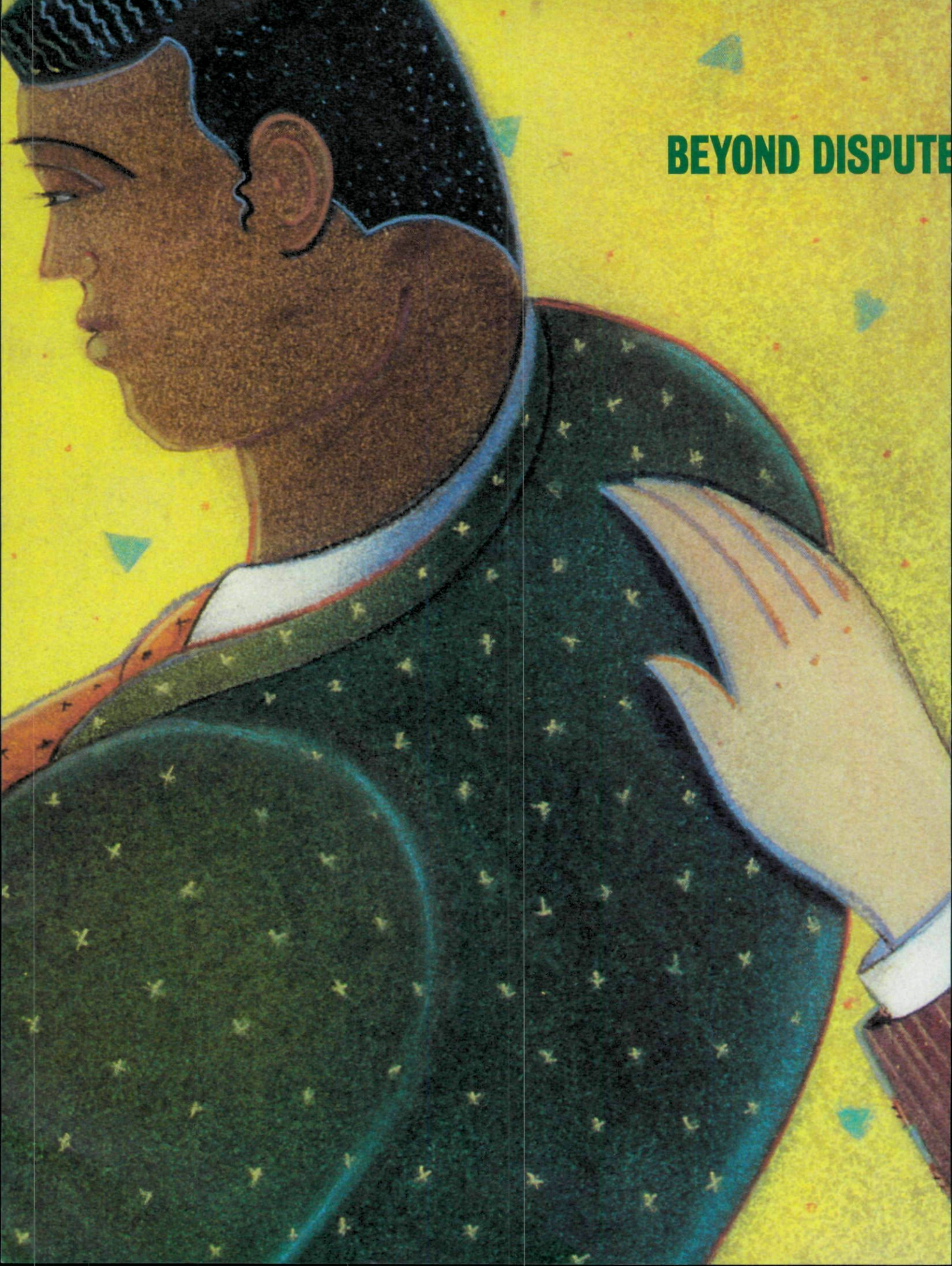


BEYOND DISPUTE



A Comment on ADR and Human-Rights Adjudication

By Mike Perry

Those involved in human-rights disputes often express a strong reluctance to resolve such matters through adjudicative forums. Indeed, traditional methods of dispute resolution often fail to address the underlying circumstances that cause these conflicts in the first place. The author considers the propriety of using alternative dispute resolution in instances of human-rights violations, in order to ensure that justice truly prevails.

“Overall, I estimate that 75% to 95% of all men and women in a given institution or workplace will not willingly choose, or even cooperate with, a formal, polarized grievance process when they feel harassed.”¹

This finding indicates that a vast number of people are unwilling to resolve human-rights disputes in the adjudicative forum. The hesitancy of this alarming proportion of complainants to avail themselves of traditional dispute-settling mechanisms indicates a failing on the part of institutional structures and the courts to adequately address concerns relating to human rights. This aversion to judicial procedures challenges the assumption that adjudication is the only means of achieving justice in human-rights disputes.

This article will briefly discuss the hesitancy of most complainants to initiate judicial proceedings. A comment will be offered on the propriety of applying alternative forms of dispute resolution to human-rights complaints, considering the interests of justice, rights and interests, power, and the status of the law. Through its analysis of these issues, this article will outline the distinct considerations that must be marshaled when employing non-adjudicative means to assure that justice prevails in any negotiated resolution of a human-rights complaint.

The Special Nature of Human Rights

Matters of harassment and discrimination on the grounds enumerated by law and in institutional policies are particularly offensive and bring higher consequences than instances of plain human meanness or interpersonal mistreatment. Human-rights disputes entail this higher level of scrutiny presumably on the assumption that an individual is being treated adversely, or distinctly, on the basis of an immutable personal characteristic. Accordingly, human-rights complaints have specific features unique from strictly monetary or interpersonal disputes.

The distinctive aspects of harassment and discrimination and their bearing on the effective resolution of human-rights complaints becomes apparent in an analysis of the adjudicative model. The reasons for complainants' hesitancy to embrace institutional grievance processes are instructive in assessing the propriety and efficacy of negotiating human-rights concerns.

Formal Grievance Proceedings

The adjudicative process is often a necessary means of resolving human-rights disputes. Judicial proceedings may provide adequate forms of redress for certain complainants in specific situations.

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Even the staunchest advocates of ADR readily acknowledge that there are cases for which ADR is not appropriate. Many civil rights and liberties cases cannot and should not be diverted from litigation to ADR.²

Formal grievance procedures have the advantage of institutional approval. The accompanying perception of legitimacy and authority may promote enduring resolutions to complex disputes. In many instances, a judicial ruling may be the only way to bring an ongoing or extremely contentious complaint to a conclusion. The standardized evidentiary considerations of adjudicative procedures may guarantee a procedurally fair evaluation of the dispute, assuring that people are not wrongly accused of discrimination or harassment.

Despite these positive aspects, the reality persists that many people refuse to avail themselves of judicial procedures. In order to assess the failing of the traditional system to provide complainants accessible paths to justice, the reasons people are hesitant to initiate adjudicative proceedings must be considered.

Concerns

People who feel harassed or perceive themselves as the subject of discrimination typically fear a loss of privacy and dignity in the perceptions of their colleagues if they engage in formal grievance procedures. Often the dispute is too complicated or potentially disruptive for the complainant to be confident that a positive solution would result from an adjudicative proceeding.³

Many individuals may be hesitant to endure possible risks to their reputations by instituting public hearings that may be regarded by many people as an overreaction to a single issue. Being labeled a troublemaker or someone who cannot take a joke is a salient deterrent to formal complaints. In many instances, complainants may believe there is insufficient evidence to succeed under the factual scrutiny of the adjudicative process.

In cases where the complainant does not feel empowered within the institution where the complaint has arisen, individuals may perceive

launching a complaint will necessitate further struggle with the institution itself by way of its grievance mechanism. Thus, pursuing redress through judicial proceedings may be a privilege of empowerment. Given the propensity of these concerns to discourage complainants from seeking adjudicative resolutions, the dedicated advocate must examine alternative methods of resolving human-rights disputes.

Informal Measures and ADR

Providing options and choices to address complainants' diverse interests are the hallmarks of successful, non-adjudicative, dispute-settling methods. There are many informal alternative measures for resolving human-rights disputes that attempt to address concerns regarding the adjudicative process.⁴

The direct approach encourages person-to-person negotiations in instances where the offense alleged is not overly serious. This option is especially appropriate for instances of offensive speech and well-suited to situations in which the complainant merely desires that the offensive behavior is stopped. The direct approach is a private method over which the complainant maintains control and thereby empowerment.

Informal third-party resolution is based on the intervention of a neutral actor who "shuttles" between the disputants to produce a solution. Third-party involvement may reduce the degree of confrontation that deters many complainants from the adjudicative model and the direct approach. The selection of a person possessing formal authority as the third party lends legitimacy to the process and enforceability to a settlement.

A creative method of resolving human-rights disputes is known as the "generic" approach. This form of informal resolution fashions a remedy tailored specifically to the needs, interests and wishes of the complainant.

During the life of a complaint, a person in authority may "coincidentally" conduct a staff workshop on harassment, disseminate literature on discrimination, or send a policy letter within the institution denouncing human-rights violations. This approach is a means for addressing situations in which evidence is scarce, the complainant is disinterested in other means of redress but still wishes action to be taken, or the offensive behavior does not take the form of discrimination or harassment against an individual. These innovations are anonymous and non-confrontational, and may educate an audience beyond the offender. The most well-known form of alternative dispute resolution, principled negotiation in the form of formal mediation, also addresses human-rights complaints

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effectively.

In mediation, a neutral third party trained in negotiation techniques assists the parties in resolving the dispute themselves through a highly structured, interest-based process. Mediation allows the parties to explain their perspectives on the dispute and focuses on reaching a settlement that addresses the interests of each party. Mediation provides privacy to the parties and, when voluntary, permits the complainant a great measure of control over the process.⁵ Concerns have arisen, however, regarding the propriety of resolving human-rights disputes through negotiated, settlement-based processes.

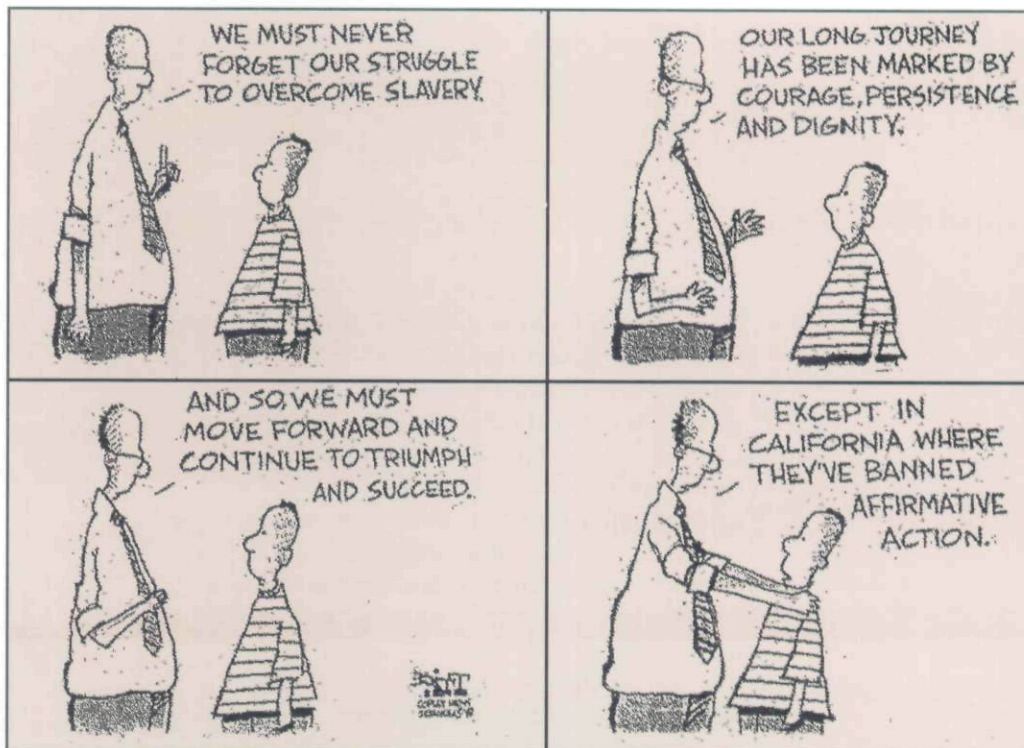
Critics find it difficult to accept the notion that rights violations may be addressed in the "win-win" context of principled negotiation. The recognition of the offender's interests, rather than his or her prosecution for violating human rights, is assumed by many observers as implicit in a mediated resolution. The fact that interests, as well as rights, are taken into account are beyond the tolerance of many passionate advocates. Many complex interests, in addition to legal rights, however, may be intrinsic to a human-rights dispute and must be considered if a resolution is to be just.

Rights vs. Interests

That the resolution of disputes is traditionally conceptualized as a brokering of rights vs. interests presumes a dichotomy between two poles. Human-rights disputes are often conceptualized as matters of principle, pure disputes over values and amenable only to an adjudicated resolution if justice is to prevail.⁶ The notion that justice cannot be achieved through principled negotiation equates rights with litigation. The usual causes of disputes being miscommunication and a lack of awareness, however, may make mediated settlements the natural conduits for resolving rights-based complaints.

If rights can be understood as a kind of language that reconfirms the difficult commitment to live together as it enables the expression of conflicts and struggles, perhaps people can work through legal interpretation to communicate disjunction and misunderstanding.⁷

The personal, intimate and discourse-oriented nature of the mediation process may make it the only appropriate manner by which to address the



misunderstandings and interpersonal dysfunctions that cause most human-rights disputes. But this process does not address the issue that a negotiated settlement to a human-rights issue defies the interests of justice.

Justice

Many proponents of ADR would contend that justice is not the standard to which ADR should be held. Concepts of justice vary widely. Although mediators and arbitrators often ponder the question of their responsibility for accomplishing justice, all of us, individually and as a society, must answer that question.⁸

As people who feel harassed are very different from one another, their notions of justice vary. A realization of justice, therefore, must incorporate an individual's rights with his or her interests. Most human-rights disputes are value conflicts that include interests.⁹ Challenges to the validity of negotiated settlements of human-rights disputes stem from the oversimplified analysis of interests assumed by the rights-based model.¹⁰

Consider the following situation:

A man is demoted from a clerical position at a major retail-supply distribution company. The supervisor responsible claims the demotion is due to the man's difficulty speaking English. A recent immigrant from Poland, the man held the position under the previous supervisor for two years. The demoting supervisor has been overheard telling anti-Polish "jokes" and making derogatory comments about the competence of people from Poland.

Recent cartoon distributed by Copley News Service points to changing tides in protections against discrimination.

Mediation allows the parties to explain their perspectives on the dispute and focuses on reaching a settlement that addresses the interests of each party.

As this situation is a blatant case of discrimination on the basis of ancestry and ethnic origin, the conscientious advocate may wish to bring a formal complaint before an organization such as the Equal Employment Opportunity Commission or the Ontario Human Rights Commission. Competent counsel will first want to learn more about the case. This instinctive intrigue, even when assessing rights-based claims, may demonstrate that interest-orientated considerations influence the form of resolution sought.

Consider the following facts:

As a trained watchmaker, the man's skills are not readily employable in Canada. The man is trying to save money and wants little disruption in his life as his family is trying to immigrate to Canada. His "demoted" job pays the same wage as the original position. The man is of the upbringing that granting a job is an act of generosity. Any perceived hostility toward one's supervisors is seen as intolerable disrespect. The demoting supervisor is a member of the company's complaint-review committee.

The instant situation requires a reconsideration of the popularly drawn distinction between rights vs. interests. It is difficult to assert that an adjudicative process would ameliorate the complainant's situation in a manner approaching justice. An effective strategy to account for the interests of the complainant may be to transform the context of human-rights disputes from the right to be free from discrimination to the individual's need of a fair and equitable environment.¹¹

Many times complainants may be satisfied with educating the perpetrator or having the respondent recognize an error by way of formal apology. In the above example, there is nothing to suggest that a mediated settlement would not result in the man's reinstatement. Too often, those implying a degree of impropriety exists in the mediation of human-rights disputes neglect the fact that settlement is the ultimate goal of the process.

A settlement means the complainant must not endure continued harassment or discrimination. The immediate end of any dispute-resolution measure in the human rights context is to ensure that the discrimination or harassment stops.

Paramount among resolving human-rights

complaints is consideration of the fact that harassment and discrimination do not occur independent of the individual. The complainant may possess a variety of interests related to the dispute. It is becoming increasingly apparent that people who feel harassed are very different from one another. In particular, people who have been harassed typically have strong feelings about what should happen as a result of offensive [behavior] —and these strong feelings vary from person to person.¹²

Accordingly, given the significance of the interplay of rights and interests, solutions that satisfy the complainant best serve the ends of justice. The enthusiastic advocate may be frustrated by a complainant who does not wish to prosecute his or her legal rights to the full extent of the adjudicative system. The sensitive advocate must resist making a reluctant client the champion of a human-rights issue through the judicial process. In this regard, advocates of litigation as the most effective means for addressing human-rights disputes often overlook the double standard to which alternative forms of dispute resolution are often held.

While mediation and negotiation may not alter the attitudes of a perpetrator or effect an end to harassment or systemic discrimination, nor does the adjudicative model rehabilitate an alleged offender. Beyond a source of moral vindication, litigation is more apt to humiliate a "losing" respondent, making him or her exceedingly resistant to recognizing the behavior admonished by the court. Nor do legal rights resolve problems. Rather, they transpose a problem into one that is defined as having a legal, and therefore inherently adversarial, solution.¹³

In terms of effecting social change, the limits of alternative dispute resolution are, in most cases, no more than those of the adjudicative process.

[It is] a false expectation...that the pursuit of legal rights through the courts effect[s] lasting social change, or that formal recognition of rights can have any real transformative impact on underlying social institutions, values and conditions.¹⁴

Strategies other than civil litigation or individual grievance action may be employed to combat discrimination and sexual harassment in society. In addition to rights, interests and the nature of justice, the functions of power inherent in any dispute must be considered carefully when resolving human-rights complaints.

Power

Many observers are skeptical about the ability of non-adjudicative methodologies to fully include the entitlements and interests of the

usually weaker complainant in a negotiated settlement. There are many forms of power. The propriety of non-adjudicative procedures is dependent largely on the form(s) and exercise(s) of power in existence.

Better-known sources of power relevant to human-rights disputes include "systemic" power, in which the assumptions of an institution's policies subtly favor one party over another. "Personal" power exists when one party's personal features, such as command of the dominant language, level of education or degree of assertiveness, are more highly honed than those of the other party. It is generally assumed that an adjudication process is the most adept method of reaching a solution where there is disproportionate power among parties, yet the exercise of power traditionally has little to do with legal rights.¹⁵ More often, "formal" power, such as that of an employer over an employee; "sanction" power, the ability to exact retribution; and "resource" power, one's ability to manipulate factors to the complainant's detriment, operate in human-rights disputes.¹⁶ These power imbalances, if not overwhelming, can be accommodated within the framework of negotiated settlements.

In addressing imbalances of formal power, alternative dispute resolution assures both parties are involved in the process at the same level and that the complainant may exercise a similar degree of control over the proceedings, as discussion is usually the sole means of presentation and either party may end the process unilaterally.

While emerging laws and public policy may prevent retribution and exercises of resource power, the enhanced personal contact and communication of mediation may engender a more sincere and honored resolution than the confrontational and adversarial adjudicative process. Adherence to the principles of fairness and fundamental justice can also accommodate power differences within a negotiation process, as can the presence of clear legal rights.¹⁷

The Role of the Law

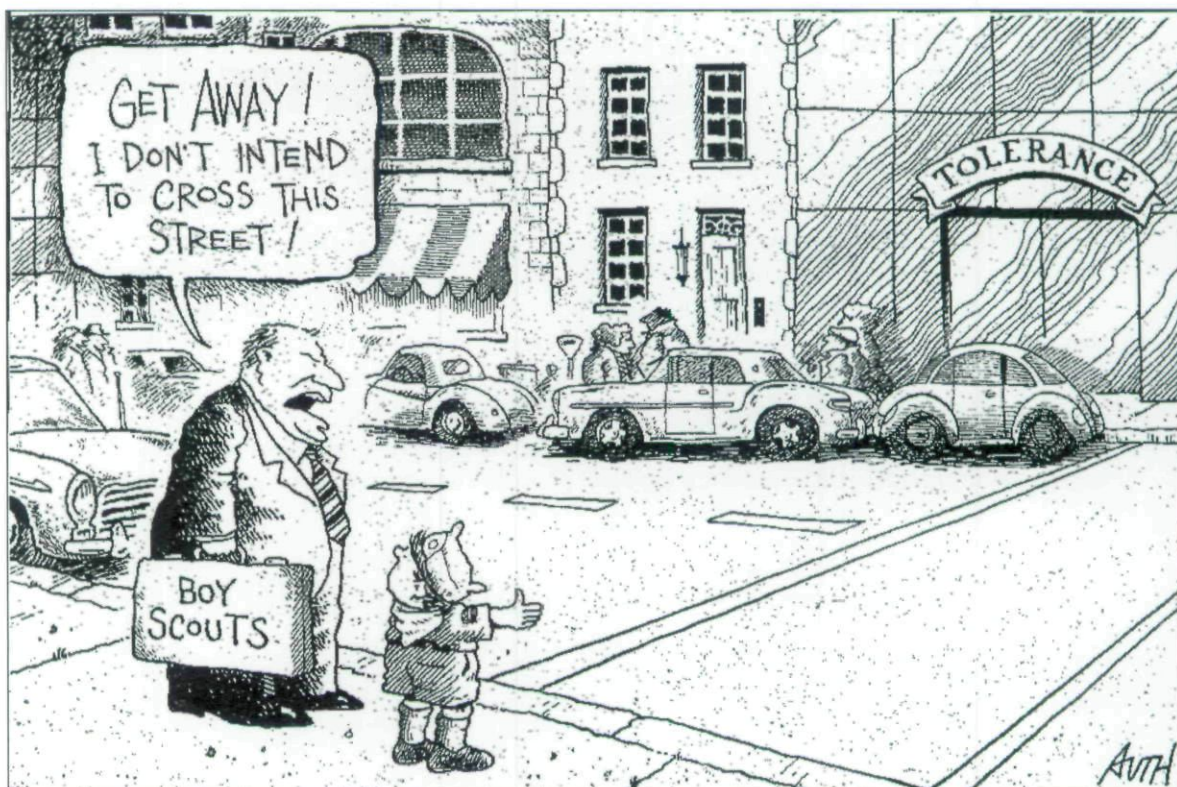
The "shadow of the law" is traditionally regarded as having a deleterious effect on otherwise good-faith negotiations. Agreements are somehow perceived as tainted when reached through litigation. The interrelation of the law and means of alternative dispute resolution, however, furthers the efficacy of mediation by identifying and narrowing the issues of the dispute and remedying imbalances of power.

In human-rights disputes, legal rights bring power to a mediation.¹⁸ Having clear legal recourse ensures the parties' commitment to the process. Assuming information is power, knowledge of the legal rights and remedies applicable, usually on the part of the complainant, levels the playing field and increases the chances of reaching a settlement that is just.

Conclusion

Disputes designated as human-rights issues are defined primarily by human-rights legislation and

Award-winning newspaper cartoonist Auth recently spoofed a Boy Scout edict against admitting gays as Scouts.



public policies. Adjudicative structures exist as important forums in which to resolve these disputes. An intriguing reality of human-rights disputes, however, is that most individuals would not consider utilizing formal procedures to resolve complaints.

This hesitancy may be the result of an aversion to the confrontation and publicity the adjudicative process entails, or stem from the alienation or lack of empowerment a complainant may feel within a given institution. Given that judicial procedures are not options readily considered by human-rights complainants, the propriety and efficacy of the many available alternative forms of dispute resolution must be evaluated.

Many observers perceive a compromise of the complainant's rights in the negotiated settlements and claim that negotiation in human-rights disputes tacitly condones the offender's behavior, a situation from which justice for the complainant cannot flow. This conceptualization of justice is somewhat narrow. It assumes that rights supersede interests and that justice is only attainable through their adjudication. A settlement can only be considered just, however, if it accounts for the interests of the individual who must live under its terms.

As individuals become more aware of their rights and more adamant of living and working in environments free from prohibited forms of discrimination and all harassment, the number of complainants will increase and the means required to address them will have to evolve accordingly.

Looking forward to the twenty-first century...the most effective and efficient systems will be those that deal with a wide spectrum of concerns and with all forms of unacceptable interpersonal behavior, including harassment that is simply plain human meanness and workplace or interpersonal mistreatment.¹⁹

The effective advocate will possess the skills to identify disputes specifically involving human-rights issues, evaluate the rights and interests, power, and legal dynamics involved in the complaint, and be capable of prescribing and operating competently within a variety of means for resolving the dispute. ■

ENDNOTES

¹ M. Rowe, "An Effective, Integrated, Complaint Resolution System," in B. Sander & R. Shoop, eds., *Sexual Harassment on Campus: A Guide for Administrators, Faculty and Students* (Toronto: Allyn and Bacon Ltd., 1997), 204. These proportions may vary significantly with the context of the offense, the type of complaint launched and for reasons of cultural values. For the purposes of this article, the terms "adjudicative," "judicial," "formal grievance" and "traditional" all will be used interchangeably in reference to all institutionalized grievance procedures, including, but not limited to the courts. An adjudicative process typically entails formal

rules of evidence, open hearings and the adversarial presentation of fact toward the passing of a "win-lose" judgment and subsequent sanction as a resolution of the dispute.

² D. Hoffman, "ADR: An Opportunity to Broaden the Shadow of the Law," 21 *Human Rights* 20 (1994).

³ For example, the intensity, publicity and duration of formal sexual-harassment dispute procedures are flabbergasting. See E. Costello, "The Mediation Alternative in Sex Harassment Cases" 47 *Arbit. J.* 17 (1992).

⁴ For a more detailed account of the use of both formal and informal forms of alternative dispute resolution to address human-rights complaints, see *supra*, note 1, at 204-208.

⁵ For further discussion of the important aspects of the complainant's control over a dispute-resolution process see J. Roberts, "ADR and Civil Justice: An Unresolved Relationship," 56 *M.L.R.* 450 (1993).

⁶ For an elaboration of the distinction between disputes over interests and disputes over values, see V. Aubert, "Competition and Dissensus: two types of conflict and conflict resolution," 7 *J. of Disp. Res.* 26 (1963).

⁷ M. Minow, *Making All the Difference* (Ithaca: Cornell University Press, 1990).

⁸ *Supra*, note 2, at 21.

⁹ *Supra*, note 7.

¹⁰ H. Shue, "Mediating Duties," 98 *Ethics* 704 (1988).

¹¹ See P. Williams, "The Pain of Word Bondage," in *The Alchemy of Race and Rights* (Boston: Harvard University Press, 1991).

¹² *Supra*, note 1, at 203.

¹³ C. Smart, "The Problem of Rights" in *Feminism and the Power of Law* (London: Routledge, 1989).

¹⁴ M. Jackman, "Constitutional Rhetoric and Social Justice: Reflections on the Justiciability Debate," in J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution* (Ottawa: Carleton University Press, 1992).

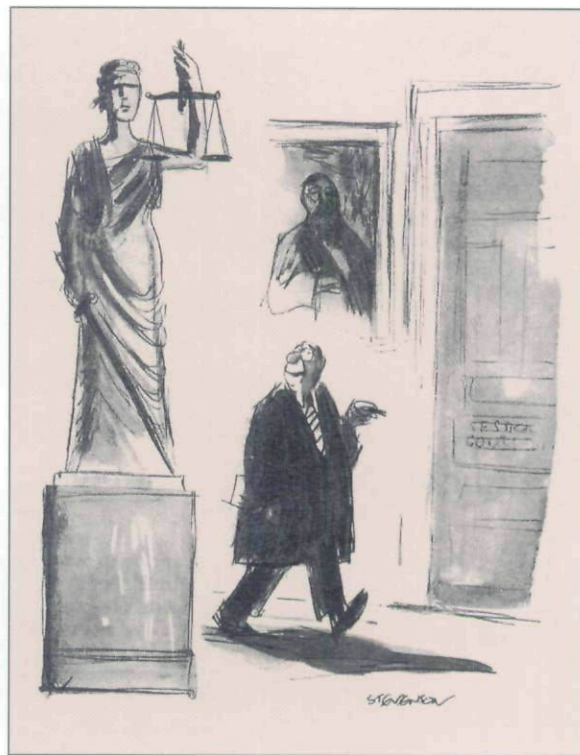
¹⁵ *Supra*, note 13.

¹⁶ For a more detailed discussion of the role of power differentials in dispute-resolution processes, see *supra*, note 3, and B. Mayer, "The Dynamics of Power in Mediation and Negotiation," in J. Macfarlane, ed., *Alternative Dispute Resolution* (Windsor: Course Materials, 1997).

¹⁷ The most successful and efficient forms of alternative dispute resolution in any situation include adherence to the principles of fairness and fundamental justice to protect the rights of all parties. These features of the process include providing the parties due notice; following clear, established and accountable procedures; affording the alleged offender the opportunity to respond to the complaint; instituting a set standard of proof of the facts; ensuring privacy; performing follow-up; and deterring reprisals and/or malicious claims. See *supra*, note 1, at 210-213.

¹⁸ *Supra*, note 3, at 20-21.

¹⁹ *Supra*, note 1, at 209.



"Mornin' Sweetheart."

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