NEGOTIATIONS AS A MODE OF DISPUTE SETTLEMENT: TOWARDS A GENERAL MODEL

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In a previous essay I sought to make a distinction, not an original one, between two processes of dispute settlement: adjudication, and negotiations (Gulliver, 1969: 17). This was not intended as an absolute distinction, for clearly there are certain features common to both. But I was emphasizing what seems to be a key factor: the existence or absence of a third-party adjudicator. Whilst recognizing that this distinction is not acceptable to some scholars in the sociology of law, and that some would not wish to give such importance to that key factor and to other associated processual characteristics, it is nevertheless worthwhile to examine further the processes of negotiation. There are at least two reasons for this. First, anthropologists have given rather little attention to the description and analysis of negotiations in the variety of societies and cultures which is their concern. Secondly, processes of negotiations occur in all societies, including of course our own Western ones, and I believe that there are common patterns to them, cross-culturally, which merit attention.

This paper is offered as a tentative attempt, with a few illustrations, to sketch out a model of negotiation processes. It is a preliminary statement only, arising out of research which is as yet incomplete, and references to the literature are therefore deliberately kept to a minimum, pending further elaboration.

I begin with a simple case (deliberately so chosen) which was recorded among the Arusha of northern Tanzania.[1] A man, Ngatieu, came to an arrangement with his cousin, Moruo, his mother's brother's son, whereby Moruo would keep on his farm Ngatieu's four cattle and three goats. As was customary, the agreement was that Moruo would be rewarded for his services by the milk of the animals and a calf in due course. Two months later, after an absence from the Arusha country, Ngatieu visited Moruo's farm and discovered that one of his animals — a steer — was missing. Moruo, the herdsman, reported that it had strayed and could not be found. Ngatieu was disinclined to believe this and made enquiries locally.

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He soon learned that Moruo had slaughtered the animal and sold some of the meat for cash with which to meet a debt. Ngatieu returned to the farm and accused Moruo of this. Fairly quickly Moruo admitted to his offense and offered to replace the slaughtered beast and to pay a sheep in addition to Ngatieu.

Among the Arusha people it is agreed that when a stolen animal is slaughtered it should be replaced with an equivalent animal, together with a compensation payment of three more of the same kind (or two if the offender is a kinsman of the owner). Theft of livestock is considered a serious matter. Thus Moruo's offer was well below normative expectations. Ngatieu angrily refused his cousin's offer, and he left the farm with the matter unresolved. His other animals remained there, still to be tended by Moruo. Ngatieu first discussed the affair with his close associates — his near patrilineal kin — and then, accompanied by one of them, went to consult with the spokesman of his lineage. A spokesman is chosen by the men of the lineage as a permanent counsellor to give advice and to act as advocate when disputes arise.[2] The spokesman agreed to take up the case with Moruo and his lineage counsellor, and to try to arrange a meeting between the two sides. Eventually it was agreed to hold a meeting at Moruo's farm. Ngatieu went there accompanied by his spokesman, one of his brothers, and a more distantly related but notable member of the lineage. They met Moruo's party, comprising Moruo, his lineage spokesman, a paternal cousin, and another kinsman who was an influential neighbor. No other people were present, for the two spokesmen had agreed that a private meeting was more likely to achieve a settlement. Either party could, however, have sought a more formal, larger, and public meeting had this been thought more advantageous in the circumstances.

Moruo, the defendant, opened the proceedings by immediately admitting his offense and offering (as he had previously) to replace the slaughtered steer and to pay a sheep in compensation. Ngatieu and his spokesman refused, demanding the standard two steers as compensation. Eventually, after a good deal of argument and bargaining, it was agreed that Moruo should pay compensation of a male calf in addition to replacing the original steer. Both animals were formally handed over to Ngatieu, with the other men as witnesses. The rest of his animals were brought over from the nearby field and paraded before the men, so that it would be known which were his stock. Ritual reconciliation was performed, and some

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beer was drunk together. Ngatieu and his associates departed, leaving behind all his animals which Moruo was to continue to herd in continuation of the original agreement.

The dispute was settled by this particular outcome for a number of reasons. In the first place, Moruo could scarcely deny his offense: it was too obvious that he was guilty and no mitigating conditions were produced. Attempt to claim innocence would only have exacerbated the matter to his disadvantage. On the other hand, Moruo wished to avoid as much as possible the consequences of his action: that is, to pay as small a compensation as possible. Ngatieu sought his full normative rights as the injured person; but in the end neither he nor his supporters felt able to continue to insist on this. A compromise was reached to which both parties were willing to agree, and which was put into effect immediately. Ngatieu's weakness lay in the fact that he had little prospect of finding someone else to tend his animals if he were so to antagonize Moruo that Moruo would refuse to continue the herding agreement. Previously Ngatieu had put his animals with his sister's husband; but the two men had quarrelled and Ngatieu had had to remove them from his brother-in-law's farm. Ngatieu had no other kinsman who had adequate pasturage on his farm sufficient to accommodate more livestock.[3] Like all Arusha, Ngatieu was unwilling to put his valuable stock with some non-kinsman (even should such a man be willing), who would make a higher demand for the service and would be less susceptible to control. Ngatieu could not take his animals to his own farm: he had hoed up the only paddock there and turned it into a coffee plantation, and his only son capable of herding work had started in school and was unavailable.

Moruo was, of course, well aware of this and took advantage of it to hint (threaten is too strong a word) at an end to the herding agreement if Ngatieu pressed too strongly for compensation. Yet it was to Moruo's advantage also to retain that arrangement for he obtained extra milk and the promise of a calf. Both men wished to maintain the mutual advantages of continued kinship relations with the potential of cooperation, assistance, and support. Both therefore wished to reach some agreement which would allow this. Thus each disputant and his associates operated with strengths and weaknesses as negotiations were conducted to the end of a mutually acceptable, workable settlement.

The main features of this case can be summarized: (1)

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After the protagonists were unable to solve their disagreement between themselves, an agreed arena was found where negotiations could occur. Each disputant brought supporters, but there was no third-party participation of any kind. (2) There was tacit agreement on the mutual advantage of reaching a settlement: the advantage of continued opportunity to maintain valuable cooperation and assistance as culturally postulated by the close kinship link. (3) The nature of the dispute was agreed throughout — compensation for theft — and no other complications were raised. This is why it was a simple case. (4) The norms or rules relevant to the case were clear and, in principle at least, not contested. (5) Within this framework of established agreement there remained room for maneuver and bargaining as each side sought its maximum advantage. (6) As a result of bargaining, an agreed settlement was reached that, in those particular circumstances, was acceptable to both parties, even though each would have preferred something better for himself. (7) The settlement was put into effect straightaway, and before witnesses; and it was made manifest by symbolic acts: specific ritual and commensal beer-drinking.

This particular dispute is taken from my anthropological field notebooks as a simple illustration of the treatment of a case without recourse to courts, judges, and authority. There are many quite similar simple cases in any society, though many that are more complex and difficult. This case shows the principal features involved: an arena, a desire to make a settlement, agreed definition of the nature of the dispute, identification of appropriate norms and rules, a process of bargaining, an agreed settlement, and formal recognition and execution of the settlement. In negotiations any or all of these features may be problematic in a particular case, and not readily established. Some may in fact never be quite clarified, even the definition of what the dispute is about. Apart from the final settlement, these features are not necessarily determined quite in the order I have given here; and in the common confusion of events (sometimes a contrived confusion) there may be overlapping of stratagems and efforts regarding each one. Particular cultural contexts of disputes affect all this, facilitating at some points and hindering at others.

THE INITIAL PHASES OF NEGOTIATIONS

A dispute proper only becomes imminent when dyadic argument fails. For example, two kinsmen or neighbors fail to agree; two businessmen are unable to fix the matter by

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letter, telephone, or lunch at the club. One or both parties can no longer tolerate the situation as it stands. Two things are now necessary in order to initiate negotiations: both parties have to want, or at least accede to, an attempt to reach a settlement, and an arena has to be discovered where the attempt can be made. Very often a mutual desire to obtain a settlement is built into the very situation itself, for continued operation of enterprise requires it. Take two businessmen: the one whose firm makes machinery must have nuts and bolts from the other who supplies them, or his production line may be seriously held up since (for a number of reasons) he may not immediately be able to find another supplier. The supplier of the nuts and bolts, on the other hand, may not be able to find an alternative purchaser. Both men may, apart from the particular issue in conflict, be happy to continue profitable dealings with each other. So they are well disposed to try and sort out the problem of delivery dates, quality, price, or whatever the difficulty may be. Or two kinsmen wish, or are even more or less compelled, to continue the kind of cooperation and interdependence involved in their ascribed relationship; but this is threatened, or at least made difficult, because of an unresolved disagreement. That is, a pre-existing relationship and a mutual wish to continue it, at least for the moment, induce the two parties to seek a settlement of their problems, although the difference is acute enough that, on their own, they cannot or prefer not to deal with it. Even if there is no wish to continue any relationship, there may well be a strong desire to clear up the matter and discover what one's liabilities are. Insurance companies, for instance, like to clear their books of outstanding claims, for profit-seeking business cannot easily tolerate a lot of unknown financial obligations to claimants, and they wish to establish a reputation for prompt dealings (Ross, 1970: 127). An individual often needs to know what compensation he can get for some loss imposed on him: he cannot wait, and a bird in the hand is often worth two in the bush (Gulliver, 1963: 233).

Quite often, however, whilst one party seeks a means to settlement, the other does not. The latter may not care, he may hope to gain by inaction, he may just be intransigent. There are a number of stratagems that can be used to bring pressure to bear on the recalcitrant party, depending on cultural possibilities and the nature of the relationship, if any, between the parties. Pressures may be brought through the

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common group to which both belong: the business association, the lineage, the religious congregation, the political alliance, for example. Threats may be made, and even carried out, to interfere with other interests of the recalcitrant party: to strike or to work-to-rule, to refuse cooperation in some other sphere where the two parties are in multiplex relationship. Appeals may be made to influential public opinion, with references to the public good, honor, saving face, morality, or whatever ideology seems useful. In some societies force may be threatened, and used, or outside authority involved. There may be persons in institutional roles, such as the Nuer leopardskin chief or the Department of Labor official, who can to some extent act as influential go-betweens at this stage. There may be persons who have valued connections with both parties: here the anthropological prototype is the man who is kinsman to both disputants, who is likely to be trusted by both and to have an interest in getting the matter settled and his own divided loyalties resolved.

I merely wish to be suggestive of the kind of action that can develop. On occasion there may be a long drawn-out process before success is gained; sometimes there may be failure, so that positive negotiations never get started. The abortive strike was a common feature of earlier industrial relations in Western countries, as powerful employers held out until impoverished workers acquiesced. Anthropologists have reported cases where, in feud-like situations, one party has been relatively too weak, or just could not get at the other party, to force a confrontation. The embryonic dispute is then in effect settled wholly in favor of the obstinate, stronger party.

The point to be made here is that by seeking to turn the dispute into what I call a dispute proper and putting it into the public domain, the initiating party precipitates a crisis. The former disagreement is given new, and maybe different, importance as other people are drawn in and the declared intention is to force the matter to a settlement. Each party will appeal to his own potential supporters; leaders may emerge who may not be the original disputants. The matter at issue can be changed as all this goes on, since the others now involved may perceive different aspects which affect them or possibilities to their own advantages; whilst more experienced or skilled supporters can suggest new arguments and stratagems. Not uncommonly, the original disagreement may have been rather

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inchoate, its implications ill-examined. Raising it to dispute level usually calls for increased clarification and specification.

At this time negotiations have already in reality begun, as stands are taken, issues are presented, support sought, and strengths asserted and tested in a preliminary but possibly decisive manner. Advantages may be gained or ceded that are not thereafter recoverable. For example, the employer who goes into a strike situation saying that he can give no more than a 5% wage increase, will almost certainly find it very difficult to give less than that although later he discovers that the workers might have been induced to accept only 4% after a period of attrition. As research into negotiations concerning insurance claims have shown, an initial offer of compensation is virtually going to be a minimum, for the claimant knows that the insurance company can pay at least that amount. Conversely the claimant's initial statement of injuries and his demand become the maximum possible, and probably susceptible to some decrease during negotiations. Somewhere in between those limits lies the eventual sum to be agreed and paid. So it behooves both parties to be careful in making opening bids; yet some bid is usually required when one party forces the issue actively. I have given quantifiable examples, but similar considerations affect other initial situations where issues are more complex and less measurable. If a son-in-law goes into the start of a dispute admitting that some bridewealth remains owing (but that there is good reason why he should not pay it now) he cannot later assert that he has met his total obligations. The party who precipitates the crisis may be deliberately seeking to provoke his opponent to a stand of this kind, so that he may assess his own strategy in the negotiations to come. But of course he must accept the liability of having to take a stand also at that time.

At this crisis point the matter in dispute may be somewhat clarified. But it may also be further obfuscated by new details, accretions of issues, and ideology. Seeming irrelevancies may get caught up, particularly of an affective kind. Other people jump on the bandwagon as they see their own interests affected and as they pursue their own advantages. Political issues, for instance, and ambitious politicians, often attach themselves to disputes in simpler and highly complex societies alike. Whatever precisely happens, dependent on circumstances and strategies, and the relation between cool heads and unguarded emotions, the nature of the dispute is likely to be altered, even

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radically. Yet its more precise definition in the context of seeking a settlement usually depends on further negotiations after the arena has been fixed and the encounter begun.

The choice of arena may be fairly obvious as some regular pattern is followed. For instance, each disputant and his lineage supporters can meet on an inter-lineage basis with due form; the village square, or the men's house, may offer an ever-ready forum; the house of the ritual go-between or the office of the administrative mediator may be a convenient place. The arena is not always clear; and even if it is, one or both parties may still seek a different arena because of some perceived advantages. There may be an open choice of institutionalized arenas, each of which offers rather different rules and strategies, and perhaps different choices of supporters. Elsewhere I have described the range of choices available to the Arusha people of Tanzania: parish assembly, age-group conclave, patrilineal moot, intralineage conclave, mediation by the headman or by the chief, formal court. Some or even all of these may be possible, according to the nature of the dispute and the disputants (Gulliver, 1963: 173ff.). The search for a mutually acceptable arena can delay negotiations and embitter relations. The standard arena may be, or may be thought to be, unduly preferential to one's opponents.[4]

An apt illustration of these problems comes from the industrial strike which occurred in 1970 at the Pilkington glass factories in St. Helens, Lancashire. Industrial relations at Pilkingtons had not hitherto been poor; the workers there were noted in nearby Liverpool for their lack of militancy. Yet grievances had been accumulating and little seems to have been done to acknowledge and deal with them, as a notably paternalistic, puritan ethic firm and a well-entrenched, bureaucratic trade union continued in their set ways. The strike, that is the precipitating crisis, began after a complaint about alleged underpayment of wages in one of the factories. Very soon afterwards, as the first strikers were joined by workers from some of the other Pilkington factories, the dispute turned into one about wage rates generally, with a strikers' demand for higher pay. Later, as many more Pilkington workers in that town (and some in Pilkington factories elsewhere) joined in, the demanded increase in wages for all employees was raised. Then a new issue developed between the strikers, local members of the union, and the national executive of that union whether or not the strike should be declared an official one, with full union

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support, strike pay, and so on. Gradually the employers, sticking to a wage offer below that of the strikers' demand, virtually withdrew to the sidelines as the principal disagreement turned on the adequacy of union representation of the workers' interests, and on who should negotiate with Pilkingtons, and how, over wages and conditions. There were at least three parties striving to gain standing and influence, and a great flood of propaganda and ideology.

The fact that the strike lasted for seven weeks (unique in that town and industry) is explainable by (1) the failure to agree what the dispute was really about, and (2) failure to find an acceptable arena where negotiations could occur. The strike threw "a number of pre-existing features of [the] situation into sharper relief. People start talking and thinking about things they have never really thought and talked about before. Or if they have thought and talked about them it has been in a desultory abstract way — the way people talk when there is no sense of urgency, no possibility of action" (Lane and Roberts, 1971: 158). Attempts were made to demonstrate the strikers' opinions, to reach preliminary agreement as to the issues, and to find some acceptable arena, through several mass meetings (at some of which union officials were shouted down, and even manhandled), and meetings between leaders of the unofficial strike committee and local union officials. These were quite unsuccessful, and indeed they stimulated mutual misunderstanding and mistrust. The employers and the union officials were scarcely in disagreement, both coming to favor a three pound pay raise conditional on a return to work. In the end no encounter occurred because the parties "were not agreed as to what to fight about. In withdrawing to positions based upon quite different issues the participants were not deliberately attempting to be obstinate and intransigent. What was sincerely felt to be a real issue by one party was genuinely felt to be irrelevant by others" (Lane and Roberts, 1971: 236).

This, then, was a real case of failure, and the crisis (the strike) ended as workers gradually decided that the loss of pay was too severe to be borne longer. The whole affair was, of course, a most complex one, involving thousands of strikers, dozens of shop stewards and union officials, employers' representatives, a national trade union and the Trades Union Congress, local and national news media, and national political considerations. However, it was not primarily the complexity which produced stalemate (or, rather, a settlement by default

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favoring the employers), for both before and since even more complex strikes, involving larger numbers of workers, were settled in Britain as a result of negotiations in an agreed arena.

Once the arena is agreed — but sometimes before that in effect — the two parties can meet in deliberate encounter. The first requirement then becomes the exchange of information as in some way or other each party declares or affirms its position, makes its claim, and provides evidence and argument in support. This is obviously a prerequisite to bargaining. But there is more to it than that. Each party needs to discover what and how much the other knows, what construction it puts on that, where its chief emphases lie, and what its strategy is. There is a probing of the validity of alleged fact and of the strengths and weaknesses of one's opponents.

Secondly, it is necessary for the parties to reach agreement on the definition of the matter in dispute. Despite any preliminary agreement of the kind I have already mentioned, we cannot simplistically assume that the parties do agree on this; nor may we assume that the overt cause of the disagreement is the real matter that has to be negotiated. For example, an apparently simple case of a creditor's claim for the repayment of a debt may in effect be a matter of dispute over relative status and quite other rights between the disputants. A boundary dispute between adjacent farmers may really be a problem of inheritance or of landlord-tenant relations. A minor offense may be seized on in order to force the offender to come into the public arena where he may be confronted with a more serious matter which he is avoiding. A frustrated complainant may deliberately commit a petty offense in order to provoke his reluctant opponent to action. Once in the public arena, the real issue may be broached and defined.

Clearly, serious negotiations cannot go further until the parties agree what the particular issues are; but these are often definable in more than one way, and each party seeks the definition and covering rules which best suit its own advantage. Examples can bring out this point.

In the well known case of the wildcat strike described by Gouldner (1965) which occurred in the United States in 1950, the management side was consistently concerned to define the issues as what it called "grievances." These were demands by workers which could be legitimated and negotiated with reference to the existing contract between management and em-

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ployees. That is, management wanted to take a stand on that contract, though it was (under pressure) prepared to discuss differing interpretations of parts of the contract. On the other hand, management was not willing to negotiate in terms of what it called workers' "complaints": that is, matters falling outside the contract. This was partly because management felt on safer ground by sticking to a legalistic argument; but it also wished to avoid the raising of issues, and negotiations on them, which touched on what were considered to be the prerogatives of management in running the business efficiently to maximize profits. Such prerogatives involved, for instance, the "election and placement of supervisors, types of product manufactured, schedule of operations" (Gouldner, 1965: 109). In fact at least some of the causes of the strike related to workers' accumulated dissatisfactions in precisely these areas. The ultimate settlement had to, and did, deal with the appointment of particular supervisors, and with work rates associated with investment in new machinery. Nevertheless the management was fairly successful in maintaining its own definition of the issues in dispute and the right to run the business as it best saw fit. The fundamental role, power, and prerogative of management were not therefore directly questioned.. On the whole those American workers were not inclined to question free enterprise, capitalist business operations; yet some of their claims did threaten to do just that. By their definition of the dispute the management headed off any real confrontation of that kind. Additionally, the reference to existing contractual arrangements was preserved for the future as standard procedure in labor relations in that firm. The achievement of this was, in the event, made easier because the striking workers were principally concerned with their own immediate demands, and then getting back to work and to earning wages, rather than with logical pursuit of those demands into an examination of basic industrial relations.

In a dispute which I observed in an African community (Ndendeuli) in southern Tanzania,[5] a young man had just returned home after a year or so as a migrant worker. His father-in-law sought a share of the savings which the young man was thought to have brought back. Apart from a courtesy gift to his wife's parents (a generalized obligation to a superior affine) the young man refused. In the subsequent dispute negotiations the father-in-law and his supporters argued that the demand was for a legitimate further installment of bride-

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wealth. The son-in-law on the contrary argued that he had previously completed all bridewealth payments and that what was in dispute was the size and nature of his gift to his affine. In that society the final completion of bridewealth (usually a series of cash payments) is not clearly marked. But whereas bridewealth payment is intrinsically bound up with marriage and paternity, gifts between affines concern the recognition and maintenance of affinal relations, and scarcely touch the marriage itself. The marriage is more fundamental, and compulsion to secure it by bridewealth payment is strong. Affinal relations are not unimportant, but there are many alternatives to any one affinal link: other affines, and a range of cognatic kinsmen, all offering much the same social advantages. Compulsion to secure an affinal relationship is therefore rather less strong, both normatively and pragmatically. In the end, in this case, the definition of the father-in-law — a dispute over bridewealth — gradually gained dominance in the negotiations, thus giving marked advantage to him. This may have been justified in that context, as the father-in-law and his supporters asserted. But it may not have been so at all. The young man could not bring conclusive evidence sufficient to vindicate his assertion that bridewealth had been completed earlier. At least as decisive was the fact that the young man was under pressure from the mutual kinsmen of both disputants neither to prolong the dispute nor to appear selfish and ungenerous. With this definitional problem settled — albeit this was a gradual trend in the negotiations and it was not immediately allowed to be so settled — the participants in the meeting got down to consideration of the actual amount to be given to the claimant.

In these instances negotiations were already well under way when agreed definition was achieved, for to define a situation is to imply what can be done about it. The issues are set and often, as in those cases, narrowed down. In the American wildcat strike the management was able to avoid discussion of wider issues which, in reality, underlay some causes of the strike but which were embarrassing to the business firm. In the African case the father-in-law was able to avoid discussion and assessment of the state of affinal relations where the young man could possibly have demonstrated that he had hitherto been at least as punctilious as, or maybe better than, his wife's father in honoring obligations of assistance, cooperation, and courtesy.

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Another apposite bridewealth case comes from the Arusha of northern Tanzania.[6] Here it was abundantly clear that the payment had been only partly completed. Payment is in specifically named cattle and sheep, each of which is identified by symbolic penumbra; and the son-in-law could not pretend that he had given three of these animals. Instead he sought to define the dispute not in terms of bridewealth but with reference to generalized affinal kinship relations. (This was the exact opposite of the son-in-law in the preceding case.) First he insisted on, and demonstrated in detail, that he had consistently acted as a good son-in-law should, and that the affinal relations were active, advantageous ones to be mutually preserved. It came out, however, despite attempt at concealment, that not only had the son-in-law sufficient animals with which to pay bridewealth (a thing he had denied), but that he was intending to use them instead to buy a piece of land adjacent to his farm. The father-in-law had not known of this, and it appeared (at least to me as observer) that the younger man was put at a disadvantage. But in the course of negotiations in open, public moot the son-in-law and his supporters argued (1) that his present farm was a small one, too small to provide secure livelihood under prevailing economic conditions, whilst land for sale (especially so conveniently located) was scarce and becoming scarcer; and (2) that the father-in-law's insistence on obtaining bridewealth would effectively prevent purchase of that land. To prevent that, it was argued, would be highly unfriendly, not in keeping with good affineship. Furthermore, it would deprive the son-in-law of the opportunity to provide a proper livelihood for his wife and children — the daughter and grandchildren of the plaintiff. By defining the dispute in these terms, rather than as a straight case of bridewealth debt, and gradually getting it accepted, the son-in-law was in a good position to bargain over the final issue.

One may be inclined to dismiss this kind of thing as casuistry, special pleading, downright deception, and a number of other uncomplimentary epithets. Whilst the morality of it may perhaps be questionable — though we must certainly avoid ethnocentrism and self-satisfying abstract ethics of a no less questionable kind — the world is full of this kind of thing. Negotiations are not contained by simple moral rules, and in any event the moral rules are very often controversial as they apply to a particular dispute with its particular con-

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catenation of circumstances and issues. As a first approximation, disputants in negotiations are concerned to win, that is to gain as much and cede as little as they can. But further analysis will amplify and modify that statement, of course.

RULES AND NORMS IN NEGOTIATIONS

A simplistic assumption is that when disagreement occurs, or when it develops into a dispute proper, the essential thing is to discover the facts of the matter, then to identify the relevant rule or norm, and finally to apply it and to resolve the issue. All societies have their rules and norms which express accepted expectations of behavior, rights, duties, and morals, and therefore a dispute can be assessed against these and so dealt with. Most interestingly to novelists and social scientists alike, it is very seldom as straightforward as that. In the first place, rules and norms do not necessarily cover all eventualities. What is the rule governing the size of workers' pay? In a capitalist society there is none; or rather there are different versions of alleged rules, and it is obvious that strikes are not settled by these alone. Secondly, where there is a rule, it may be so vague or generalized that its precise application is unclear as the two parties interpret it differently according to their own standpoint and advantage. Even if the rule is more explicit, or sub-rules exist to take care of particularities, there remains room for genuine (as well as contrived) disagreement as to how it shall be applied to the specific, unique case. Disputants are not necessarily being immoral, unprincipled, shrewdly calculating, or plain obstinate, when they disagree; though all of these things they may also be.

Thirdly, rules and norms sometimes conflict, requiring mutually impossible obligations for people. Such conflict is not invariably or effectively governed by other rules, and divergent interpretations are possible. Fourthly, people may seek if possible to avoid a rule or norm that operates to their perceived disadvantage — by dissimulation, by open defiance, or by denial of the validity of the rule.

Fifthly, by definition, negotiation procedures involve no one with the obligation or right to determine what the relevant rule is and how it shall be applied to the particular case. That is a principal task of an adjudicator, whether he argues from a law book, common sense observation, political ideology, or merely from overriding authority. In negotiations no third-

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party *per se* exists, as each party proposes its own view of the applicable rule and its application. In some disputes there may never be agreement as to the rule and its application, though there can still be agreement on what should be done in the instance as a settlement. Agreement to disagree is sometimes vital to successful negotiations. One party may be strong enough to impose its own definition. Ultimately, however, what the parties are most likely to be after is a settlement of the dispute, and not specification of rules. The very fact that negotiations need not invariably turn on rules, that intepretation of them can remain incongruous, is important.

Are we then left with a conclusion that in negotiations there is a power struggle where eventually might, and cunning, is right? that threats and inducements are the natural order? that marketplace haggling is the prototype? Negotiators do sometimes act like that. The contrast with adjudication processes seem stark, especially if one is persuaded by the stereotype of the authoritarian judge, operating with a fixed, all-pervasive code of law, seeing that justice shall be done. Yet clearly it is not so, or not altogether so; and it is important not to overemphasize the difference between adjudication and negotiation. Students of jurisprudence have often pointed out not only the extreme generality of many of the laws quoted in courts, but the undeniable fact that adjudicators sometimes make up their minds on a decision and only then find rules and precedents to support and rationalize that decision. And yet, of course, there is someone there actually making a decision, a ruling, which has weight.

There can be few negotiations in which the parties fail to refer to and claim support from rules and norms. Whether one thinks of a contemporary industrial strike situation, or of African villagers sorting out their differences, the proceedings are full of such claims and righteous justifications. Two businessmen, who agree not to "throw the book" at each other but to approach their problems realistically as a purely economic transaction, will nevertheless not refrain from loaded references to economic, personal, and general ethics and standards. Whatever the significance, at least one cannot ignore this aspect of behavior for it is evidently deeply involved in what goes on. At a minimum, human beings appear to feel the need to justify, and to explain or explain away, their actions. Even a dictator calls his state a democracy, or he invokes the supreme ethic of divine right from God or from the proletariat.

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Social man is a rule-bearing man. A person may wish to avoid or break rules, at least in the particular case, or he may wish to change them. But he cannot ignore them. Tentatively, I suggest that norms and rules are essential symbols, collective representations, denoting sets of established interests, patterns of relationships, and forms of groups. Ultimately, but not necessarily consciously, an appeal to norm or rule is a symbolic act, a supercharged reference to part of approved, persisting social life, to order, to interdependence, and to a person's own self-identity as a social being. Where, as sometimes, the appeal to a norm is somewhat cynical or pragmatic, selectively referring to what supports or is held to support a claim, and denying what does not, this too is a symbolic act. I do not mean this in a necessarily mystical sense — though that too may be present where the symbol is part of some pervasive ideology of a religious or political kind — nor is there any implication of unimportance. Symbolic behavior is powerful, and it is seldom if ever absent. It is more than a mere language of discourse in negotiations, though that it is also.

To state the obvious fact that negotiation processes inherently involve norms, rules, customs, standards, is not nevertheless sufficient to explain their operation and significance. It is as important to avoid the Scylla that all is controlled by norms and rules, as it is to eschew the Charybdis that they are unimportant and that might is right.

In the conclusion of my book, *Social Control in an African Society* (1963), the hypothesis was suggested that dispute processes can be distinguished as juridical (rule struggles decided by a third party) or political (power struggles). That is too simple as well as inaccurate. Even the idea of a continuum with pure juridical and pure political as polar opposites does not help. The political element is too pervasive for such treatment. A somewhat similar dichotomy has been suggested between conflicts of interests and conflicts of values. A conflict of interests, it is held, occurs where two parties want the same resource but there is not enough for both. Here values are not contested, for the common desire for the same thing predicates a common evaluation of it, whether it be money, land, or honor. A conflict of values occurs where the two parties disagree specifically on the evaluation of some resource, of some right or obligation, over a norm or rule, and also over what in fact happened in some situation and how that should be interpreted. Conflicts of interest, it is argued, are dealt with

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by negotiations, and conflicts of values by judicial procedures and the declaration of a decision based on legal rules. This kind of argument has been put forward recently by Aubert (1969) and Eckhoff (1966), though it is not novel. Eckhoff goes so far as to state categorically that "decision by judgment is excluded" in what he calls "a pure conflict of interests," and that judgment "is related to the level of norms rather than to the level of interests" (1969: 175).

This may seem as persuasive as it is neat. Yet a judge in his court in this country may be — indeed, often is — faced with a conflict of interests case which he must decide; and so he does, with the full authority of his role. He does not, and ultimately cannot, refuse the case and order negotiations, though he may be prepared to encourage those and to listen to their results. In another society where the role of judge and institution of court are unknown, cases of conflicts of values are regularly dealt with by negotiations. It might appear that it is the mode of dispute settlement which in effect determines the defined nature of a case, or at least the way it is presented. Go to court and the matter is presented as an issue of norms, rules, and precedents; go to negotiations and people bargain over interests. Although the nature of the arena certainly influences presentation — and this requires cross-cultural investigation — it is undeniable that in negotiations, for example, values are often hotly disputed, are seldom taken for granted, and are commonly a source of conflict. Moreover it is quite usual that disputes (at least as they are argued) contain conflicts of both values and interests.

A simple distinction between interests and values is not the basic difference between negotiations and adjudication. With the greatest of caution, however, I do suggest that in adjudication there is a greater inhibition by norms and rules, whether these are specifically enunciated (as in the High Court in England) or only tacitly acknowledged largely by implication (as in local magistrates courts in that country). But in negotiations, values, norms and rules are more than merely stratagems of ideological appeal. Perhaps, though it appears problematical, they may be used in much the same way as in adjudication. First, however, it is necessary to see what is their processual significance.

Previously I have referred to the phase of seeking definition of the issue in dispute. This effectively involves reference to some set of norms and rules, for definition is not usually

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altogether possible otherwise. Even the grossest of sheer interests conflicts are hedged by standardized concepts of customary behavior, market price, status and reputation, honor, toleration, and the like. With this definition agreed on, but probably beginning during the process of definition, there follow two phases which may overlap each other. First, there is the establishment of the maximum limits to the area of dispute, in which the main emphasis is on differences between the parties; and secondly, there is the narrowing down of differences, in which the main emphasis is on negotiating areas (or segments) of tolerable agreement and, perhaps, open or tacit collusion to ignore certain other areas. In these three key phases the negotiators continually but not exclusively refer, overtly and covertly, to norms and rules.

Following Llewellyn and Hoebel (1941), any norm or rule, though it has its ideal, "pure" formulation, also has its tolerable leeways. These leeways represent the range of actual behavior which is permissible, tolerable, and scarcely blameworthy. The difference is between ideal behavior (which only saints and paragons perform) and the reasonable expectations of conduct which ordinary people can and should reach. There are in any society generalized ideas about these leeways, but in a particular dispute they have to be specified as applicable to it, once the appropriate set of norms and rules has been identified. An adjudicator can do this, directly or by implication, during the course of argument and in explanation of his judgment; and precedent may fairly clearly set some of the leeways. In negotiations where rulings are impossible and precedents are problematic (if not irrelevant), it is also necessary to seek leeways tolerable to the parties: the maximum limits of acceptable behavior, as well as the maximum limits to claims. How is this accomplished?

One lead comes from a method of establishing upper and lower limits as a viable range of bargaining in straightforward economic, quantifiable transactions. In a highly simplified model of this, one party can supply the other with some product, but the price of it is disputed. If the two are to reach agreement there must be some range, however small, within which both supplier and purchaser prefer to close the deal rather than seek alternative transactions. The supplier seeks an absolute minimum which is equal to what he could get elsewhere, less the estimated costs in time, effort, administration, transport, etc., required to secure the alternative sale. Say he can obtain

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$110 elsewhere but that it would cost $5 to achieve this; then his minimum is $105. The potential purchaser seeks an absolute maximum which is equal to the price at which he could get the product elsewhere, plus the extra costs required to reach that alternative. Say he can get the item for $110, but that it would cost him $5 to achieve this; then his maximum is $115.

There is here a viable range between $105 and $115 within which both parties would be satisfied, though clearly they have divergent interests concerning the point within that range which is to be finally reached. They must, then, first discover if there is such a range and what its limits are. Perfect information would settle this easily, but typically in the real world each party seeks to persuade the other of a definition of the range most advantageous to himself, and there may be other considerations also. If, however, the viable range can be discovered (not necessarily with precise, finite limits), then a deal is possible, though not inevitable, for competitive conflict may still defeat rationality.

It is the suggestiveness of this model, rather than its elaboration in actual transactions, that is important here. Two things are required in order to establish the range of negotiations, and these provide the two phases already mentioned. First, the specification of maximum differences with reference to the cluster of norms and rules agreed on. This phase, be it noted, consists not only of establishing the outer limits but also of communication by each party to the other of its relative strengths and degrees of importance and obduracy on the various issues concerned. "Non-negotiable" demands are in fact seldom that, though one or two of them may genuinely be so, unless the other party's strength is thought to be slight.[7]

There follows, often overlapping, the search for a viable range within which agreement is tolerable (not too disadvantageous) to both parties. Here the emphasis shifts from differences to agreements: bits of issues that can be dropped, others that in themselves are capable of tolerable resolution, and others where (still without agreement) there is seen to be, as in the economic model, a range within which neither party will be too dissatisfied. Deals, tacit or overt, are made: we will give way, or shift our position towards you on this and this issue, if you will give way or shift towards us on that and that. These tend to occur where differences are smaller and issues less crucial. Either party may have boosted such

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issues earlier largely to provide offers and prestations in this phase. But essentially there is a sorting out and elimination process so that gradually the parties are left with the final core differences. Strengths are not abandoned, of course, but mutual adjustments are made as the parties reaffirm their desire for an eventual settlement.

For example, in the first of the cited African bridewealth cases (Ndendeuli) the two parties agreed to define the issue as one of bridewealth debt. Thereafter they came to agreement successively that good affinal relations had hitherto existed (not altogether true in fact, but further dispute there seemed to be of no advantage to either side), that a particular total of money had already been given in bridewealth, that another outstanding debt was less important than the matter of bridewealth, and that the son-in-law had brought back savings earned abroad. I summarize these agreements briefly although in the event they were discussed and differences sorted out or tacitly and tactically ignored. Finally the two parties were left with two core differences: the exact sum to be paid by the son-in-law, and whether or not that sum would be reckoned as the final installment of bridewealth for that marriage.

In these phases the characteristic feature is on a *gradual* approach towards each other by the parties. Starting with separating disagreement, the parties agree to try to reach a mutually acceptable settlement. They agree on the arena; after a stand on differences they come to agree on a definition of the issues with reference to some norms and rules. In seeking for a viable range setting the outside dimensions of the issues they emphasize differences again; but thereafter there is a renewed approach as the area of consensus is enlarged and differences narrowed. Even where the core differences are glaringly obvious, and a possible solution is evident, the processual pattern is still most likely to be followed for it has the character of a necessary developmental ritual. Anthropologists are familiar with a comparable ritual-symbolic approach process in the betrothal and marriage patterns of many societies. There the eventual completion of the marriage is not necessarily in doubt, but the contracting parties who were "strangers" gradually assume essential new status relationships with each other. This aspect of negotiations as ritual requires further examination.[8]

At least sometimes, and perhaps usually, there is effective

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specialization among team members in accomplishing the requirements of these phases. If there is a principal disputant, he is likely (so it appears from empirical cases) to stand firm on his original claim as that has been defined. Other members of his team may be chiefly effective in presenting the extremes of the claims, the outer limits of the leeways, and showing the degree of importance and strength entailed. Other members tend to become prominent in that later phase where the emphasis turns to the narrowing of differences, the establishing of secondary agreements, and perhaps finally in the bargaining phase after the core differences have been isolated. In complex cases with a variety of issues, team members may specialize on one or other of these, and may even be chosen because of their known ability or viewpoint.[9] The team may be led throughout by the same individual — the principal disputant, the acknowledged counsellor, the senior man, etc. — who signals his or the team's acceptance of shifts and secondary agreements.

For example, in the second of the cited African bridewealth cases (Arusha) the extreme limits of bridewealth claim (the insistence on a strict adherence to the ideal norm) was made by the elder brother of the father-in-law. The counter-extreme (no payment of bridewealth at all) was made by the father's brother of the son-in-law; and neither was immediately controverted by his own principal. But when the phase of narrowing differences set in, neither of those supporters took much part and their extreme positions were modified by their principals. In that cultural context it was significant that each was the close, senior kinsman of his principal. Similarly those who took the initiative in the succeeding phase, and in the final bargaining, were the less closely related kin of each principal — those less involved in the marriage and its outcome. They could, without seeming disloyalty to their principal, and without necessarily committing him, make tentative suggestions for modifications and shifts on issues which the other party could take up if it desired. They could reach over to their opposite numbers in the other party and could bring pressures to bear on their own.

With the eventual identification of core differences, almost certainly now modified from their original form and strength, within the viable range where success is possible, the phase of final bargaining sets in. This can be prolonged if the viable range is still unclear in some respects as certain claims are

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incommensurate, or if team leaders and/or principals have become involved in interpersonal antagonisms and prestige-seeking competitiveness. On the other hand, if the preceding phases have been effectively carried through, this final bargaining can be rather brief since each party has more or less committed itself to something tolerably acceptable. Bargaining can be almost perfunctory, there being no particular rationale to any one point within the range and both parties appreciating the danger of a last minute failure. As Schelling has noted, there is so often "the intrinsic magnetism of particular outcomes" (1963: 70), such as splitting the difference, taking a round number, following some extraneous divider. African land disputes, when it has been at last agreed to divide the disputed area, seem often to be settled in the end by taking a path, a row of bushes, or a water channel, as the divider, though this may have little or no rational relevance to the balance between the disputants. However, not all final bargaining is so easily dealt with, for important points may well remain for one or both parties. A few cents per hour one way or the other may mean only peanuts to workers, but it may become a substantial sum to the firm which employs hundreds of men.

The agreed settlement of the dispute is then usually reiterated and given some emphasis in ritual form: the signed papers, hand shaking, commensal drinking and eating, specific symbolic performance (*e.g.*, oaths, religious sacrifice), and so on. In non-Western societies especially, the settlement is commonly put into effect immediately — the money is handed over, the land boundary marked by stakes — in the absence of documents or legal contracts.

This kind of analysis may inadvertently give the impression of a fairly well organized process, considered strategies, and an overall, rational scheme in the minds of negotiators. This can be the case when professional negotiators operate, with a wealth of experience and a procedure more or less unaffected by emotions raised by the dispute or by a spirit of competitiveness overriding considered advantage. Even professionals, such as trade union negotiators or lineage spokesmen who recurrently lead parties, are not immune from these irrational elements, and they may be straitjacketed by the prevailing ideology within which they have to work. Where negotiators are not so professional the whole process often follows no smooth path. That there appears to be a common pattern nevertheless is therefore noteworthy; and tentatively

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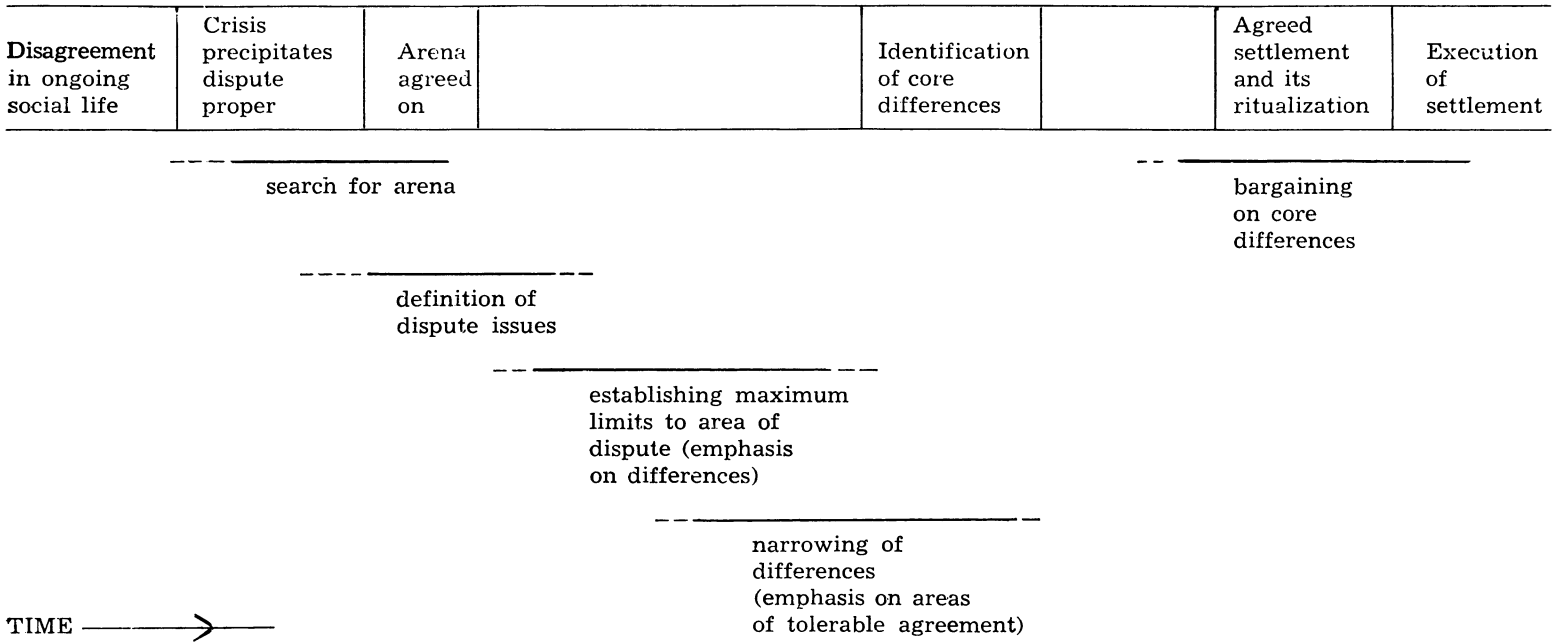
GENERAL MODEL OF THE PROCESS OF NEGOTIATIONS[a]



[a] The process may be stopped at any point in frustrated disagreement, and it may be restarted at some earlier point, perhaps with changed teams and a different arena. Time lengths of successive phases vary proportionally to each other in different cases. There may be several sessions of negotiations in the total process, with a minimum of one to determine the arena, and one thereafter in that arena.

I relate this to structural limitations, functional effectiveness, and ritual necessity. Yet the process of negotiations is seldom straightforward, going on clearly from phase to phase. Participants are not necessarily fully aware of the pattern of the whole, nor the place of each phase in it. So often, too, negotiations are more or less ad hoc, created to suit the developing situation of the dispute.

The accompanying diagram summarily shows the general phase model of dispute settlement by negotiations as this has been sketched out in this paper. In the discussion only passing references have been made to the behavior and strategies of each party, both among its own members and towards the other party. All that is, of course, at least half the story and an integral part of the whole process. Each phase, and the overlapping and interconnection of each phase, requires careful consideration. Moreover, the prevailing socio-cultural context affects various aspects of these processes, although the significant variables have not been considered here, important though they must be. In general I have attempted to indicate outlines and to suggest means of dealing with the analytical problems. My few examples are no proof of anything, and intended only as illustrations of points in the exposition.

FOOTNOTES

[1] The instance cited here was originally given in slightly different form as Case 22 in Gulliver, 1963: 253.

[2] In my monograph on the Arusha he is referred to as a "counsellor" in distinction from other kinds of "spokesmen" (*ilaigwenak*) in that society (Gulliver, 1963: 101).

[3] Land is acutely scarce in the Arusha country, with population densities over 1,000 people per square mile on the better lands, and most pasture-land has been converted to arable.

[4] This was the case, in part, in the drawn-out postal strike in Britain in early 1970, as trade union leaders feared what seemed to them to be a biased arbitrational procedure favoring government policy of restricting wage increases.

[5] This Ndendeuli case is more fully described as Case 2 in Gulliver, 1971: 145.

[6] This Arusha case is more fully described as Case 21 in Gulliver, 1963: 243.

[7] Sometimes the objective of presenting "non-negotiable" demands may be to frustrate negotiations at that time or place.

[8] A good example of the danger of peremptorily cutting short this process, in an American labor dispute, is given in Douglas, 1957: 79.

[9] In a Western society the accountant, pensions expert, or medical expert, may be selected as members of the team because of their expertise. In simpler societies there may be experts on genealogical, ritual, or agricultural matters.

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