

Session 4: Implementation of Informally Negotiated Agreements or Settlements

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Panelists: Maarten Hajer, David Kahane, Richard Reuben, Marianella Sclavi, Dan Yankelovich

Scenario: A neighborhood effort to involve local residents in overseeing a "brownfields redevelopment" program is just wrapping up. Federal and state funds, as well as substantial private investment, will be allocated to help clean up an abandoned contaminated site based on the clean-up agreement reached through a mediated dialogue. The plan answers the question "How clean is clean?" and spells out the proposed design of new housing, commercial and recreational facilities to be developed on the site. A consensus building process -- preceded by a credible conflict assessment -- generated a written consensus among the more than 30 participants in the process. Right before the group presents its final recommendations to the city council, however, a new neighborhood group appears claiming that it has been left out, that it had tried unsuccessfully to convince the advisory group to modify its proposals, and it is seeking a promise from the city council that the advisory group's proposal will not be accepted.

I. Unjust Process

D.Kahane asked what it would mean to create a process, no matter how good, if we knew from the start that it would unjustly exclude some people who would be harmed by exclusion. What effect would this have? He suggested that it might make participants and organizers more attentive to issues of exclusion and to what kind of exclusion should de-legitimize a process. In his view, we should be concerned about excluding groups that are also excluded from other democratic processes, who lack organizational capacity, and who may lack a sense of shared identity and shared interest. He noted that there seem to be varying degrees of confidence about how well even good facilitation and reflection by deliberators can circumvent this problem. The challenge is to make these issues of exclusion part of a systematic process rather an unexpected challenge. When we arrive at the process' "punctuation" —its outcomes and decisions—we ought to reflect on who was excluded, and ask what claims we can make about representing the public will.

J.Forester continued that if every consultation excludes unjustly, then we need some criteria for what constitutes justness. His own just criteria would have to do with group

representation and power dynamics. Random sampling helps meet a criterion of fairness. However, problems may arise if a group is not numerous enough to be properly represented. Procedural fairness, R. Reuben suggested, leads people to judge a process as legitimate. This is because process drives the outcome more than content. This squares nicely with democratic values: participation needs to be broadly based, reciprocal rather than the dominated by special interests, all participants should be treated alike, the result should be rational, and the processes should be transparent. However, the hard part is applying these principles in a particular context. He reflected on the need for a mechanism to ensure some kind of accountability.

M.Sclavi commented that legitimacy can be enhanced by listening. (She also advocated a “humoristic” approach.) Listening creates opposing yet more legitimate positions. By accepting the paradox (i.e. that really listening may generate mutually exclusive explanations or proposals), groups can work through a problem. In order to do this, one must suspend disbelief, visit others’ locales, drink and eat together and ask people to explain their positions.

S.Sherry noted that people who have gone through deliberative processes are different than people who have not. They are more open to the deliberation process, and perhaps even better at it. However, these groups, or citizen assemblies, do not have the same kind of legitimacy as elected officials. As a result, people don’t trust them as much. We have not yet figured out how to build ad hoc representative legitimacy so that people feel adequately represented in deliberative dialogues.

II. Continual Process

M.Hajer noted that when an informal agreement is reached, it is more of an artistic representation than an actual plan. A good deliberative process is meandering and does rarely takes a consistent form. Regarding the scenario, he reflected that we know we will probably not stick to the proposal currently under discussion because we will encounter unexpected obstacles, prompting us to deliberate and reconsider. While politicians should be upfront about their goals, parties need to understand that this is a long process that

they cannot control entirely. The process should involve fracture and conflict, in terms of changing the ways in which people are involved. Meandering through multiple decisions should cancel out the parties' respective discursive biases. D. Kahane added that the process should also be self-consciously recursive, moving through multiple iterations. It might then actually produce recommendations and proposals for public scrutiny before the process is over. This should help mitigate some issues of exclusion.

P. Adler asked how one can conclude any specific process if the theory of deliberative democracy prescribes iterations and recursiveness? Given what F. Fisher said earlier that this is a utopian concept and very process-oriented, how does deliberative democracy expect to reach conclusions in practice? "When people get persuaded," M. Hajer replied, and when those who are in a position to make a decision in this process are included. But, there is no "cookbook recipe." The fact that we put more emphasis on more rounds and "meandering" does not mean that the process has to take longer.

P. Adler responded that he actually practices this kind of recursive process, but he still wanted to know how we can reconcile the need for finality and certainty with the need for legitimacy and new knowledge. D. Fairman added that in general if you tell a public official that a decision-making process will be deliberative and recursive, the official will "never call you back." Our culture prefers solutions and finality, so we need to be careful about setting a precedent by organizing processes that can be restarted at any time. We should not unjustly prolong a legitimate process. J. Innes agreed, saying that "You cannot sell your services if you tell people that consensus-building is forever," even though it is. Some people have the misconception that when you reach a consensus, the process stops and everyone moves on. However, people often say "this is the best we can do today, but I am going to interact with these people during the implementation phase. Therefore, we are going to set up a representative group for the next phase." These "spin-offs" encourage others to participate in and improve democracy.

III. Time Scale

D.Yankelovich noted that the time required for these processes is orders of magnitude greater than the time people want to give to them. C.Menkel-Meadow echoed this concern about the time and resources that deliberative processes require, because they exclude those without the time and resources to participate. This is a structural problem. One response is to invent more open processes. But this makes it harder for us to be experts on what is going to happen and to sell such process to elected officials who want predictable outcomes.

IV. Learning: Individual Opinion to Collective Judgment

D.Yankelovich cautioned that we are confounding decision-making and deliberation. “Deliberative democracy has two words in it.” It calls for a democratic process, but also for an *informed* process that generates judgment and wisdom. He noted that one difference between deliberative democracy and dispute resolution is that deliberative democracy groups distinguish between dialogue for the purpose of reaching mutual understanding and dialogue for the purpose of decision-making. In order for democracy to work, we need to bring the public into a state of judgment beyond raw opinion, which is clouded by emotional content and resistance, wishful thinking, identity, pride, prejudice, cognitive dissonance, and denial. B.Isaacs added that we do not know enough about the journey from raw opinion to informed judgment, and the creation of more balanced structural conditions does not guarantee a better result. It takes work to be informed, and people need to develop the capacity to participate. This contrasts with the fast-paced world in which we do not have sufficient time and energy to become informed. He observed that we all have different ideas about what the process is. In his experience, the challenge is to transform patterns of collective identity.

V. Differences between Dispute Resolution and Deliberative Democracy

D.Yankelovich further observed that the word “deliberation” may obscure another important difference between the two fields. “Deliberation” in dispute resolution refers to negotiation among stakeholders to find consensus within a group. “Deliberation” in deliberative democracy focuses more on changes that happen within the individual. There

is an important difference between the two. Reiterating his earlier question, A. Fung asked what the differences are in how conflict resolution and deliberative democracy experts look at the world.

In addressing L.Susskind's question as to whether certain criteria were sufficient to meet the needs of deliberative democracy, J.Cohen noted that deliberative democracy is not just about solving discrete problems. In the field of dispute resolution, mediators and stakeholders want to make progress solving particular problems. Deliberative democracy is a way of thinking about the larger whole of democracy. If we talk about one piece of democracy, such as the EIA, deliberative democracy needs to be able to talk about how to improve that piece as well. As it stands, the two fields may operate in different intellectual spaces. C.Menkel-Meadow disagreed with the contention that deliberative democracy is more systematic and dispute resolution more problem-oriented. She described dispute resolution as more than tools and techniques—"It is a way of life." However, she agreed that practitioners of deliberative democracy are utopian. She noted that we are trying to pin down its utopian ideals and open up the conversation.

VI. Location and Bias

J.Cohen remarked on the lack of discussion of the political setting in which choices are made, the venues in which decisions are made, and the concomitant outcomes. He suggested that the outcome one wants affects the kinds of forums one likes. When someone proposes that an issue be decided through the courts or the legislature or regulatory negotiation, it has something to do with what they want the result to be. Forum choices have to do with mobilization of bias based on the kind of outcome you desire. We can analyze what peoples' biases are based on why they want one kind of forum instead of another.

VII. Resistance

D.Yankelovich voiced his concern about the depth of resistance among elected officials, which D.Booher had mentioned previously. He described it as profound, deeply ingrained in the nature of the process, emotional, and positional. Unless the field finds a way of

dealing with this resistance, we are never going to make real headway. C.Lukensmeyer echoed the need for a shared diagnosis about what promotes progress. She described the depth of resistance, not just among elected officials, but also within broader institutional structures. She reflected on the need for governance mechanisms that reconnect deliberative democracy to the collective will of the public.

VIII. Remaining Questions

D.Kahane asked how arguments about efficiency and implementability push against making deliberative processes transformative and complex enough to achieve social reform. M.Elliott noted the lack of discussion about social capital and capacity building, and asked whether it is not as relevant as we thought or whether this was an oversight.

IX. Take Away

S.Sherry asked what practitioners can take away and use from the workshop. D.Kahane said that if we wish to transform society, deliberative democracy can help make the practice of dispute resolution more legible and increase the uptake of such practices. Deliberative democracy can offer a generalizable account of what is going on and help us acknowledge what underlies practice, such as social justice commitments. J.Cohen noted with pleasure that the notion of deliberative democracy has spread and is being discussed. This helps its practitioners explain to themselves why they do what they do.