

**D I S P U T E
S Y S T E M
D E S I G N**

PREVENTING, MANAGING,
AND RESOLVING
CONFLICT

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CHAPTER 2

ANALYTIC FRAMEWORK FOR DSD

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Over the past twenty years, DSD scholars and practitioners have suggested a number of principles for design practice, as Chapter 1 reviews. Authors have proffered many of these principles as “best practices” or even proposed them as ethical guidelines; some frame principles as criteria to judge or measure the quality of an organizational system’s outcomes. The field requires a more structured approach to dispute system design. In order to develop effective DSDs that are tailored to their dispute streams, stakeholders, culture, and contexts, designers need a “framework and conceptual map.”¹ This chapter presents an analytic framework for interrogating an existing or prospective system for preventing, managing, or resolving disputes. To place this framework in its larger context, the following section briefly reviews frameworks as components of institutional analysis.

FRAMEWORKS IN INSTITUTIONAL ANALYSIS

The late Elinor Ostrom, the first woman Nobel Laureate in Economics, observed that “the terms - framework, theory, and model– are all used almost interchangeably by diverse social

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scientists.”² She instead characterized these terms as nested concepts, moving from the most general to the most detailed assumptions an analyst makes. At the broadest level, “a general framework helps to identify the elements (and the relationship among these elements) that one needs to consider for institutional analysis” and organizes “diagnostic and prescriptive inquiry.”³ The framework provides the most general set of variables for analyzing many kinds of settings. In contrast to a general framework, a theory relates to one or more elements within a framework, permitting the analyst to ask certain questions and to make and test working assumptions. For example, in DSD, procedural justice is a theory in social psychology that enables social scientists to make working assumptions about how processes and structures affect perceptions of fairness.⁴ At the most detailed level, a model makes “precise assumptions about a limited set of parameters and variables.”⁵ For example, Robert Axelrod used game theory to test precise assumptions about how successfully different negotiation strategies (cooperate or defect) would operate in a prisoner’s dilemma exercise, establishing in certain experiments that cooperating first and punishing defection was the most successful approach.⁶

Ostrom and her colleagues and students at the “Indiana School” developed the Institutional Analysis and Development (IAD) framework, which is broadly applicable to institutions of governance. Her focus was on collective action related to common pool resources like water and land.⁷ For the IAD framework, she sought a set of universal building blocks with which to examine action arenas or action situations, which may be nested in one another.⁸ For example, any individual case within a DSD may represent an action arena. Ostrom explained that within the arena are participants and an action situation, which interact. The IAD contains seven clusters of variables that characterize the action arena: “1) participants (who may be either single individuals or corporate actors); 2) positions; 3) potential outcomes; 4) action-outcome linkages;

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5) the control that participants exercise; 6) types of information generated; and 7) the costs and benefits assigned to actions and outcomes.”⁹ Ostrom’s framework treats rules and law as independent (exogenous) variables that shape what can happen in the action arena.¹⁰ Ostrom’s other independent variables are physical and biological conditions and attributes of the community.¹¹

Research varies with one’s academic discipline and whether one considers a framework, theory, or model. Depending on the specific research question, a researcher may use what Ostrom terms independent variables as dependent (endogenous) variables; a dependent variable is one you expect to see change. For example, the Federal Arbitration Act and the U.S. Supreme Court’s case law interpreting this legislation together act as independent variables shaping the action arena for mandatory or adhesive consumer or employment arbitration in the United States (see Chapter 12). These laws allow companies to write and enforce arbitration clauses that prevent employees or consumers from joining class actions (a form of adjudication that qualifies as an action-outcome linkage).

In comparison, Lauren Edelman uses sociological theories and models to interrogate how employers interpret and respond to broad and ambiguous legal mandates regarding employment discrimination at the workplace.¹² Edelman examines how human action through company agents shapes the meaning of law and how employers implement internal DSDs that address workplace harassment or discipline. In this analysis, law is an endogenous variable. At issue is its effectiveness from a policy standpoint in preventing and remedying employment discrimination given how those with the power to do so interpret and enforce it.

Because this chapter starts at the framework level to examine DSDs as institutions, it treats law as exogenous or independent. It is very important for scholars to challenge the law’s

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efficacy from a policy standpoint by examining not only its verbal structure but also law's actual function in terms of how humans interpret the words and how this interaction shapes behavior. Scholars in many disciplines use theories and models to do this work (see Chapter 5).

Institutional design is a broad field, the comprehensive review of which is outside the scope of this book.¹³ While Ostrom does not specifically address DSD, her work relates broadly to organizations as institutions.¹⁴ Chapter 5 explores how to evaluate a dispute system using variables like those in the IAD framework as well as theories and models within a framework. The next section provides an analytic framework specific to DSD.

ANALYTIC FRAMEWORK FOR DISPUTE SYSTEM DESIGN

The framework presented here is intended to structure analysis of dispute system design—in short, to elicit the information that a designer, analyst, or user needs.¹⁵ It serves as a quick reference chart, containing key questions relating to each element of design.

Analytic Framework for Dispute System Design

1. Goals
 - a) What do the system's decision-makers seek to accomplish?
 - b) Which types of conflicts does the system seek to address?
2. Stakeholders
 - a) Who are the stakeholders?
 - b) What is their relative power?
 - c) What are their interests and how are their interests represented in the system?
3. Context and Culture
 - a) How does the context of the DSD affect its viability and success?

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- b) What aspects of culture (organizational, social, national, economic, or other) affect the system?
- c) What are the norms for communication and conflict management?
- 4. Processes and Structure
 - a) Which processes are used to prevent, manage, and resolve disputes?
 - b) If there is more than one process, are processes linked or integrated?
 - c) What are the incentives and disincentives for using the system?
 - d) What is the dispute system's interaction with the formal legal system?
- 5. Resources
 - a) What financial resources support the system?
 - b) What human resources support the system?
- 6. Success, Accountability, and Learning
 - a) How transparent is the system?
 - b) Does the system include monitoring, learning, and evaluation components?
 - c) Is the system successful?

GOALS

In designing or redesigning a system, it is important to determine and articulate the system's goals and values at the very outset of the design process. Does a company seek to manage litigation risk or increase employee retention? Does a juvenile court seek to reconcile a victim and offender? If there are multiple goals, what are the priorities among them? Clarifying goals should help determine whether the design should include only one process (such as mediation or arbitration) or provide for more process options.

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Decision-makers, who determine goals, can be one or more persons or entities with the authority to commission, approve, and implement the design. Decision-makers may be individuals, such as a CEO who has the power to approve a final design, or groups, such as an advisory panel or stakeholder group with the power to create all or part of the design process and/or approve the outcome. The designer is the person or group that creates or refines the dispute system. The designer is also the keeper of the guiding principles for design; his or her role is to encourage the use of these principles in the design process. Because the emerging field of DSD is interdisciplinary, designers may be lawyers or come from other professional or academic disciplines, including management, organizational development, social psychology, labor and employment relations, diplomacy, or international development.

The decision-maker and the designer might be the same or different people or groups. Designers might be employees of the organization or entity that will host the DSD, or might be contractors, consultants, or others outside the organization. There are advantages and disadvantages to both choices. People from inside the organization know its culture and past practice. They know the personalities of people responsible for managing key offices. They may have the best insight on incentives, disincentives, costs, and benefits of the existing system. However, they are also accustomed to the status quo; they may resist change or feel threatened by it. An outside consultant may have broader knowledge of the possible alternative models and may bring to the organization new ideas for changing the incentive structure. She does not have the baggage or history associated with managers of key offices. By adopting a facilitative process, she may be able to enlist help from people within the organization. However, the outsider faces a steep learning curve in understanding the organization.

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A system designer must understand which stages and types of conflicts the system seeks to address, and what the system's decision-maker intends to accomplish through this design. A DSD within an organization may address one, a few, or many categories of disputes or broader conflict. For instance, a company could design a system intended to resolve only internal employee disputes. Alternatively, the company could design a system that addresses disputes with external actors such as customers, partners, or suppliers. For example, General Electric (GE) instituted an Early Dispute Resolution system prescribing a protocol on how, when, and by whom a given dispute between GE and its customer or contractor would be assessed and handled.¹⁶

Some categories of disputes are subject to legal constraints that limit design choices. In the United States, collective bargaining agreements usually include a defined grievance procedure that employees must use for certain disputes. Statutes mandate certain procedures for specific categories of disputes, such as claims for discrimination or workers' compensation. Public employee systems or special education disputes are subject to due process limits under the U.S. Constitution. It may be challenging to create and effectively integrate new design options alongside existing mandated or historical processes.

Goals that are often identified for DSDs include the following:

- *Conflict prevention/Conflict management/Dispute resolution.* Is the decision-maker focused narrowly on dispute resolution, such as settlement alternatives for litigated cases? Or does she want to prevent conflicts and manage them at an earlier stage before litigation is threatened or filed?

- *Efficiency/Resource savings.* Does the organization want to save time, and if so, whose time? Is minimization of cost a goal? If so, whose cost? An organization could seek to address

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certain types of conflicts and disputes in order to enhance employee morale and reduce turnover, to reduce litigation costs, or avoid adverse publicity. An organization might try to shift costs and resource expenditures onto the other party or parties to discourage them from pursuing a claim. For example, arbitration clauses that prohibit class action arbitration against companies can make it costlier for individual consumers to pursue small claims against those companies.

- *Relationships.* Do decision-makers seek to transform or restructure relationships? They might address disputants within the organization (such as managers and employees) or between insiders and outsiders (for instance, between partners in a joint venture, two neighboring countries, or a business and its customers).

- *Safety.* Is there a desire to prevent violence or damage to property—or to prevent further violence or damage if an incident has already occurred? For example, some designs address potential workplace violence. In this context, the goals of protecting the community might be in tension with the goal of keeping confidential the mental health status of individuals.¹⁷

- *System operation.* Decision-makers might try to enhance system accessibility or decrease caseload. If some categories of conflicts are not being addressed, or groups of employees are not using a system, a company may seek to redesign the system to make it more welcoming and to increase usage rates. A company could also try to address conflicts earlier to decrease the number of lawsuits filed against the company. The United States Postal Service, for instance, used mediation within two to four weeks of an employee filing a discrimination complaint to encourage employees to resolve disputes before litigation.¹⁸

- *Public recognition.* Designers may seek to protect privacy for an organization, its clients, or its employees. Other goals might include providing public vindication of a claimant's rights or creating precedent for future cases. Parties often choose arbitration and mediation to

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keep outcomes (and sometimes disputes) from public view. While trial results are public (except in very rare instances), arbitration, mediation, fact-finding, and other processes can be either confidential or public, depending upon the design and parties' agreements. Important public policy questions may arise, for instance, if private parties—such as the plaintiffs and defendants in a stream of product liability cases—seek confidential processes that keep the public uninformed about a defective and potentially harmful product.

- *Substantive outcomes.* Decision-makers may seek to achieve just outcomes, which raises questions of defining “justice.”¹⁹ Do they seek fairness of process or of outcome? What is their underlying assumption about justice in the system? Some systems, like the September 11th Victim Compensation Fund (VCF), distribute financial assets and seek to achieve some form of distributive justice.²⁰ Some systems emphasize opportunities for complainants to be heard in order to enhance procedural justice. (The VCF tried to achieve both.) In the arbitration process to distribute the proceeds of the Dalkon Shield tort claim facility, individuals harmed by the product (a contraceptive intrauterine device) were given an opportunity to tell their stories to trained arbitrators who awarded damages based on an injury grid. In another example, the Truth and Reconciliation Commission that followed apartheid in South Africa sought to restore and rebalance relationships among victims, the community, and offenders through processes aimed at restorative justice.

- *Reputation (of individuals or organizations).* A business that loses a highly publicized product liability lawsuit may redesign its product and create a consumer complaint resolution process to identify future product defects earlier and help resurrect its reputation. Kaiser Permanente sought to restore its credibility with the patients in its health maintenance organization by improving the speed and transparency of its arbitration system.²¹ Other

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companies have been proactive in issuing public apologies in addition to payment of damages in order to restore credibility and consumer confidence after release of a harmful product.²²

- *Compliance.* Among decision-makers who seek greater compliance with applicable laws and rules, sanctions for noncompliance can be emphasized to deter future failures or the capacity to comply can be enhanced (or both). A corporation that has been sanctioned under federal securities laws may create a system to assure that whistleblowers can report possible future violations without fear of retribution.

- *Satisfaction.* Whom does the decision-maker seek to satisfy—all stakeholders, or only some? Does it seek more durable resolutions? The more satisfactory the resolutions, the more durable they are likely to be, because satisfied disputants are less likely to thwart or ignore a previous agreement.

- *Organizational improvement.* Is there a desire to identify and correct institutional weaknesses or injustices? A healthcare provider may hope not only to decrease the number of medical malpractice lawsuits but also to reduce its level of medical errors (whether or not lawsuits are filed). A company might devise a system to help retain female employees who are leaving in disproportionate numbers due to hostile working conditions.

As discussed above, the decision-maker who controls system design has the power to define the system's goals and priorities. However, from a normative standpoint, the issue of control over DSD raises questions of fairness and justice. First, whom does the decision-maker represent? Is the decision-making body one party to the disputes in the stream (e.g., a company adopting mandatory arbitration for consumer or employment disputes), both parties to disputes (labor and management), or a third party (court or agency)? Is there an effort to share this power or provide opportunities for stakeholder voice? Second, what form or conception of justice does

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the system expressly or impliedly incorporate as a goal? The trade-offs required among competing goals may affect the quality of the resulting system. For instance, a significant tension can exist between the goals of efficiency and fairness or justice. Efforts to radically expedite resolution while minimizing costs could result in a system that lacks procedural or substantive fairness. Which would be the more appropriate process in the context of juvenile justice: prioritizing punishment by emphasizing jail time and compensation (retributive justice)? Or seeking to avoid criminalizing a youth, exploring ways – perhaps through mediation between the victim and the offender – that the youth pays a penalty, but is also reconciled with the victim and the community (restorative justice)? In assessing the tradeoffs among goals, the designer can help the decision maker to consider the guiding principles in Chapter 1, Figure 1.1.

STAKEHOLDERS

The second framework element is identification of stakeholders and analysis of their relationships and power. Stakeholders include the people and organizations that create, host, use, and are affected by a DSD. In addition to the immediate parties in conflict, stakeholders can include individuals or entities that are subsidiary to or constituents of those parties, as well as others directly or indirectly affected by the outcome of the dispute. For instance, in a system to allocate financial compensation among claimants injured by a toxic spill, stakeholders would include those injured individuals as well as the companies responsible for the spill, their insurers, counsel for the parties, and perhaps government entities and other groups and advocates for the environment within the broader community where the spill occurred.

The designer might use a multi-stakeholder process to design or assess the new system. For example, through passage of the Civil Justice Reform Act, the U.S. Congress decreed that all

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94 federal district courts create and confer with a multi-stakeholder advisory group in considering ways to reduce cost and delay.²³

Stakeholders should be involved in the design stage of a DSD through some variant of a conflict stream assessment (CSA), discussed in Chapter 4. Diverse stakeholders might influence and be influenced by the system. The more engaged these stakeholders are, and the more deliberative their role in helping select the scope of coverage and establish priorities among possible goals, the more likely it is that the subsequent DSD will be responsive to their needs and expectations. The design will need to assess multiple goals and priorities and make tradeoffs among them. The more that stakeholders, including users, are involved in the dispute system's design and continuous improvement, the more likely it will be sustainable in the long term.

CONTEXT AND CULTURE

Context is the circumstance or situation in which a system is diagnosed and designed. Jennifer Lynch described the catalysts (“5 Cs”) that often trigger organizational system design: *compliance* with legislation or policy (e.g., the U.S. Administrative Dispute Resolution Act of 1996); *cost* of grievance, litigation, and settlement to spur experimentation with mediation or arbitration; *crisis* in the media, negligent act, or fraud (e.g., the Kaiser case described in Chapters 4 and 14); *competition* within an industry or among professional firms (e.g. GE early case assessment in Chapter 12); and *cultural transformation* to align a firm with its constituents (e.g., the transformation of dispute handling by the U.S. Postal Service in Chapter 11).²⁴

Culture refers to patterns of being, perceiving, believing, behaving, and sense-making shared by a group of people.²⁵ Culture is commonly viewed as arising within national, regional, or religious contexts, but can also develop across a profession, a community, or a corporation or other organization. In the relationship between culture and conflict varies; disputants—

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individuals, firms, or countries—respond to conflict in a number of ways. Individuals have different conflict management styles; moreover, institutions and organizations may develop particular conflict management approaches. Countries and social groups are influenced by their own cultural understandings and approaches to conflict.

People and organizational culture

One framework for understanding people's response to conflict is the “dual concern” model illustrating how people attempt to balance concern for self with concern for others.²⁶ Individuals tend to choose from or exhibit one of four basic strategies—yielding, problem-solving, contending, or avoiding. “Yielding” is lowering one's own aspirations and settling for less than one would have liked. “Problem-solving” is pursuing an alternative that attempts to satisfy the interests of both sides. “Contending” is trying to impose one's preferred solution on the other party. “Avoiding” is not engaging in the conflict at all.²⁷

While these are strategies an individual person may choose, organizations as collections of people may develop their own distinct cultures regarding conflict. These cultures can in turn influence what strategies people and stakeholders choose to use and can shape dispute resolution procedures and their results.²⁸ Organizational culture consists of patterns of meaning and identity in an organization, which can take the form of communication, symbols, beliefs, language, rules, artifacts, values, or assumptions. For example, a startup organization may foster an entrepreneurial spirit wherein individual creative effort is highly rewarded. However, if problems arise, this organizational culture may discourage collaborative problem-solving. It is important to align processes to prevent, manage, and resolve disputes with an organization's culture.²⁹

David Lipsky, Ronald Seeber, and Richard Fincher³⁰ developed a framework for analyzing these organizational level conflict-management choices. They identified independent

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variables and grouped them into environmental factors and organizational motivations that together give rise to a conflict-management strategy to contend, settle, or prevent workplace conflict. The environmental factors include market competition, government regulation, litigation trends, legal and tort reform, statutory and court mandates, and unionization. The organizational motivations include organizational culture, management commitment, the champion's role,³¹ the organization's exposure profile, and a precipitating event.

Corinne Bendersky³² analyzed a human resource department's unsuccessful attempt to reduce the number of equal employment opportunity claims alleging discriminatory promotion decisions within the company. The new policy offered employees confidential counseling on how to address promotions with their supervisor, with an option to use outside mediation services. The effort failed on two counts. Employees were not consulted in the design stage; thus, the process did not reflect their needs or concerns. In addition, company management generally discouraged employees from seeking help in dealing with problems, thereby sending a mixed message. Employees felt that their only options were to directly negotiate with their supervisor (the subject of their complaint), leave the company, or file a legal action. Use of the counseling or mediation services were not seen as viable options. That cultural disconnect undermined HR's good intentions to prevent and resolve employee promotion disputes.

Culture in a national and international context

Jeanne Brett offers an iceberg metaphor for approaching cultural differences: visible above the water line are behaviors and institutions; immediately below the surface are knowledge structures, values, beliefs, and norms; in the murky depths are fundamental assumptions.³³ Behaviors include ritual greetings like exchange of business cards, bows, cheek kissing, or handshakes. Institutions may be legal, economic, political, social (e.g., village elders),

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or religious.³⁴ Less visible are the values, beliefs and norms that call for cultural fluency on a number of factors that influence how people communicate and navigate conflict. Many of these values and norms lie on a spectrum. For example, where do information sharing norms and values fall in relation to transparency versus privacy? Is time approached in a more flexible manner or are schedules strictly observed? Where does the culture fall in terms of formality versus informality, direct or indirect communication, and individualist or collectivist social values? People from collectivist societies tend to prefer non-confrontation procedures in the context of their own societies and be less inclined toward direct competition and problem-solving; people from more individualist societies are seen as more willing to use these latter approaches.³⁵ In an organizational culture, is management more hierarchical or more lateral? Is decision-making more top-down or does it seek consensus? Do the goals of dispute resolution tend toward reaching agreement or improving relationships?

Hierarchical societies have deference patterns that are absent in egalitarian cultures.³⁶ Another dimension of difference is beliefs or expectations about the behaviors of others based on shared knowledge of conventions, rules, and context. For example, some cultures are quick to trust, assuming they can trust until the other side proves otherwise; other cultures tend to exhibit slow trust, requiring time to build strong relationships before they trust the other side.³⁷ Norms include conventions of communication. Some cultures use indirect communication, relying on high context because they already share a social context, while other cultures use direct communication (low context) because they share a vocabulary.³⁸ Brett cautions avoidance of stereotypes and places prototypes on a bell curve of variation. In the tails of the distribution, people from different cultures may overlap.

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Culture affects how people perceive fairness regarding how disputes are handled. For example, in some cultures, people value confidentiality, while in others people may expect a more public and transparent process. Parties might have different priorities regarding individual versus collective social interest, direct or circumspect communication styles, and the importance of long-term relationships—all of which inform how they share information and whether they use and expect a more competitive or cooperative approach to disputes.³⁹ No particular characteristics are objectively preferable, but behavior misaligned with expectations might confound effective communication and impede dispute resolution.⁴⁰

Any individual will be an amalgam of their many cultures, which may include their national, religion, gender, educational experience, family context, professional training, and many other factors.⁴¹ By monitoring one's own words and actions and the meaning one intends, as well as the other parties' words and actions,⁴² checking one's assumptions and deliberately seeking to understand the disputants' cultural contexts and perspectives, one can design a strategy or process more attuned to the parties' preferences; the resulting design may help bridge those differences within an organization or a society.

PROCESSES AND STRUCTURE

Process options and structure constitute the fourth framework element. For existing systems, which processes are used to prevent, manage, and resolve conflicts and disputes?⁴³ (Chapter 3 identifies and discusses these building blocks.) How are those processes defined, and how do they interrelate within the context of the institution? It might be useful to consider how the system has evolved, how external systems (including the formal legal system) reinforce or constrain it, and what creates incentives and disincentives for its use.

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Many different types of processes can be used to prevent, manage, and resolve conflicts. Some organizations offer one formal process, such as mediation or arbitration, while others develop a range of processes for one or more types of disputes. If multiple options are offered, those options may be linked together or they may exist as discrete, unlinked processes that evolved—perhaps not strategically—in different parts of the organization. Whether linked or discrete, the available processes may have different incentives (e.g., financial, timing) that encourage or discourage use by different stakeholders.

An organization's freedom to design its internal conflict prevention, management, learning, and resolution processes may be constrained by courts, legislatures, or administrative bodies. Laws and institutional policies require human resource specialists to report certain kinds of known or suspected crimes or risks, for example. Existing law may prohibit or require use of certain processes or specific "due process" elements. Once designed, an organization's dispute system may be challenged in a court or legislative body if some stakeholders believe its processes run afoul of legal or other societal norms. For example, binding arbitration clauses in adhesion contracts ("adhesive," forced, or mandatory arbitration) generated decades of litigation in the United States regarding whether such processes should be legally prohibited.⁴⁴

A DSD is usually strengthened by multiple options. Some of them should be interest-based. A designer should identify disputants' respective interests, which encompass fundamental human needs like security, economic wellbeing, belonging, recognition, and autonomy. Those interests, in turn, reflect economic, relational, political, and social values.⁴⁵ The designer should assess alternative strategies to satisfy those interests, and generate options to achieve them.⁴⁶

Ury, Brett, and Goldberg⁴⁷ suggested that dispute systems vary based on whether they reconcile the parties' interests, determine who is right, or establish who is most powerful. The

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authors argued that processes primarily oriented toward interests are more likely to lead to results with long-term sustainability than rights- or power-based methods and to yield the highest satisfaction with outcome, contribute to the development of better relationships, and therefore help prevent recurrence of the dispute.⁴⁸ However, exploring interests may require a significant investment of time. Ury, Brett, and Goldberg advised low-cost, transparent, rights-based procedures (like arbitration) as backups if interest-based approaches are unsuccessful. Sometimes, therefore, a DSD might offer a system of sequential process options, e.g., disputants commit to try negotiation, then mediation where negotiation fails to produce agreement, then arbitration if mediation fails as well.

Interest-based processes focus on a basic range of human, economic, and social needs and concerns. Rights-based dispute resolution requires a neutral third-party to apply agreed-upon rules from law, policy, or contract to a set of facts to determine who wins. Rights-based processes include varieties of arbitration and the traditional court trial in the justice system. Power-based processes use dominance in physical force or financial resources to impose an outcome; for example, strikes and lockouts are common tactics in the collective bargaining system for managing industrial conflict.

To the extent feasible within the context, the system should be responsive, focus on interests, start with lower-cost options, and aim to address conflict broadly. “Responsive” here means sensitive to basic human needs and interests. “Low-cost” (wherein “cost” includes financial, temporal, and emotional costs) system arrangements move from prevention, to low-cost management, to low-cost resolution processes. A “comprehensive” system is available to all and open to the broadest scope of coverage that can be managed with the available resources. The broader the scope, the more likely stakeholders will be to engage the system when a dispute

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is burgeoning—at the grievance or conflict stage—and thus allow it to function as a preventive system as well as one that resolves conflict. Designers may need to balance the scope with resource constraints and efficiency in DSD; efficiency should also be understood in terms of the costs and benefits of prevention relative to resolution.

When users choose their own process, they are more likely to be satisfied with both the process and its outcome.⁴⁹ Social psychologists John Thibaut and Laurens Walker examined the importance of process choice, arguing that factors other than whether the individual has won substantially affect satisfaction and perceived fairness in allocation disputes.⁵⁰ In contrast to distributive justice, which suggests that party satisfaction is a function of outcome (the content of the decision or resolution), procedural justice suggests that satisfaction is also a function of the process (the steps taken to reach that decision). Tom Tyler and E. Allan Lind theorized that when procedures accord with the fundamental values of the group and the individual, procedural justice follows. People value participation in the life of their group, their status as members, and voice in decision-making. When users choose their own process, they are more likely to be satisfied with both the process and its outcome.⁵¹

Disputants have different preferences for procedures—such as negotiation, mediation, and arbitration—depending on a variety of circumstances. When there is significant time pressure, disputants may prefer arbitration, which can result in speedier outcomes; however, people in close relationships tend to reject arbitration, presumably because of its more coercive and adversarial features.⁵² User control over process choice is also a factor increasing the likelihood that the system is fair and unbiased. Within a design, control over process choice allows disputants to select those processes they perceive to be in their best interests. If a disputant believes her conflict involves an important issue of public policy, litigation may be the

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appropriate choice.⁵³ To deprive users of that choice through adhesive, forced, or mandatory arbitration, for instance, may be procedurally unfair (see Chapter 12). Moreover, the systematic privatization of public law through adhesive arbitration may undermine the enforcement of public rights and the development of precedent; affording a choice of dispute resolution processes conveys respect for individuals' autonomy. Donna Shestowsky found that participants in experiments preferred high disputant control in every area; they wanted a neutral third party's role to be limited to helping them arrive at their own decision.⁵⁴

RESOURCES

The decision-maker needs to decide what resources, human and financial, can be committed to DSD implementation and evaluation. Will internal staff design the system, or will the decision maker retain outside consultants or advisors? Even if outside advisors are involved, how much money and staff time will the organization devote to these design processes?

The designer (or a member of the assessment-design team) also needs to assess what resources the current system expends for conflict prevention, management, and/or resolution. On the human resource side, are neutrals in the current system adequately trained to provide high-quality and ethical services? Do other personnel in the system have sufficient skills, training, and supervision?

How will the new or revamped system be financed? Will its funding level be adequate to achieve the stated goals? What impact do the amounts and sources of funding appear to have on the results of the system? For example, Congress passed a bill authorizing the September 11th VCF and provided an open-ended budget of taxpayer dollars for it. In contrast, President Obama and representatives of British Petroleum (BP) agreed that BP would commit \$20 billion to spend on the DSD formed to address claims following the Deepwater Horizon explosion. (The court

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subsequently administered a separate compensation scheme under which BP paid additional funds.) Meanwhile, the DSDs for allocating donations from the general public to victims of the terrorist attacks in Aurora, Colorado and Boston, Massachusetts differed from either of these examples because donations were not conditioned on releasing potential defendants from liability. Ensuring adequate resources in complex systems may require making hard decisions that, as noted above, can affect perceptions of fairness, justice, and likelihood of success.

Also central to DSD resource discussions is who pays for the services. A system financed by some but not all of the parties might create bias or a perception of bias. For example, the company implicated in an industrial spill might bear the significant expense incurred for a process to address liability, fact finding, and compensation involving federal and state agencies, residents of the community, and the business itself. While having only one side pay increases the risk of bias, imposing financial costs on lower-income parties may create burdens that effectively deny access. Some ways to ameliorate the real or perceived risk of bias is to emphasize transparency in the process and participation in the decision-making.

Systems need to be designed in alignment with available resources—human, organizational, and financial. A program’s credibility depends on both top-down and bottom-up support. Top-down support includes adequate financial and human resources, public statements of support from organizational leaders, and use of the program by key stakeholders. Bottom-up social support includes testimonials from satisfied participants, success stories, and word-of-mouth endorsements. Within a business, for instance, support could include moral leadership by managers, education and training of managers and employees on use of the processes, financial support for the operation, and emotional support for users. In a public context, monitoring and periodic review through published reports, hearings, and the media could be valuable for

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enhancing credibility.

SUCCESS, ACCOUNTABILITY, AND LEARNING

Success can be defined not only by whether the system achieves its intended goals but also by whether it achieves broader societal goals, including fairness and justice. A system's success is more readily judged if its outcomes are made available to and studied by independent evaluators (see Chapter 5). Unfortunately, barriers such as cost, privacy concerns, and difficulty in collecting data often preclude such meaningful evaluation.

Evaluation is important in three primary respects. First, evaluation is necessary for system operators to ascertain whether the system is working. Are key stakeholder groups using the system? Are costs in line with projections? Are neutrals delivering high-quality services and upholding ethics rules? Are users satisfied with the options and services? Second, ongoing evaluation identifies opportunities for system improvement. Third, it is important for users to understand how—and how well—the system operates. Transparency increases credibility and therefore participation, encouraging further feedback from participants. However, it may be important to foster transparency on how a system works in general but preserve privacy on the details of specific cases.

Learning refers both to system improvement based on feedback and to stakeholder training and education. The organizational entity's management must be adequately trained in the system's use and efficacy. Public or private users must be informed about its availability. Staff of an organization—at all levels—benefit from education about conflict management and communication. Consumers and other users learn about specific procedures available for resolving disputes. Meanwhile, third-party neutrals learn about the organization and its culture.⁵⁵

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System procedures should be transparent and accountable to all stakeholders, and provide a fair, just, balanced, unbiased, and effective means for managing conflict and resolving disputes. As noted in the opening to this chapter, systems have traditionally been deemed effective if they achieved the goals of lessening transaction costs, increasing satisfaction with the outcome, building relationships among the disputants, and reducing recurrence of the disputes.⁵⁶

However, these evaluations were based primarily on employment systems. Governance systems and transitional justice may have a broader and more complex set of goals, such as establishing peace, security, reconciliation, and the rule of law. Chapter 5 will explore best practices for how to conduct an evaluation in these many contexts of system design.

CONCLUSION

This chapter introduced institutional analysis as social science focused on understanding institutions in terms of their structure and function. The Analytic Framework for Dispute System Design was then provided for analyzing an existing system for preventing, managing, or resolving conflict. Within this context, the role of the designer is revealed in its full complexity. The designer brings unique expertise by which to analyze and explain key categories of information: goals, stakeholders, context and culture, processes and structures, resources, and success, accountability, and learning. The next chapter examines the many different types of DSD processes and structures.

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¹ Elinor Ostrom, *Understanding Institutional Diversity*. (Princeton, NJ: Princeton University Press, 2005), 8.

² *Ibid.*, 27.

³ *Ibid.*, 28.

⁴ See Chapter 5, Accountability: Evaluating Dispute System Design.

⁵ Ostrom, *Understanding Institutional Diversity*, 28.

⁶ Robert Axelrod, *The Evolution of Cooperation*. (New York, NY: Basic Books, 1984.) See also Robert Axelrod, *The Complexity of Cooperation: Agent-Based Models of Competition and Collaboration* (Princeton, NJ: Princeton University Press, 1998).

⁷ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, UK: Cambridge University Press, 1990).

⁸ Ostrom, *Understanding Institutional Diversity*, 5–8.

⁹ *Ibid.*, 14.

¹⁰ *Ibid.*, 16–22. See, generally, Elizabeth Baldwin, Tingjia Chen, and Daniel Cole, “Institutional Analysis for New Public Governance Scholars,” *Public Management Review*, (2018), accessed March 4, 2019, <https://doi.org/10.1080/14719037.2018.1538427>; Daniel H. Cole, “Laws, Norms, and the Institutional Analysis and Development Framework,” *Journal of Institutional Economics* 13, no. 4 (2017): 829–847; Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* 3rd ed. (Oxford, UK: Oxford University Press, 1998).

¹¹ Ostrom, *Understanding Institutional Diversity*, 22–27.

¹² Lauren B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights*. (Chicago, IL: University of Chicago Press, 2016.)

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¹³ See, generally, Glenn Morgan, John L. Campbell, Colin Crouch, Ove Kaj Pedersen, and Richard Whitley, eds., *The Oxford Handbook of Comparative Institutional Analysis* (Oxford, UK: Oxford University Press, 2010); and Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford, UK: Oxford University Press, 2007).

¹⁴ Lisa Blomgren Amsler, “The Evolution of Social Norms in Conflict Resolution,” *Journal of Natural Resources Policy Research* 6, no. 4 (2014): 285–90.

¹⁵ The original version of this framework was developed in 2002 by Maude Pervere and Stephanie Smith in connection with their first class on system design at Stanford Law School. The framework has been further developed and refined by Stephanie Smith and Janet Martinez. It was first published and discussed in Stephanie Smith and Janet Martinez, “An Analytic Framework for Dispute Systems Design,” *Harvard Negotiation Law Review* 14 (Winter 2009), 123–69. Since that publication, “culture and context” has been added as an explicit element of the framework.

¹⁶ P.D. Villarreal, “Unnecessary Litigation: A System Flaw—GE Launches Zero Defect Campaign,” *Metropolitan Corporate Counsel Annual Index* 7, no. 8 (August 1999): 1–36. See Chapter 11, Commercial Disputes.

¹⁷ Richard V. Denenberg and Mark Braverman, *The Violence-Prone Workplace: A New Approach to Dealing with Hostile, Threatening, and Uncivil Behavior* (Ithaca, NY: Cornell University Press, 1999). See also Public Employees Federation, AFL-CIO, “Resource List for Workplace Violence Prevention,”

http://www.pef.org/healthandsafety/resource_list_workplace_violence_prevention.htm

¹⁸ See Chapter 11, Managing Conflict in Employment.

¹⁹ See Chapter 1, What Is Dispute System Design?, for definitions of justice.

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²⁰ See Chapter 8, Claims Facilities; Kenneth Feinberg, the special master for the September 11 Fund, used an algorithm to calculate compensation for each individual claimant, but retained discretion to adjust the amounts to be more fair.

²¹ This case is discussed in Chapter 13, Consumer Disputes.

²² Two examples of high-profile corporate apologies for product defects are Johnson and Johnson (see Barbara Kellerman, “When Should a Leader Apologize – and When Not?” *Harvard Business Review* (April 2006)) and Toyota (see Micheline Maynard, “An Apology from Toyota’s Leader,” *New York Times*, February 24, 2010.)

²³ Civil Justice Reform Act, Pub. L. 101-650, Sec. 104, 104 Stat 5089 (1990) (prior to 1991 amendment.)

²⁴ Jennifer F. Lynch, “Beyond ADR: A Systems Approach to Conflict Management.” *Negotiation Journal* 17, no. 3 (2001): 207–16, esp. 208, 211.

²⁵ Michelle LeBaron, “The Alchemy of Change: Cultural Fluency in Conflict Resolution,” *The Handbook of Conflict Resolution: Theory and Practice*, 3rd eds. Peter T. Coleman, Morton Deutsch, Eric C. Marcus (San Francisco, CA: Jossey-Bass (2014); Roy J. Lewicki, Bruce Barry, and David M. Saunders, *Negotiation* (New York, NY: McGraw Hill, 2005), 441. Jeffrey Z. Rubin and Frank E. A. Sander, “Culture, Negotiation, and the Eye of the Beholder,” *Negotiation Journal* 7, no. 3 (1991): 249–63.

²⁶ Dean Pruitt, Jeffrey Z. Rubin, and Sung Hee Kim, *Social Conflict: Escalation, Stalemate, and Settlement* 3rd ed. (New York: McGraw-Hill, 2003), 37.

²⁷ *Ibid.*, 67.

²⁸ Deborah M. Kolb, *When Talk Works: Profiles of Mediators* (San Francisco, CA: Jossey-Bass, 1994).

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²⁹ Cathy A. Costantino and Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco, CA: Jossey-Bass, 1995).

³⁰ David B. Lipsky, Ronald L. Seeber, and Richard D. Fincher, *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals* (San Francisco, CA: Jossey-Bass, 2003).

³¹ *Ibid.*, 225-230. A champion is a senior official or executive who has the authority to set policy and marshal the necessary organizational resources to implement it.

³² Corinne Bendersky, "Culture: The Missing Link in Dispute Systems Design," *Negotiation Journal* 14, no. 4 (October 1998): 307–11.

³³ Jeanne M. Brett, *Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries*, 2nd ed. (San Francisco, CA: John Wiley & Sons, Jossey-Bass, 2007), 27–52.

³⁴ *Ibid.*, 28–29.

³⁵ Max H. Bazerman and Margaret A. Neale, *Negotiating Rationally* (New York: Free Press, 1992); Dean G. Pruitt and Peter J. Carnevale, *Negotiation in Social Conflict* (Ann Arbor, MI: Open University Press, 1993).

³⁶ Brett, *Negotiating Globally*, 34–37.

³⁷ *Ibid.*, 37–38.

³⁸ *Ibid.*, 39.

³⁹ Geert Hofstede, *Culture's Consequences: International Differences in Work-Related Values* (Thousand Oaks, CA: Sage, 1980); Edward T. Hall, *Beyond Culture* (New York: Doubleday, 1976). Hofstede describes four key dimensions: power distance, collectivism versus

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individualism, masculinity versus femininity, and uncertainty avoidance (weak to strong). Hall focused on four factors: primary interest (the relative importance of relationship or the transaction); communications (indirect/“high context” or direct/“low context”); time (punctual or more flexible); and space (more or less personal space; level of formality).

⁴⁰ Hofstede, *Culture’s Consequences*; Shalom H. Schwartz, *Beyond Individualism/Collectivism: New Cultural Dimension of Values* (Thousand Oaks, CA: Sage, 1994); Catherine H. Tinsley, Jared Curhan, and Ro Sung Kwak, “Adopting a Dual Lens Approach for Examining the Dilemma of Differences in International Business Negotiations,” *International Negotiations* 4, no. 1 (1999): 5–22; Catherine H. Tinsley, “Models of Conflict Resolution in Japanese, German, and American Cultures,” *Journal of Applied Psychology* 83, no. 2 (1998): 316–23.

⁴¹ For a series of essays on culture, conflict resolution, and the relationship between; he describes culture as a constituent of human cognition and social action, see Kevin Avruch, *Culture and Conflict Resolution*, (Washington, D.C.: U.S. Institute of Peace, 1998), 4.

⁴² Jeswald W. Salacuse, *Making Global Deals* (New York, NY: Random House, 1991).

⁴³ In this book, the phrase “prevent, manage, and resolve disputes” will be shorthand for a wide array of actions in relation to conflicts and disputes, including anticipate, identify, prevent, assess, manage, learn from, follow up, and resolve.

⁴⁴ See Chapter 12, Arbitration in Commercial and Employment Designs.

⁴⁵ Vindication of rights can also be an “interest.”

⁴⁶ The centrality of interests in negotiation is highlighted in Roger Fisher, William L. Ury, and Bruce Patton, *Getting to Yes* (New York: Penguin, 1980); Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Harvard University Press, 1985); David A. Lax and James K. Sebenius, *The Manager as Negotiator* (New York: Basic Books, 1986); and Robert H. Mnookin,

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Andrew S. Tulumello, and Scott R. Peppet, *Beyond Winning* (Cambridge, MA: Harvard University Press, 2000). On negotiation theory more broadly, see Chapter 2, Building Blocks.

⁴⁷ William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco, CA: Jossey-Bass, 1988).

⁴⁸ *Ibid.*, 14.

⁴⁹ Tom R. Tyler, “The Quality of Dispute Resolution Processes and Outcomes: Measurement Problems and Possibilities,” *University of Denver Law Review* 66, no. 3 (1989): 419–36. Tom R. Tyler and E. Allan Lind, “Procedural Justice,” in *Handbook of Justice Research in Law*, eds. Joseph Sanders and Lee V. Hamilton (Berlin: Springer, 2001): 65–92, esp. 68–69. Tyler, “The Quality of Dispute Resolution Processes and Outcome.” Tom R. Tyler, “What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures,” *Law and Society Review* 22, no. 1 (1988): 128–42.

⁵⁰ The two first core dimensions of procedural justice—process control and decision control—were first proposed in John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Mahwah, NJ: Lawrence Erlbaum, 1975), 122.

⁵¹ Donna Shestowsky, “When Ignorance Is Not Bliss: An Empirical Study of Litigants’ Awareness of Court-Sponsored Alternative Dispute Resolution Programs,” *Harvard Negotiation Law Review* 22 (Spring 2017): 189–202.

⁵² Pruitt, Rubin, and Kim, *Social Conflict*, 25–34.

⁵³ For multiple commentators’ views on this topic, see the December 2009 *Fordham Law Review* issue dedicated to a symposium held in April 2009 on Owen Fiss’s article “Against Settlement,” published in the *The Yale Law Journal* in 1984.

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⁵⁴ Donna Shestowsky, “Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea,” *Psychology, Public Policy, and Law* 10, no. 3 (2004): 211–43.

⁵⁵ Costantino and Merchant, *Designing Management Systems*, 142–49. See, for example, the extensive implementation roll-out, Lisa Blomgren Bingham, *Mediation at Work: Transforming Workplace Conflict at the United States Postal Service* (Washington, DC: IBM Center for the Business of Government, 2003).

⁵⁶ Ury, Brett, and Goldberg, *Getting Disputes Resolved*, 11-13.

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