hazard, Jr.

Sterling Professor of Law
Yale Law School

Jan Vetter

Professor of Law
University of California at Berkeley School of Law

Little, Brown and Company Boston and Toronto

Library of Congress Catalog Card No. 86-81528

ISBN 0-316-35259-4

ALP

Published simultaneously in Canada
by Little, Brown & Company (Canada) Limited

Printed in the United States of America

Preface

This set of readings is designed to accompany a course on civil procedure. It may be introduced to students at various stages throughout their procedure classes, particularly at the advanced stages. By then, students have learned how to read cases and treatises and will have come to consider the deeper relationships between decisional law and doctrine, on the one hand, and the fundamental dilemmas of procedure on the other. Legal scholarship at its best addresses those relationships. We have compiled a set of materials that we believe reasonably balances comprehensiveness of issues, variation in viewpoint and philosophy, and length.

Neither decisional law nor the rules and statutes governing procedure can fully explain the procedural problems that they address. Courts make law, they do not describe it. Judicial lawmaking demands maintaining institutional reserves of discretion, and requires nesting a new decision in received law insofar as possible, even if that law is muddled or obsolete. It necessitates producing a result even without time or opportunity to think through the matter at hand. Legal scholarship is not subject to these constraints. Of course, legal scholarship does not always succeed in its intellectual ambitions, but even when it does not, it is a mode of thought that law students need to share as much as they need to know cases and rules.

We believe that students benefit from direct encounters with legal scholarship, for much the same reason that we benefit as teachers. It opens one's eyes to aspects of law that courts do not explain and generally do not want to hear. For the latter reason, these aspects usually are also bypassed in treatises, which are designed for citation to courts.

Legal scholarship, in our opinion, must encompass not only theories of justice at a high level of abstraction, but the technical intricacies of a developed legal system. There is a place for Rawlsian or Coasian analysis, or other philosophical inquiry, in the study of all legal subjects, including civil procedure, for the ideas of equality, equity, and transaction cost are essential in comprehending litigation. In the real

world, however, these ideas present themselves not in pristine form, but as aspects of highly complex and deeply entrenched social institutions. Hence, we think students benefit best from scholarly works that contemplate the developed law of modern procedure. Our selection is based on that premise.

Geoffrey C. Hazard, Jr.
Jan Vetter

November 1986

Acknowledgments

We would like to thank the authors and copyright holders of the following works, who permitted their inclusion in this book:

Brazil, Wayne D., The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295 (1978). Copyright © 1978 by the Vanderbilt Law Review. Reprinted by permission.

Chayes, Abram, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976). Copyright © 1976 by the Harvard Law Review Association. Reprinted by permission.

Cooper, Edward H., Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903 (1971). Copyright © 1971 by the Minnesota Law Review. Reprinted by permission.

Cover, Robert M., For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 Yale L.J. 718 (1975). Copyright © 1975 by the author. Reprinted by permission of the author, and The Yale Law Journal Company and Fred B. Rothman & Company from The Yale Law Journal, Vol. 84, pp. 718, 722-728, 730-739.

Dam, Kenneth W., Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. Legal Stud. 47 (1975). Copyright © 1975 by the University of Chicago. Reprinted by permission.

Eckhoff, Torstein, The Mediator, the Judge and the Administrator in Conflict-Resolution, 10 Acta Sociologica 148, 156-167, 169-170 (1966). Copyright © 1966 by the author. Reprinted by permission.

Friedenthal, Jack H., A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure, 69 Calif. L. Rev. 806 (1981). Copyright © 1981 by the California Law Review. Reprinted by permission.

Fuller, Lon L., The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978). Copyright © 1978 by the Harvard Law Review Association. Reprinted by permission.

George, Lawrence C., Sweet Uses of Adversity: *Parklane Hosiery* and the Collateral Class Action, 32 Stan. L. Rev. 655 (1980). Copyright © 1980 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission.

Hazard, Geoffrey C., Jr. & Myron Moskovitz, An Historical and Critical Analysis of Interpleader, 52 Calif. L. Rev. 706 (1964). Copyright © 1964 by the California Law Review. Reprinted by permission.

James, Fleming, Jr., Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655 (1963). Copyright © 1963 by Mrs. Fleming James. Reprinted by permission of Mrs. Fleming James, and The Yale Law Journal Company and Fred B. Rothman & Company from The Yale Law Journal, Vol. 72, pp. 655-673, 675-676, 679-691.

Kaplan, Benjamin, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967). Copyright © 1967 by the Harvard Law Review Association. Reprinted by permission.

McCoid, John C., A Single Package for Multiparty Disputes, 28 Stan. L. Rev. 707 (1976). Copyright © 1976 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission.

Note, A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel, 76 Mich. L. Rev. 612 (1978). Copyright © 1978 by the Michigan Law Review. Reprinted by permission.

Note, The Finality Rule for Supreme Court Review of State Court Orders, 91 Harv. L. Rev. 1004 (1978). Copyright © 1978 by the Harvard Law Review Association. Reprinted by permission.

Rhode, Deborah L., Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183 (1982). Copyright © 1982 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission.

Scott, Kenneth E., Two Models of the Civil Process, 27 Stan. L. Rev. 937 (1975). Copyright © 1975 by the Board of Trustees of the Leland Stanford Junior University. Reprinted by permission.

Shapiro, David L., Some Problems of Discovery in an Adversary System, 63 Minn. L. Rev. 1055 (1979). Copyright © 1979 by the Minnesota Law Review. Reprinted by permission.

Shapiro, David L., Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721 (1968). Copyright © 1968 by the Harvard Law Review Association. Reprinted by permission.

Shapiro, Martin, Trial Courts and Appellate Courts — Fact-Finding, excerpted from Courts: A Comparative and Political Analysis 41-44, 49-56 (1981). Copyright © 1981 by the University of Chicago Press. Reprinted by permission.

Yeazell, Stephen C., From Group Litigation to Class Action, Part II: Interest, Class, and Representation, 27 U.C.L.A. L. Rev. 1067 (1980). Originally published in 27 U.C.L.A. L. Rev. 1067, copyright © 1980, the Regents of the University of California. All rights reserved. Reprinted by permission.

Zeisel, Hans, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710 (1971). Copyright © 1971 by the University of Chicago Law Review. Reprinted by permission.

Contents

Chapter 1

The Character of Adjudication

*The Mediator, the Judge and the Administrator in Conflict-Resolution**

Torstein Eckhoff

I. Introduction

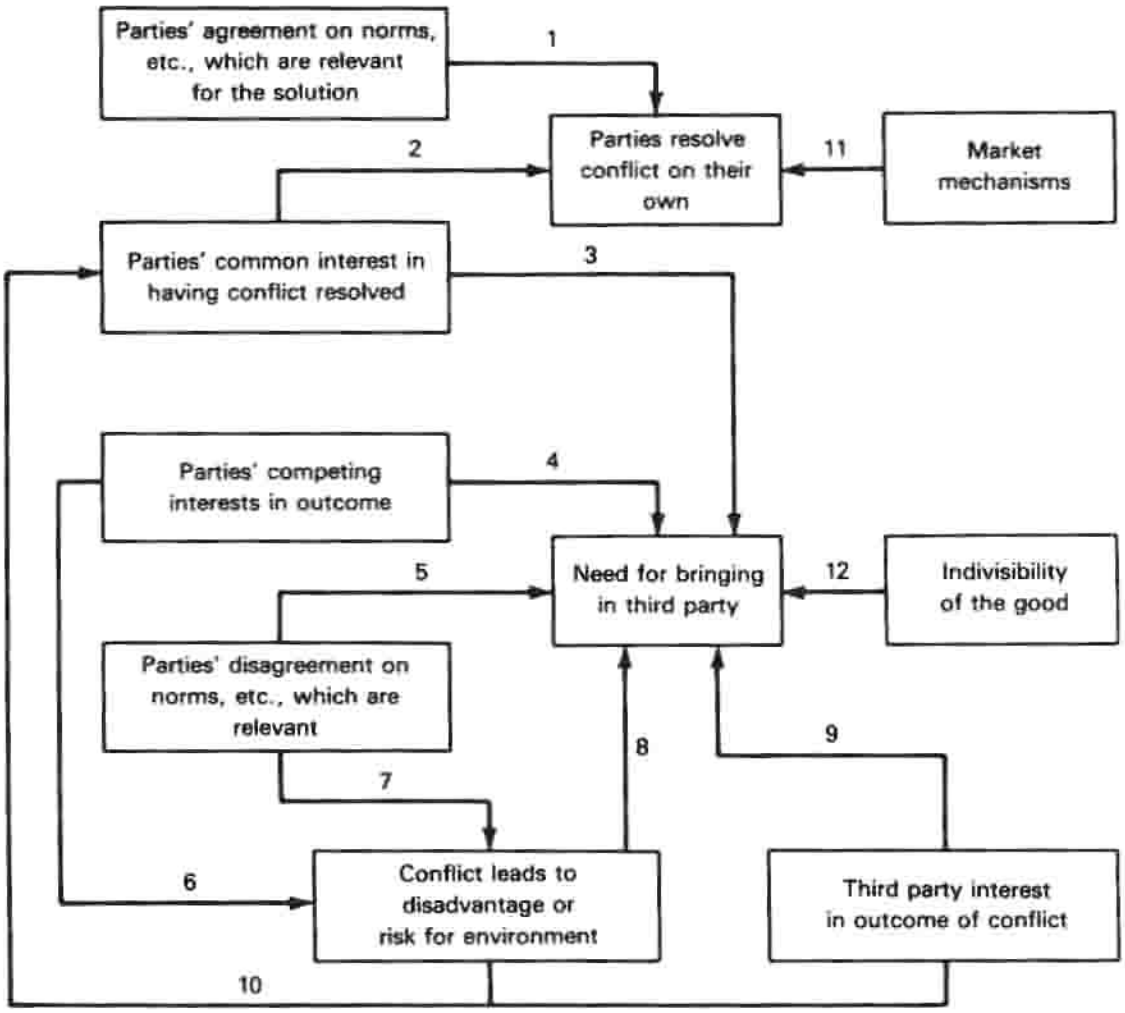
Conflicts between people are sometimes resolved by a third party who helps to bring about a reconciliation or makes a decision by which they abide. The conflict-resolver, who in the following will be referred to as the "third party," can be a father or mother who stops a quarrel between children, or a woman who chooses one of two rival suitors, or a court which settles a legal dispute or the United Nations which resolves an international conflict. The purpose of this article is to discuss some of the conditions for attempting such third party intervention and for bringing about positive results. . . .

[The following summarizes the factors or conditions under which the parties may resort to third party intervention. The numbers in parentheses refer to the arrows in Chart 1-1.]

The greater the agreement between the parties concerning normative factors which they consider relevant for the solution, the greater is the probability of their being able to resolve the conflict on their own and the less need is there for bringing in a third party (1).

The greater the common interests of the parties for having the conflict resolved, the more probable is it that they will engage in

* *Source:* 10 Acta Sociologica 148, 156-167, 169-170 (1966).



[Chart 1-1]

resolving the conflict *either* on their own, *or*, if that leads to difficulties, by bringing in a third party (2 and 3).

The stronger the competing interests the parties have in the outcome, and the more they disagree on normative factors which they consider relevant, the less probable is it that they will be able to resolve the conflict on their own, and the greater need they have for bringing in a third party, presuming that they have common interests in having the conflict resolved (4 and 5).

The relationship of antagonism between the parties can make their environments interested in having the conflict resolved — if necessary with the help of a third party (6, 7 and 8). The third party may himself be interested in the conflict being resolved (9). His reactions and those of the environment may have the consequence that the parties become more interested in the conflict being resolved (10).

In the diagram it is also indicated that market-mechanisms facili-

tate conflict-resolution by the parties themselves and reduce the need for third party intervention (11), whereas the circumstance that a disputed good is indivisible operates in the opposite direction (12).

Even if the parties (or their environments) have a *need* to have the conflict resolved by a third party, it is not certain that they [will] find someone suited to undertake the assignment. And if they find someone, it may *cost* so much (in terms of economic expenditures, delays, loss of prestige, etc.) that it does not pay. It is, naturally, also possible to conceive of cases where a third party — either on his own initiative or because the parties or their environments ask him — tries to resolve the conflict but does not succeed. A third party's potentialities for resolving conflicts and the parties' (or others') opinions of his suitability, depend both on characteristics of the conflict and of the third party and the procedure he follows. The connection between these factors will be discussed in the next section. . . .

III. The Mediator, the Judge and the Administrator

Mediation consists of influencing the parties to come to agreement by appealing to their own interests. The mediator may make use of various means to attain this goal. He may work on the parties' ideas of what serves them best, for instance, in such a way that he gets them to consider their common interests as more essential than they did previously, or their competing interests as less essential. He may also look for possibilities of resolution which the parties themselves have not discovered and try to convince them that both will be well served with his suggestion. The very fact that a suggestion is proposed by an impartial third party may also, in certain cases, be sufficient for the parties to accept it. . . . The mediator also has the possibility of using promises or threats. He may, for instance, promise the parties help or support in the future if they become reconciled or he may threaten to ally himself with one of them if the other does not give in. A mediator does not necessarily have to go in for compromise solutions, but for many reasons he will, as a rule, do so. The compromise is often the way of least resistance for one who shall get the parties to agree to an arrangement. . . . [I]t may also contribute to the mediator's own prestige that he promotes intermediate solutions. Therewith he appears as the moderate and reasonable person with ability to see the problem from different angles — in contrast to the parties who will easily be suspected of having been onesided and quarrelsome since they have not managed to resolve the conflict on their own.

In order that both parties should have confidence in the mediator

and be willing to cooperate with him and listen to his advice, it is important that they consider him impartial. This gives him an extra reason to follow the line of compromise. . . . For, by giving both parties some support, he shows that the interests of one lie as close to his heart as those of the other. Regard for impartiality carries with it the consequence that the mediator sometimes must display caution in pressing the parties too hard. That the mediator, for instance, makes a threat to one of the parties to ally himself with the opponent unless compliance is forthcoming, may be an effective means of exerting pressure, but will easily endanger confidence in his impartiality. This can reduce his possibilities for getting the conflict resolved if threats do not work and it can weaken his future prestige as a mediator.

The conditions for mediation are best in cases where both parties are interested in having the conflict resolved. The stronger this common interest is, the greater reason they have for bringing the conflict before a third party, and the more motivated they will be for cooperating actively with him in finding a solution, and for adjusting their demands in such a way that a solution can be reached.

If the parties, or one of them, is, to begin with, not motivated for having the conflict resolved, or in any case not motivated to agree to any compromise, such motives must be *created* in him, for instance with the help of threats or sanction. Cases may occur where the parties (or the unwilling one of them), may have a mediator forced upon them, and under pressure of persuasion from him or from the environment, agree to an arrangement. But mediation under such circumstances presents difficulties, among other reasons, because it demands a balancing between the regard for impartiality and the regard for exertion of sufficient pressure. If the conditions for resolving the conflict by a judgment or administrative decision exist (cf. below) these will, as a rule, be more effective procedures than mediation in the cases described here.

That normative factors are considered relevant for the solution, can in certain cases be helpful during mediation. By referring to a norm (e.g., concerning what is right and wrong) the mediator may get the parties to renounce unreasonable demands so that their points of view approach each other. Even if the parties do not feel bound by the norms, it is conceivable that others consider it important that they be followed and that the mediator can therefore argue that a party will be exposed to disapproval if he does not accommodate.

The norms will be of special support for the mediator if the parties are generally in agreement on their content and are willing to submit to them, so that the reason that there is a conflict at all can be traced back to the fact that the norms do not cover all aspects

of the difference. The remainder which is not covered will then have the features of a fairly pure conflict of interests where the norms have brought the points of departure nearer one another than they would otherwise have been.

If, however, the parties consider the norms as giving answers to the questions being disputed, but disagree on what the answers are, the possibilities for mediation will, as a rule, be weakened. In the first place, the probability that the conflict will at all be made the object of mediation is reduced, among other reasons, because bringing it before a judge will often be possible and more likely in these cases. Secondly, mediation which has been begun may be made difficult because of the parties' disagreement concerning the norms or the relevant facts. This is the more true the more inflexibly the opinions are opposed to each other and the more value-laden they are. The parties' resistance to compromising on questions of right or truth . . . makes itself felt also when the mediator appears in the arena. Perhaps the presence of a third party will make the parties even more set on asserting their rights than they otherwise would have been. The mediator can try to "de-ideologize" the dispute by arguing that it is not always wise to "stand on one's rights" and that one should not "push things to extremes," but go the "golden middle road." Sometimes he succeeds in this and manages to concentrate attention on the interest-aspects, so that the usual mediation arguments will have an effect. But it may also go the other way. The mediator lets himself be influenced by the parties to see the normative aspects as the most important, and ends up by judging instead of mediating. And even if he does not go so far, his opinions concerning norms and facts may inhibit his eagerness to mediate. In any case, it may be distasteful for him to work for a compromise if he has made up his mind that one of the parties is completely right and the other wrong.

Hoebel's survey (1954) * of conflict-resolution in various primitive cultures confirms the impression that conditions are, generally speaking, less favorable for mediation than for other forms of conflict-resolution when the conflicts are characterized by disagreements about normative factors. Most of the third party institutions he describes have more in common with what I in this article call judgmental and administrative activity than with mediation. The only example in Hoebel's book of the development of a pure mediation institution for the resolution of disputes which have a strongly normative element, is found among the Ifugao-people in the northern part of Luzon in the Philippines. This is an agricultural people without any kind

* A. E. Hoebel, The Law of Primitive Man (1954).

of state-form but with well developed rules governing property rights, sale, mortgage, social status (which is conditional on how much one owns), family relations, violation of rights, etc. Conflicts concerning these relations occur often. If the parties do not manage to solve them on their own, they are regularly left to a mediator, who is called a *mokalun*. This is not a permanent office that belongs to certain persons, but a task to which the person is appointed for the particular case. In practice the *mokalun* is always a person of high rank and generally someone who has won esteem as a headhunter. He is chosen by the plaintiff, but is regarded as an impartial intermediary, not as a representative for a party. The parties are obligated to keep peace so long as mediation is in progress and they may not have any direct contact with each other during this period. The *mokalun* visits them alternately. He brings offers of conciliation and replies to these offers, and he tries, with the help of persuasion, and also generally with threats, to push through a conciliation. If he attains this, he will receive good pay and increased prestige. If the mediation is not successful, the conflict will remain unresolved and will perhaps result in homicide and blood feuds, for the *mokalun* has no authority to make decisions which are binding on the parties.

It is easy to point to features in the Ifugao culture which have favored the growth of such a method of conflict-resolution. On the one hand, there has obviously been a strong need to avoid open struggle within the local society, among other reasons, because the people were resident farmers who had put generations of work into terraces and irrigation works. On the other hand, there was no political leadership and no organized restraining power, and the conditions were therefore not favorable for conflict-resolution by judgment or coercive power. Nevertheless, it is noteworthy that the mediation arrangement functioned so well as it did, considering that it was applied to conflicts where divergent opinions of right and wrong were pitted against each other. It is natural to make a comparison with our present international conflicts, where the conditions are parallel to the extent that the danger for combat actions and the absence of other kinds of third party institutions create a strong need for mediation, but where the mediation institutions so far developed have been far less effective.

The *judge* is distinguished from the mediator in that his activity is related to the level of norms rather than to the level of interests. His task is not to try to reconcile the parties, but to reach a decision about which of them is right. This leads to several important differences between the two methods of conflict-resolution. The mediator should preferably look forward, toward the consequences which may follow from the various alternative solutions, and he must work on