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THE ROLE OF THE COURTS IN THE NEW JUSTICE SYSTEM

By Tania
Sourdin*

Introduction

Whilst some theorists consider that it is only within courts that justice can be found¹ and find the extension of the concept of justice beyond court-based adjudication to be troubling, the reality is that justice has always existed outside judicial determination and outside courts. This is partly because for most people who are in a dispute, justice involves little contact with a court or a judge. Most civil disputes settle without a hearing and it is rare that court based adjudication is necessary. Arguably, court based adjudication is less likely to be used to determine civil disputes than in the past and this is partly because Alternative Dispute Resolution, in its various iterations, is increasingly being used to resolve, settle, and manage civil disputes.²

Justice, or the 21st century framing of the concept of justice, extends beyond notions that focus on the rule of law and legal rights. A broader view of justice has been explored by policy makers and theorists³ who have noted that:

Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.⁴

This conception of justice provides that justice is found outside courts and can be supported by a range of systems, schemes, processes, and people that may have little, if anything, to do with courts or the court system. Alternative Dispute Resolution (ADR) processes that

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¹ E.g., Hazel Genn, *What Is Civil Justice For? Reform, ADR, and Access to Justice*, 24 *YALE J.L. & HUMAN.* 397 (2012).

² See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 459 (2004).

³ See, e.g., Tania Sourdin, *A Broader View of Justice?*, in *THE FUTURE OF DISPUTE RESOLUTION* 155-166 (Michael Legg ed., 2013).

⁴ Marc Galanter, *Justice in Many Rooms*, in *ACCESS TO JUSTICE AND THE WELFARE STATE* 147, 161–162 (Mauro Cappelletti ed., 1981). There are many different perspectives of justice. Theorists for example discuss substantive and distributive justice as well as therapeutic, problem solving, sustainable non adversarial and other forms of justice. It is suggested that all these representations of justice fall within an overarching definitional representation of ‘justice’ and support the notion that justice is increasingly recognised as a concept that exists outside judicial determination.

support pre- action (or pre-filing) requirements and alternative institutional and systemic arrangements mean that a court is not the first port of call for most civil disputes - if it ever was. Although research is limited, most people in a civil dispute appear to be able to negotiate and reach an outcome that may be guided by the rule of law and the realities of the justice framework and in most jurisdictions do so without ever commencing proceedings in a court.

As justice operates outside courts, then what is the role of the court within the justice system and has it changed over the past two decades? It seems clear that courts in the expansive and renovated justice system that exists in the 21st century are not at the epicenter of the justice system. Whilst courts, judges, and the role that is played by legal institutions in supporting the rule of law are critical in both creating justice and securing it, the role of an independent court system and impartial adjudication is essential in the weaving of the social fabric of a civilized society and creating social justice where liberty and equality remain critical values. Arguably, courts play an increasingly less relevant role in directly providing everyday justice for most citizens. It is likely that this trend will continue into the future for a range of reasons beyond simply the problems of cost and delay that are present in many courts.

The changing role of the courts is partly attributable to the developments that have occurred in many jurisdictions as a result of the increased use of ADR in civil disputes over the last fifty years. This rise of ADR and the awkward relationship this “alternative” has with the court system has been a focus of discussion for many years. Initially, it was thought that ADR could be integrated into the court system through the creation of a multi-door court model which focused on “in court” referral and attracted a great deal of interest in the United States following discussion, experimentation, and commentary in the 1970s and 1980s. For example, Professor Frank Sander suggested that disputes could be referred to appropriate forums (or “doors”) for resolution or determination after entry into the court system:

One might envision by the year 2000 not simply a courthouse but a dispute resolution centre, where the grievant would first be channelled through a screening clerk who would then direct him/her to the process, or sequence of processes, most appropriate to his/her type of case.⁵

Within each court, each case would be individually assessed and referred to a specific resolution process on the basis of its particular characteristics. Further, each “door” of the “multi-door courthouse” would represent one of the dispute resolution options to which parties

⁵ Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54, 55 (1996) (quoting: Frank E.A. Sander, Bussey Professor of Law at Harvard University, Varieties of Dispute Processing, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (1976), *in* 70 *F.R.D.* 79, 111 (1976)).

may be referred, whether that be mediation, evaluation, arbitration, conciliation, or adjudication.⁶

In some ways, the development of the multi-door model in the 1970s can be linked to the confusion and uncertainty that disputants might experience if they wanted to access the newly developing ADR processes outside the courts. For example, even in May 1997 Judge Earl Johnson of the California Court of Appeals stated:

At present, it is almost accidental if community members find their way to an appropriate forum other than the regular courts. Since these forums are operated by a hodgepodge of local government agencies, neighborhood organizations and trade associations, citizens must be very knowledgeable about community resources to locate the right forum for their particular dispute.⁷

It is clear that the “multi-door” approach that emerged in the 1970s was inextricably linked to the concept of the “multi-door courthouse” and the approach was based on the assumption that the referral of disputes would take place with the court at the epicentre of the referral system. This approach, with the court as the epicentre of dispute resolution, is no longer appropriate in many jurisdictions particularly where the vast bulk of disputes are referred, resolved, and settled away from the court system and often before litigation has commenced. The more modern approach responds to the more evolved ADR system, the continuing rise in the use of ADR, a more sophisticated understanding of ADR options, and the availability of referral information on the internet and elsewhere. Rather than a “multi-door courthouse” a “multi option” justice system now operates.

The multi-option systemic approach supports external ADR agencies and processes and supports awareness levels about process availability. ADR standards, brochures, websites, and government bodies all assist with this. In many countries, existing mandatory pre-litigation approaches support clear pathways which enable and foster dispute resolution outside of the court system. The multi-option approach also assumes that some dispute resolution processes will continue to be used in respect of litigated matters and that some ADR will remain in the court system. However, the multi-option approach supports ADR options to enable most disputes to be resolved away from the civil court system which suggests that fewer civil disputes may be dealt with by the court system.

The repositioning of the courts within the justice landscape also shifted as understandings about justice and the role of adjudication in achieving justice changed. For example, one commentator has distinguished between the “new ADR movement” (which he viewed as emerging in the late 1970s in response to the United States 1976 Pound Conference on the

⁶ Reuben, *supra* note 5, at 55; Larry Ray & Anne L. Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future ... Today*, 1 OHIO ST. J. ON DISP. RESOL. 7 (1985).

⁷ Arlin R. Thrush, *Public Health and Safety Hazards versus Confidentiality: Expanding the Mediation Door of the Multi-Door Courthouse*, 1994 J. DISP. RESOL. 235, 237 (1994), (referring to Judge Earl Johnson of the California Court of Appeals, who addressed the problem of accessibility at the National Conference on Minor Dispute Resolution in New York in May 1977).

Causes of Popular Dissatisfaction with the Administration of Justice),⁸ and the “old ADR Movement” that existed for centuries and promoted adjudicative processes. The Pound Conference was said to have “made ADR fashionable and brought it to the fore of the American adjudicatory scene.”⁹ In essence, adjudication by the late 1970s was increasingly not seen as providing the only or the primary pathway to the attainment of justice. This shift can also be considered in the context of a shift towards self-determination and away from dependency. Arguably, the next stage in the shift could be described as the “new, new ADR movement” which locates ADR more significantly away from the adjudication system.

This article explores these changes in the context of current and past perspectives about the justice system and considers how courts are currently positioned in the justice system in view of the changing ADR landscape. In the discussion that follows, it is suggested that the broader conceptualisation of justice (outside judicial adjudication) has its roots in traditional formulations of justice concepts and that this conceptualization does not displace the important, significant, and essential role played by the judiciary in the public adjudication of civil disputes. The broader conceptualization does not inappropriately confine justice within institutions; rather, it supports a different and more modern justice system that includes both an ADR system and a court system. Such changes are not problematic for courts (or the justice system) provided that the role of courts is not diminished or supplanted by adjudicative forms of ADR such as arbitration and provided that access to forms of judicial intervention is not inappropriately restrained.

What is justice? Representations and Philosophy

Some have suggested that justice is an “elusive concept upon which it is possible for rational and informed observers to disagree,” even though it is “one of the core principles of every national legal system”¹⁰ and that “access to justice” is nebulous and “survive[s] in political and legal discourse because it is capable of meaning different things to different people.”¹¹ These differences have meant that there is continuing disagreement amongst those who locate justice only in the court system and those who consider justice exists throughout the dispute resolution landscape.

The differences can be partly attributed to different philosophical understandings. Put simply, more traditional and perhaps somewhat romantic litigation supporters may consider

⁸ Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 310 (1996).

⁹ *Id.* at 312.

¹⁰ Michael Kirby, *Attaining Universal Justice: Realities Beyond Dreams*, 1 VICTORIA L. SCH. J. 7, 7 (2011).

¹¹ Justice Ronald Sackville, Keynote Address at the Law & Justice Foundation of New South Wales Access to Justice Roundtable: Access to Justice: Assumptions and Reality Checks (2002) (transcript *available at* <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1028&context=access> 19).

that justice can only take place within courts as it is only through the articulation by a judge of understandings about the rule of law that justice can be done. In contrast, those that inhabit the ADR landscape may consider that while there is an important, significant and essential role played by the judiciary in the public adjudication of civil disputes, justice is also present in the relationships that exist between people and in their ethical values and ADR supports this broader formulation of justice.

This vision of justice is consistent with the concept of justice as explored by philosophers such as Socrates and Aristotle who identified justice as a virtue where its existence was demonstrated by abidance with law and fairness. Questions relating to whether you could have justice without law was explored by these early philosophers who considered that law was the essential starting point for justice, although justice did not require impartial adjudication. Rather, justice was demonstrated as a virtue according to Aristotle in respect of relationships with others.¹²

The conceptualisation of justice by Aristotle involved at least two dimensions:

Particular justice on the other hand, . . . is divided into two kinds. One kind is exercised in the distribution of honors, wealth, and other divisible assets of the community, . . . the other kind is that which supplies a corrective principle in private transactions.¹³

An essential component of justice was, therefore, to be found in the relationships that existed between people and the notion that fairness or merit should be applied within a social justice framework. In these early conceptualisations, there is recognition that a corrective principle is applied; however, it can be applied as a result of the individual's ethical virtue rather than through the imposition of a rule by another. The 'corrective principle' is the law that provides the foundation for the ethical virtue.¹⁴

The notion that justice is provided by an external figure (rather than residing as an ethical virtue within an individual or resulting from agreements based on ethical values) appears to have originally been formulated in Western societies following the initial creation and representation of a female figure as a deity and the later representations of that deity. In an engaging commentary by Resnik and Curtis exploring the representations of justice figures and the architecture of courts,¹⁵ it is clear that this figure (much like the concept of justice)

¹² Jeremy J. Mhire, Aristotle's *Eudemian Ethics* 57 (Aug. 2002) (unpublished M.A. thesis, Louisiana State University) (available at http://etd.lsu.edu/docs/available/etd-0711102-123012/unrestricted/Mhire_thesis.pdf).

¹³ *Id.* at 60.

¹⁴ *Id.* at 58.

¹⁵ See JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY STATES AND DEMOCRATIC COURTROOMS (Yale University Press, 2011); Judith Resnik & Dennis Curtis, *Re-presenting Justice: Visual Narratives of Judgment and the Invention of Democratic Courts*, 24 YALE J.L. & HUMAN. 19, 39-41 (2012).

is understood differently by different theorists.¹⁶ In terms of the history of this representation, Manning notes that, from a historical perspective, the “Egyptian term that can be translated as ‘justice’ is Ma’at, which is also embodied as a female deity depicted always with an ostrich feather in her hair.”¹⁷ In many of these representations, justice is provided by a deity or god.

Considering representations of “justice” provides some insight into the definition of justice over time. Representations of justice as a female figure grew over the past three centuries to the point that, in many Western countries, the figure is seen to represent both justice and law. This representation is relatively recent (although it originally stemmed from somewhat ancient roots). Interestingly, prior to this time and from the fourteenth century until the nineteenth century it seems that the depiction of justice was more likely to be linked to the notion of “heavenly justice” with artwork more commonly featuring biblical scenes such as the Last Supper¹⁸ appearing in some early courts and justice being linked closely to religion. The relinking of justice to a female figure became more common over the past three centuries as “Justice imagery became entwined with the Catholic Church which, unlike Jewish and Islamic traditions, regularly deploys personifications. Female figures identified as Justice can be found in Christian art from as early as the fifth century.”¹⁹

These images of justice represented a departure from the earlier philosophical formulation of justice and symbolize differing philosophical interpretations and understandings of justice. Justice in this departure was something that was achieved by the actions of an independent, even-handed figure who “judged” rather than justice that was the result of individual ethics and interrelated values in relation to reciprocity and social and other relationships expressed as the rule of law. However, as Resnik and Curtis note, the female figure of justice was originally more likely to be a reflection of a virtue (other virtues being Prudence, Fortitude, and Temperance), which is consistent with the notion that justice does not require judgment by another. For this perspective, the female justice figure can represent the attributes of justice that include even-handedness and rationality (the scales), fairness (the blindfold) and courage (the sword).²⁰

According to Resnik and Curtis, discomfort with the portrayal of justice as either a deified image or the linking of justice to “judging” is one reason why courts are increasingly using more abstract depictions of justice.²¹ In these depictions, modern justice is more likely to be

¹⁶ Resnik & Curtis, *supra* note 15.

¹⁷ Joseph G. Manning, *The Representation of Justice in Ancient Egypt*, 24 *YALE J.L. & HUMAN.* 111, 114 (2012).

¹⁸ Resnik & Curtis, *supra* note 15, at 35.

¹⁹ *Id.* at 41.

²⁰ *Id.*

²¹ Resnik & Curtis, *supra* note 15. This depiction can be contrasted with the ‘blindfold’ representing impartiality and the separation from the State.

portrayed as a set of ethical values and as a virtue (not as a goddess or deity). This approach is consistent with the earlier philosophical underpinnings of the concept, as well as more recent discussions about the role of judges within the justice system and even the breadth of the justice system.

From this “new” (but old!) justice perspective, justice starts with the individual and is supported by the State and the rule of law. Whilst judging by an independent “judge” is a critical feature in the context of the articulation of the rule of law, it is not the centrepiece of the system. The rearticulation and the approach adopted by those in the access to justice field (discussed below) locate both ADR and judicial determination within the justice system particularly where ADR supports the identification of and the attributes of justice. Justice in this context can therefore be described as incorporating a “characteristic set of principles for assigning basic rights and duties and for determining what [is] the proper distribution of the benefits and burdens of social cooperation.”²²

What is the New Justice System? Access to Justice

As noted previously, the new or modern justice system does not locate courts at the epicenter of the justice system. Rather courts are a critical component of the system. The concept of justice has been expanded partly because of an exploration of access to justice notions that gathered momentum in the latter half of the 20th century. Certainly, some would credit the access to justice movement with the redefinition of the concept of justice or at least triggering the reconceptualization of the concept. In exploring access issues, it is recognized that adopting a more narrow view of justice assumes that it is done unto others rather than recognizing that justice can also be demonstrated and achieved through non-court based processes.

In “Justice in Many Rooms,”²³ Galanter argues that the access to justice movement historically adopted a view of justice that he terms “legal centralism.” The movement was “an effort to enhance the flow of disputes into appropriate official forums where they would find justice.”²⁴ Galanter suggests that legal centralism portrays a “picture in which the state agencies (and their learning) occupy the centre of legal life and stand in a relation of ‘hierarchic control’ to other, less normative orderings such as the family, the corporation, the business network.”²⁵

²² JOHN RAWLS, A THEORY OF JUSTICE 5 (Belknap Press of Harvard Univ., 2005) (1971). Rawls conceives justice as fairness.

²³ Galanter, *supra* note 4 at 147.

²⁴ *Id.* at 161.

²⁵ Galanter, *supra* note 4.

In locating justice outside official forums, attention can be paid to what Galanter terms “indigenous law” – that is, mechanisms for private ordering whereby communities and actors outside the state create their own sets of social norms, standards, and processes in order to regulate their own activities. This more pluralistic view supports a vision of justice where ethical values are supported by institutions, the rule of law as well as processes that support self-determination and participation. In this vision of justice, justice is not only about the rule of law (or the rule “by” law); justice also aspires to support members of the society and is linked to notions of deliberative democracy²⁶ as well as the reality that many civilised individuals will not require a judicial adjudication and have obligations to be civil with one another.

The trend of access to justice commentators and reformers has occurred internationally. In Australia for example, Sackville suggested that the Australian “access to justice” movement that began in the 1960s and continued into the 1970s was based on a number of assumptions about the justice system that have proved incomplete or inaccurate with the passage of time.²⁷ He considered that these assumptions led to an inflated sense of what the courts can achieve and this consideration prompted a greater discussion about the adequate fulfilment of justice ideals. Sackville noted, in earlier work, that the *Australian Access to Justice Advisory Committee* explored access to justice as not only the capacity to equally access “legal services and effective dispute resolution mechanisms,” but also as encompassing “national equity (that is, access to legal services regardless of place of residence)” and “equality before the law (that is, the removal of barriers creating or exacerbating dependency and disempowerment).”²⁸

In the United Kingdom, Lord Woolf also considered the notion of access to justice more broadly as “referring to the principles that must be adopted by the civil justice system in order to achieve objectives within that system,”²⁹ which necessarily led to an expanded concept of justice.

A number of theorists over the past fifty years have explored the justice concept by reference to the access to justice movement and the emerging recognition that litigation reforms would not address inherent justice system deficiencies. According to Cappelletti, the first wave of the access to justice movement was aimed at addressing the economic barriers to accessing courts and litigation and in particular in supporting and enhancing

²⁶ CHRISTINE PARKER, JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE 47–54 (1999) (noting “... while recourse to law can be one means of ... doing justice, it is severely limited in what it can achieve ... other arrangements and institutions for constituting deliberative democracy – such as informal means of dispute resolution, social movement politics, formal political action, and dialogic, moralizing, and persuasive means of social control – will often be preferable.”).

²⁷ Sackville, *supra* note 11.

²⁸ *Id.* at 19.

²⁹ *Id.* (citing Lord Woolf: Final Report, Access to Justice (H.M.S.O., 1996)).

legal aid.³⁰ The second wave of the movement focused on addressing the “organisation obstacle” to accessing justice.³¹ This approach focused less on values or rights and recognised that individuals belong to a broader society, and as such require processes for addressing challenges that affect collective rights, relationships, and well-being, as opposed to those of the individual. This wave focused on developing strategies for protecting collective interests and included devices such as the class action.³²

The so-called third wave of the access to justice movement was concerned with procedural obstacles to securing justice. It recognised that “in certain areas or kinds of controversies, the normal solution – the traditional contentious litigation in court – might not be the best possible way to provide effective vindication of rights.”³³

Cappelletti suggests that:

What must first be said is that, whereas – in the last two centuries or so – Western civilizations have glorified the ideal of fighting for one’s rights ... we should recognise that in certain areas a different approach – one that I used to call ‘*co-existential justice*’ – might be preferable and better able to assure access to justice. We should be humble enough to recognise that we might have a lot to learn from African and Asian traditions.³⁴

Sackville explored the impact of the access to justice movement from a different perspective, although his conclusions were somewhat similar. Sackville also considered that the access to justice movement was based on a number of flawed or incomplete assumptions about the court system. The first assumption was that the court system is capable of upholding the rights of disadvantaged people in a timely and cost-effective manner. Sackville suggested that, although courts will continue to play an integral role in supporting the disadvantaged, this form of dispute finalisation will always be inherently time-consuming. According to Sackville, the other assumptions of the access to justice movement were that legal aid funding would continue to support accessibility and that much of the access to justice rhetoric was focused on creating a rights-based system with an expanding court system. Legal aid courts, however, have not expanded over time, and there is also an increasing recognition that justice can be administered and supported outside the State-based court system.

³⁰ Mauro Cappelletti, *Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282, 283 (1993).

³¹ *Id.* at 284.

³² *Id.* at 285.

³³ *Id.* at 287.

³⁴ *Id.* at 282.

Sackville noted that “it would seem that the time has come to recognise that many of the most promising pathways to justice be outside the court and tribunal system. In particular, they are to be found in the work of community legal centres, especially through programs designed to empower people to make ‘effective choices about legal issues’.”³⁵ In 2002, he concluded that “[p]erhaps access to justice has got much less to do with lawyers and courts than most of us have realised.”³⁶ In other words, the third wave of the access to justice movement no longer located the formal legal system as the sole domain of justice.

By 2006, this view of justice had been adopted by policy makers and the judiciary within Australia. In his opening address to the National Access to Justice and Pro Bono Conference in 2006, the former Chief Justice of Australia, the Hon. Murray Gleeson AO said:

Access to justice has a much wider meaning than access to litigation. Even the incomplete form of justice that is measured in terms of legal rights and obligations is not delivered solely, or even mainly, through courts or other dispute resolution processes. To think of justice exclusively in an adversarial legal context would be a serious error.³⁷

ADR and the Delivery of Justice

The increasing use of ADR in some jurisdictions, and in particular mandatory pre-filing ADR, reignited the debate about the parameters and meaning of justice. In Australia, where ADR is integrated within the court system and where mandatory referral to ADR can also take place before proceedings are commenced, this discussion about the meaning of justice has been limited and has tended to focus more on how ADR can deliver and support justice. In contrast, in the United Kingdom and the United States, a small number of theorists have continued to suggest that ADR can never ‘really’ deliver justice.

One issue in the debate about this conceptualisation of justice is whether or not court based adjudicated outcomes are perhaps better placed to deliver justice than forms of ADR. Hazel Genn, for example, asks if ADR processes can ever deliver justice because outcomes are not tested and the quality of a settlement is questionable. According to Genn:

Access to justice is an essential element in the rule of law. Despite the private nature of ADR, it is argued that diverting legal disputes away from the courts and into mediation is, in fact, a strategy that will increase access to justice. But this is a claim that requires some scrutiny. Mediation does not contribute to access to the courts because it is

³⁵ Sackville *supra* note 11, at 31.

³⁶ *Id.*

³⁷ Murray Gleeson, Chief Justice, High Court of Australia, Opening Address at the National Access to Justice and Pro Bono Conference 1 (Aug. 11, 2006) (transcript *available at* http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_11aug06.pdf).

specifically non-court-based. *It does not contribute to substantive justice because mediation requires the parties to relinquish ideas of legal rights during mediation and focus, instead, on problem-solving.* Mediators are not concerned about substantive justice because the mediator's role is to assist the parties in reaching a settlement of their dispute. The mediator does not make a judgement about the quality of the settlement. Success in mediation is defined in the mediation literature and by mediators themselves as a settlement that parties "can live with." The outcome of mediation, therefore, is not about just settlement it is just about settlement.³⁸ (emphasis added).

This analysis is based on the assumption that mediation does not require participants to focus on rights. In my view, this assumption is simply not correct. In many mediations, the legal framework and the understanding of the legal rights of parties will be a critical issue in determining whether or not parties negotiate and how. The legal framework will often define the parameters of the problem or an important dimension of the conflict, although it is the parties, and not the mediator, who will define, discuss and explore the rights – more often than not the mediator role is linked to supporting this discussion. In other mediations, there may be little focus on legal rights particularly if the problem is not defined in terms of legal rights and it may never be capable of being defined in those terms.

The focus may also not be on settlement in mediation. In many mediations, the focus is on "good" or "wise" decision-making that requires a consideration of outcomes that could be achieved in rights-based systems and can naturally include the decision not to settle and to litigate or do something else.³⁹ The acceptance of ADR and ADR outcomes does not import a rejection of the rule of law. Rather, these approaches involve a different pathway to reach an outcome that is "just" as defined by the parties in the context of their relationship and the rule of law.

Some of the concerns about the capacity of ADR to provide justice have their origin in work that first appeared in 1984.⁴⁰ At that time, Fiss who was troubled by the increasing focus on ADR in the court system, stated that:

I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and

³⁸ Hazel Genn, *What Is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397, 411 (2012) (emphasis added).

³⁹ There is also research that suggests that agreements can be more 'creative.' See Lyn Adrian and Solfrid Mykland, 'Creativity in Court-Connected Mediation: Myth or Reality?' 30 NEGOTIATION JOURNAL 421(2014)

⁴⁰ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). The same article (with very minor, non-substantive, modifications) appeared in Fiss's book 'The Law as It Could Be' published in 2003.

judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.⁴¹

Fiss assumed that justice could only be achieved through judicial determination as forms of ADR may either render the parties unequal⁴² or exacerbate inequities as “[j]udgment aspires to an autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration.”⁴³ A second concern related to “authority” and the capacity of individuals to enter into agreements is that such agreements may be contrary to other interests such as weaker third parties (for example, children) or interests of parties who are not included in the negotiation (such as environmental or other interests).⁴⁴ A third concern is linked to whether there is compliance with outcomes reached as a result of settlement and to what extent there is a capacity to review arrangements.⁴⁵ A final objection related to ensuring that public adjudication is retained in view of its importance in relation to supporting society⁴⁶ and “... to explicate and give force to the values embodied in authoritative texts such as the Constitution [and] statutes: to interpret those values and to bring reality into accord with them.”⁴⁷

The views of Fiss and Genn are predicated on the assumptions that justice achieved by judicial determination is superior to that which can be achieved by agreement between people and that ADR is displacing court-based adjudication or limiting access to adjudication. Each of these assumptions requires close consideration, however, it is suggested that neither assumption is correct.

With regards to the first assumption that judicial determination is superior to ADR in delivering substantive justice, significant work that has been undertaken in defining and outlining the impact of procedural justice (as well as other forms of justice) suggests that justice does not only involve outcomes that are in compliance with a rule of law. Other

⁴¹ Fiss, *supra* note 40, at 1075.

⁴² *Id.* at 1076.

⁴³ *Id.* at 1078.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1083. Notably, research conducted by the author of this paper suggests that outcomes reached through mediation are more likely to be complied with and are capable of review through a number of legislative and other requirements that support ‘good faith’ negotiation or limit unconscionable conduct and outcomes. See Tania Sourdin, *Good Faith, Bad Faith? Making an Effort in Dispute Resolution 2* VICTORIA L. SCH. J. 19 (2012) (formerly entitled DICTUM).

⁴⁶ See also Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure* 162 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (2014) 1793 where Resnik voices broader concerns about the lack of public debate about legal norms that may occur as a result of declining activity in the court system.

⁴⁷ Fiss, *supra* note 40, at 1085.

factors are relevant that can be linked to ‘voice’, participation and procedural explanation. In addition, there is adjudicated court hearings may not produce substantive justice. As Burnside noted, “At the start of a career as a law student, we see Law and Justice as synonymous; later we fall into cynicism or despair as clients complain that Law and Justice seem unrelated ...”⁴⁸ Davies has observed that:

... it still seems to be generally accepted that our system is effective at achieving justice between the parties. I think that ... is a misapprehension. Between parties of equal bargaining power that might be so but that is rarely, if ever, the case. And between parties of unequal bargaining power our system is unfair... the richer litigant can afford the better lawyer. He or she can also afford to pay for more time to be spent on the preparation of her or his case. And the richer litigant may compel a poorer opponent to expend more money than he or she can afford by engaging in time and cost-wasting procedures thereby compelling the poorer litigant either to compromise unfairly or give up. Nowhere is this unfairness more evident than in litigation in which one part is unrepresented, a situation which is becoming increasingly common. So to invest our system with the virtues of ascertaining the truth or of achieving fairness between the parties does not stand up to close examination. In truth it achieves neither.⁴⁹

Importantly, in the context of the role that ADR has in delivering justice, Cappelletti suggests “there are situations in which *conciliatory* (or ‘co-existential’) justice is able to produce results which, far from being ‘second class,’ are better, *even qualitatively*, than the results of contentious litigation.”⁵⁰ He observed that situations in which the parties are concerned with preserving ongoing relationships are a prime example of disputes suitable for conciliatory or “mending” justice.⁵¹ Cappelletti argued that the desirability of preserving relations through ADR can be seen in disputes between people who are likely to have ongoing exposure to one another – for example, neighbours, those in schools and universities, patients in hospitals, and those who have business or workplace relationships.⁵² As those in the access to justice movement have noted, the outcome of court adjudication can clearly be influenced by many factors, including the quality of representation, the resources available to the litigant and the quality of the decision-making

⁴⁸ Julian Burnside, *The Practice of Law: Justice or Just a Job?* 8 NEWCASTLE L. REV. 1, 2 (2004).

⁴⁹ Geoffrey L Davies, Paper delivered at the 20th Australian Institute of Judicial Administration Annual Conference: The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System (July 12, 2002) 4-5 (transcript *available at* <http://www.aija.org.au/ac02/Davies.pdf>).

⁵⁰ Cappelletti, *supra* note 30, at 289.

⁵¹ *Id.*

⁵² *Id.* at 290.

and surrounding rights-based framework. In addition, adjudicative decision-making can be influenced by a range of factors that can influence substantive justice.⁵³

The view that outcomes achieved in the various parts of the system may have strengths and weaknesses and that “perfect justice” is aspirational is probably a more realistic one. Just as outcomes in a court adjudication may be “better” in some instances than ADR outcomes, so too an ADR outcome may be “better” than court outcomes in other circumstances. If engagement in ADR, for example, supports (and possibly extends) relationships and individual and community empowerment, and betters future decision-making, then arguably this outcome is as important as the normative and influential impact a court judgment might have. In this context, there is a great deal of general literature that refers to the behaviour of individuals in dispute. Some of this relates to concepts of “learned helplessness”⁵⁴ and the need to have justice option mechanisms in place that support the attainment of helpful negotiation and conflict resolution skills as well as continuing relationships.

In terms of the second assumption made by Genn and Fiss – that ADR is displacing judicial adjudication – there are a number of points that can be made. For example, ADR may simply remove some disputes from the queue that forms as people wait to litigate. If they do not reach agreement, they can rejoin the queue. Access to justice and the courts is enhanced through the use of ADR as those disputes that require judicial determination are able to access it. Judicial adjudication is not displaced, rather it is supported. Clearly, an overburdened court system has implications for both society and justice. Disputants may not take action if they think that they cannot do so – the justice mechanism may be “too hard” to access, individuals may not be aware that they have a “right” to take action, or they may be unable to access court-based services because it is too slow, particularly if they have a disability or some other limitation. The wider view of justice that incorporates ADR as well as judicial determination does not suggest that ADR should limit access. Rather, in terms of the more recent configurations of justice, the system should stress personal obligations to resolve disputes before enabling access to judicial adjudication except where this is not appropriate because of disadvantage or some other factor such as urgency.

However it may be that some forms of ADR can displace court adjudication more readily than others. As ADR can be facilitative, advisory, or determinative (and sometimes a mix

⁵³ See Tania Sourdin, *Decision Making in ADR: Science, Sense and Sensibility* 1 Austl. Ctr. for Court and Justice Sys. Innovation, Working Paper No. 1, (2012) (<http://www.civiljustice.info/cgi/viewcontent.cgi?article=1000&context=decision>), See also Tania Sourdin, ‘Facilitative judging: science sense and sensibility’ in TANIA SOURDIN AND ARCHIE ZARISKI, *THE MULTITASKING JUDGE; COMPARATIVE JUDICIAL DISPUTE RESOLUTION* (Thomson Reuters, 2013)

⁵⁴ See, e.g., Dominique Crié, *Consumers' Complaint Behaviour. Taxonomy, Typology and Determinants: Towards a Unified Ontology*, 11 J. DATABASE MARKETING & CUSTOMER STRATEGY MGMT. 60 (2003); C Kim et al., *The Effect of Attitude and Perception on Consumer Complaint Intentions*, 20 J. CONSUMER MARKETING 352 (2003); Mary C LaForge, *Learned Helplessness as an Explanation of Elderly Consumer Complaint Behavior*, 8(5) J. BUS. ETHICS. 359 (1989); Jinkook Lee & Haracio Soberon-Ferrer, *An Empirical Analysis of Elderly Consumers' Complaining Behavior* 27 FAM. CONSUMER SCI. RES. J. 341 (1999); Chenting Su & Yeqing Bao, *Student Complaint Behavior Based on Power Perceptions*, 22(3) S.M.Q. 43 (2001).

of processes) it may be that more advisory and determinative processes have different impacts and may displace court adjudication in a more significant way. For example, the impact of facilitative forms of ADR such as mediation may be more limited than the impact of determinative forms of ADR such as arbitration as forms of arbitration can effectively oust the jurisdiction of domestic courts and replace the public court focused adjudicative process with private, and sometimes corporate, rather than State (and citizen controlled⁵⁵) adjudication initiatives (see discussion below).

The Role of Courts and Judges

The demise of the multi-door courthouse model and the rise of the multi-option approach which is predicated on the notion that the justice system exists beyond courts and that courts have a limited role in the context of justice provision has significant implications for the future role of courts and judges. In particular, the question that must be explored is whether courts should focus primarily or perhaps even solely on adjudication and leave ADR to those who operate outside courts.⁵⁶ The multi-option approach, however, does not suggest limiting the role of courts in this manner. Rather, it continues to locate some ADR processes within the court environment which enables considerable benefits to be realised.⁵⁸ Those benefits include elevating ADR processes to a socially and judicially acceptable level, and ensuring that “market imperfections” do not adversely impact ADR processes.⁵⁹

Clearly, there are a number of issues that arise where ADR processes are situated or mainly connected to the court system (as was envisaged in the early multi-door arrangements). For example, locating ADR within courts and not supporting ADR in the pre-litigation area may mean that people may be less likely to use ADR before commencing litigation. This reality means that courts need to be wary of how much ADR they may offer (even on a referral basis) and be aware of trends in dispute resolution outside courts. Offering and regulating ADR within court environments may also reduce the number and scope of pre-litigation ADR options available (particularly if having different levels of immunity for ADR practitioners may make ADR more attractive for practitioners - higher levels of immunity within court referral frameworks and lower levels outside courts could provide disincentives to pre-litigation ADR).

Other critical issues with a multi-door model include concerns about the institutionalisation of ADR processes and a potential loss of flexibility in terms of process design. Court

⁵⁵ See Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure* 162 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (2014) 1793.

⁵⁶ Stempel, *supra* note 8.

⁵⁸ *Id.*

⁵⁹ *Id.* at 395.

structures and processes may impact ADR processes, so ADR may begin to “model” institutionalised processes and norms. Other concerns relate to the “grass roots” nature of ADR processes and the potential “legalisation”⁶⁰ of ADR as more evaluative forms of ADR are sponsored, or perhaps preferred, by those within courts and tribunals.

Institutionalisation within a legal framework will almost inevitably produce greater uniformity, regulation, and codification of ADR and this may have some benefits. As Sharon Press has pointed out, however, this can inhibit process flexibility.⁶¹ There may also be funding and other issues where declining court budgets are present - the ADR budget (if it exists) may be seen as the easiest area to cut as there is an understandable preference to ensure that the adjudication area remains resourced. There are other issues as well that can be linked to temperament and training. For example, should judges mediate or should the judicial role be limited to some forms of facilitative ADR such as settlement conferences where caucusing does not take place?

At the same time, the multi-option approach is not without difficulties. One issue that arises in the emergence of the multi-option system of justice where most ADR activity takes place away from courts is that there may be less capacity to regulate ADR other than through systems of reporting, standards, and accreditation. In this regard, it has been argued that quality control mechanisms can be introduced more readily within a court than where ADR operates outside of any structure or framework.⁶² There is limited evidence, however, that this has been the case within court systems where ADR has been a focus. In such systems, ordinarily there has been limited quality control and evaluation of processes.

In addition, the rise of the multi-option model of justice raises pragmatic issues relating to funding. For example, should traditional adjudication absorb most of the available funding in a justice budget? Will different processes “compete” for funding or will policy decisions assume that much ADR will be privately-funded?⁶³ At present, the multi-option model that is supported in jurisdictions such as Australia by a raft of legislative devices (that may require ADR prior to entry into the court or tribunal system) assumes that there will be some funded ADR agencies (for example, the Federal Attorney-General funds many family ADR agencies and family relationship centres⁶⁴) whilst others will be self-funded and supported by persuasive structures and processes (such as benchmarks, standards,

⁶⁰ Rapid mediation or “speediation” can be viewed as a response to the closer relationship between courts and community-based mediation.

⁶¹ Sharon Press, *International Trends in Dispute Resolution – A US Perspective*, 3 ADR BULL. 21, 22-23 (Austl.), available at <http://epublications.bond.edu.au/adr/vol13/iss2/1> (2000).

⁶² This view is questionable given the onerous quality control mechanisms that exist in systems (such as the family system) that operate outside the court system.

⁶³ See Stempel, *supra* note 8, at 297.

⁶⁴ The largest pre-litigation scheme that imposes mandatory attendance at a dispute resolution process operates in the family dispute area in Australia. Initiatives that have been phased in since 2006 represent a significant change in family law. See *Family Law Act 1975* (Cth) (Austl.)

contractual requirements, and codes). ADR is also utilised and supported outside of the litigation system by split or partial funding arrangements. For example, many schemes that operate at the community level and are directed at family⁶⁵ and community disputes are partly funded by the government, while others directed at commercial and general civil disputes are industry funded or privately funded.

The multi-option approach that uses a mixed funding model assumes that guidance is not required by courts to enable those within our society to access the broad range of ADR processes and that there is no need, in most instances, to locate a coordinating function inside the court system. The approach assumes that referral networks will operate to support disadvantaged disputants and that otherwise a “Do it Yourself” approach supported by internet, telephone, or online systems will divert most civil disputes away from courts. At the heart of the approach are dispute resolution schemes that can operate at local, state, and federal levels in businesses, government, and other organisations. For example, in many jurisdictions, dispute resolution schemes have been set up in various industries to provide a free, effective, and relatively quick means of resolving disputes about products and services. This approach assumes that ADR processes do not belong to any particular organisation or professional body but rather that they are available at all levels of society.

If this approach – which situates ADR across the society – is adopted, then one primary issue will be the provision of information and whether it is necessary for a coordinating body to provide information. This again raises issues about how collaboration and coordination can be most effectively fostered within the justice system and whether courts should be doing more to understand what lies outside their doors.⁶⁶

The Relationship Between Courts and ADR

The relationship between ADR and courts remains uneasy in many jurisdictions and this is problematic from a systemic perspective. Courts are often unaware of dispute resolution options outside courts and of the innovation that exists in the ADR area. For example, innovations in online dispute resolution may not be understood, appreciated or adopted by courts. To use a medical analogy, it is as if surgeons in a hospital were unaware of what pharmaceutical approaches and other less traditional approaches were being used on patients (that could perhaps be usefully incorporated within a hospital setting). This is of course not the case with all courts. Some courts have more sophisticated understandings than others about ADR and have led ADR reform initiatives. Whilst most courts are aware of ADR, however, few courts are engaged in any active dialogue with the non-legal parts of the ADR sector.

⁶⁵ See Revised Explanatory Memorandum, *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)(1) (Austl.).

⁶⁶ An example of a collaborative approach has been developed by the MARYLAND ALTERNATIVE DISPUTE RESOLUTION COMMISSION, <http://www.marylandmacro.org> (last visited Apr. 21, 2015).

Increasingly, ADR and the courts have been perceived as engaged in an interdependent partnership.⁶⁷ This relationship requires courts to continue to articulate and enforce the substantive law and to set appropriate legal parameters for ADR, for example in relation to the finality of private dispute resolution, and the confidentiality and admissibility of mediation communications.⁶⁸ There are however significant variations in terms of court approaches and understandings about these important matters and there may also be significantly different ethical rules that apply to those involved in court connected ADR and non court connected programs. These difference can mean that consumers of ADR in one part of the system (for example where ADR is linked to the court) may have more incentives to use ADR than where it is not linked. In addition, there are varying approaches to issues relating to the quality of ADR processes that are connected to courts in some way. On the whole, there seems to be a disinclination for courts to evaluate or foster research into ADR even where referral is more or less mandatory and connected to a court as few courts are concerned with or prepared to take responsibility for the quality of court connected ADR processes other than providing minimal monitoring (and at times not even performing this function).

There are also significant variations and a lack of consistency about how ADR is connected to courts. For example, in some courts, ADR is provided by court staff and has an important role to play within the court itself: increasing litigant satisfaction; promoting a more positive cooperative culture within courts; and helping courts deal with their caseloads. In other courts, the integration between ADR and a court may invite a consideration of the judicial function and role. For example, in some courts judges may use facilitative processes when encouraging settlement⁶⁹ – these may vary from a discussion of the “issues” and a suggestion that settlement be attempted to judges providing a preliminary view (an evaluation) on issues that have been raised and the evidence that may be required.⁷⁰ Other judges may use facilitative processes and techniques of summary and reframing when conducting concurrent evidence (“hot tub”) processes⁷¹ or when involved in specialist “problem solving” courts. The restorative, comprehensive, therapeutic justice models all involve a greater focus on procedural justice and some techniques and approaches that are now used by judges can be identified as arising and first gaining prominence in the ADR sector. More rarely, judges may follow a more proscribed

⁶⁷ Kathryn M. Werdegar, *The Courts and Private ADR: Partners in Serving Justice*, 51 DISP. RESOL. J. 52 (1996).

⁶⁸ Christine McCarthy, *Can Leopards Change Their Spots? Litigation and Its Interface with Alternative Dispute Resolution*, 12 AUSTRALASIAN DISP. RESOL. J. 1, 35 (2001).

⁶⁹ See TANIA SOURDIN AND ARCHIE ZARISKI, *THE MULTI TASKING JUDGE; COMPARATIVE JUDICIAL DISPUTE RESOLUTION* (Thomson Reuters, 2013)

⁷⁰ See TANIA SOURDIN & ARCHIE ZARISKI, *THE MULTI-TASKING JUDGE, COMPARATIVE JUDICIAL DISPUTE RESOLUTION* (Thomson Reuters 2013).

⁷¹ See TANIA SOURDIN, *ALTERNATIVE DISPUTE RESOLUTION* (Thomson Reuters, 4th ed. 2012) at 196, 197.

mediation process model.⁷²

The differing relationship between courts, policy-makers, and ADR and the variations in the philosophical approaches to ADR varies greatly and produces a range of integration strategies (that may appear in combination in some Courts):

1. Pre-litigation ADR – either supervised or unsupervised by courts and falling within the ‘shadow of the court’ and often involving mandatory strategies.
2. Self-referred litigation related ADR – where courts and tribunals are not involved and may be unaware that parties are using external ADR processes.
3. Court-connected ADR – involving referral to ADR processes – such processes might be conducted by external or internal practitioners.
4. Court-integrated ADR – involving judicial and quasi-judicial officers within Courts using ADR processes to resolve and manage disputes (processes may vary from settlement conferences, mediation, or concurrent evidence approaches) – this integration may involve facilitative judging.

These variations and the lack of consistency across the system in the tracking and evaluation of ADR use means that the modern justice system is not well understood and it is difficult for sound policy decisions to be made, particularly as there is little research that tracks disputes from the point that they arise to the point of finalisation. There is also little information about how ADR changes have impacted courts and the court system. Whilst a number of commentators have suggested that the “vanishing trial” has become a feature of some jurisdictions, it may be that the work done by courts has become harder and more complex. While some complexity can be linked to statutory and relationship complexity (as often more people and organisations are involved in social and commercial transactions and disputes than in the past) some of the complexity can be linked to the types of disputes that are finalized by ADR.

For example, the role of the courts is arguably changing as they deal with more intractable and violent disputes that defy resolution by ADR. Within Australia, the revised family law arrangements require people to use dispute resolution before commencing court proceedings, a Commonwealth taskforce noted that the processes used to resolve, settle, or determine disputes in that area had changed in recent years.⁷³ The report noted that:

Government intervention in a non-violent family dispute focuses initially on improved access to information, to filter some disputes and assist all,

⁷² Sourdin, *supra* note 70.

⁷³ Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System 5* (2009) (Austl.), available at <http://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf>.

then mandate the use of informal mechanisms to reserve the most entrenched disputes (and those involving violence) for the courts.⁷⁴

This changing role, where courts deal with the most difficult disputes, may skew both the workload of the courts and the understanding that courts have about the dispute resolution landscape. From a court perspective, disputes and disputants may appear to be increasingly motivated by irrationality and complexity. For disputant behaviour to be understood and appreciated, better quality research about behaviours and motivations needs to take place. In addition, the demographic profile of those who do use the courts needs to be better understood so that more informed decisions can be made about triage, case management, and court workloads.

At present, courts can also have a somewhat difficult relationship with ADR as they can manage and support ADR processes by their interpretation of ADR clauses in contracts and in legislation that seeks to promote or mandate ADR. Where understandings of the dispute resolution perspective are gleaned only from an “in court” experience, rather than a whole of justice system perspective, decisions about these important matters are more likely to reflect the concerns of a small number of disputants and lawyers who may have limited understandings about the world of dispute resolution that exists away from their doors.

There are other issues that are linked to this relationship between ADR and the courts that require examination and have been previously raised. Genn’s concerns that ADR might displace the court system are relevant in this regard. Whilst the concerns may not be as relevant with respect to facilitative processes such as mediation in the civil setting, there have been issues with ADR processes that are determinative, particularly where they exist outside of courts and can “trump” domestic court determinations.

In the arbitration area, for example, the Philip Morris Asia Arbitration that was pursued against the Government of Australia regarding tobacco plain packaging legislation followed Australian court cases that found that the legislation was valid.⁷⁵ The arbitration is being conducted pursuant to a *1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments (Hong Kong Agreement)* that effectively ousts the domestic courts⁷⁶ and provides that arbitration can be conducted to challenge the capacity of a State to deal with some domestic law as an arbitral

⁷⁴ Access to Justice Taskforce, *supra* note 72.

⁷⁵ See Australian Government Attorney-General’s Department, TOBACCO PLAIN PACKAGING – INVESTOR-STATE ARBITRATION, http://www.ag.gov.au/tobaccoplainpackaging#_paad (last visited Sept 6 2015). Note the High Court hearing in Australia took place in April 2012 and a decision was made on 7 August 2012 (see *JT International SA v Commonwealth of Australia* [2012] HCA 43 The arbitration panel was appointed on 7 June 2012 and has dealt only with procedural matters to early 2015 (as the arbitral proceedings are subject to confidentiality arrangements there is little other information available)

⁷⁶ The Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments provides for arbitration in Article 10 and 11 see <http://www.austlii.edu.au/au/other/dfat/treaties/1993/30.html> (last visited Sept 6 2015)

decision may be made that overturns both legislative intention and judicial ruling.⁷⁷ The ousting or limiting of the courts' jurisdiction as a result of specific arbitral agreement (or as in the Philip Morris case via more generalised investor state arrangements) raises issues for both States and courts about the boundaries of ADR and where limits should be placed regarding determinative ADR processes that exist outside domestic courts.

Conclusion

The modern civil justice system involves a repositioning of courts and an acknowledgement and understanding of the breadth of the justice system. As justice is increasingly perceived as a much broader concept, and the system involves a number of non-static elements, the litigation system and judicial dispute adjudication will be viewed as a far smaller, although critical, dimension of a broader justice system. The important and expanded role of the alternative dispute resolution (ADR) environment requires recognition and a clear acknowledgment that ADR should not supplant judicial determination or the courts; rather, judicial determination must remain a useful and essential part of the civil justice system.

To support the new justice system, all components of the system must be considered and supported using a systemic approach. The reality is that the relationship between the parts of the system that focus on dispute resolution are symbiotic – each is reliant on the other and each is required to support a just society. Institutionalized justice is supported by informal justice, and informal justice requires institutions and impartial judicial determination. The integration of ADR at all levels of the justice system has significant implications for courts. Their processes will continue to evolve as there is recognition that some ADR skills can be blended with judicial adjudication approaches while still maintaining core judicial values (transparency, accountability, and maintenance of the rule of law). Some ongoing issues include the extent to which determinative processes can oust judicial determination, whether judges should adopt ADR processes and conduct mediations with private sessions (behind closed doors) or whether settlement conferencing without caucus is more appropriate⁷⁸ and how ethical rules and requirements in respect of confidentiality, impartiality and immunity will apply.

⁷⁷ See *id.* The controversy relating to 'Fair Trade' Agreements is partly based on the concerns relating to arbitral arrangements. These concerns have been expressed in some jurisdictions and there is some commentary concerning these agreements – see for example BENN MCGRADY, *TRADE AND PUBLIC HEALTH, THE WTO TABACCO, ALCOHOL AND DIET*, (Cambridge, 2011); See also Daniel, Fletcher --- "JT International SA v Commonwealth: Tobacco Plain Packaging" 35(4) SYDNEY LAW REVIEW (2013) 827 and Cecilia Olivet, Pia Eberhardt 'Profiting from Injustice' (Report, Transnational Institute, 2012) <https://www.tni.org/en/briefing/profitting-injustice> (last visited Sept 6 2015). See also for example, *Eli Lilly and Company v. The Government of Canada*, Notice of Intent to Submit a Claim to Arbitration under NAFTA (Nov. 7, 2012). Available at: <http://italaw.com/sites/default/files/case-documents/italaw1172.pdf>. Other concerns that have been raised relate to the both the secrecy surrounding these arrangements and the duration of agreements (the Hong Kong agreement noted above had a term of fifteen years).

⁷⁸ See Tania Sourdin, *Five Reasons Why Judges Should Conduct Settlement Conferences*, 37 MONASH U. L. REV. 145 (2011); Tania Sourdin, *Why Judges Should Not Meet Privately With Parties In Mediation But Should Be Involved In Settlement Conference Work*, 4 J. ARB. & MED. 91 (2014).

The definition of “justice,” its objectives, and the reach of the justice system, as well as the location of dispute settlement options, has significant political, policy, social, and funding implications. In this context, the framing of the civil justice system as inimical to the litigation and court system is no longer (if it ever was) part of the policy approach of many governments. In view of this change, the role of the courts and judicial determination requires reexamination. It seems that courts and judges will do less civil dispute work. However the work that they do is likely to be more complex and involve more intractable disputes. At the same time the way that courts and judges ‘do’ their work will continue to change. Judges will become more responsive and more flexible partly because the community and the broader ADR environment support these changes. However, if the recent past is any indicator, it seems likely that judges will lead much of this innovation. For such innovations to be productive and to ensure the long term health of the court system it is critical that a closer understanding and relationship between courts and the ADR system be developed and supported. This will enable innovations in each area to be extended and ensure that disputants experience a supportive justice experience.

In addition, to ensure that the system maintains its integrity it must be based on transparent objectives and ethical criteria. Using such a construct suggests that more facilitative forms of ADR such as mediation can operate and support the resolution of most civil disputes. Arbitration, however, may require additional boundaries or clear limitations to ensure that core values inherent in the system can be met (for example, by ensuring that important health and safety issues cannot be diverted to private forms of arbitration that restrict citizen participation and rights and oust the operation of the court system). This approach may also ensure that there is no displacing of the important maintenance and articulation of justice values and rights undertaken by courts and may assist to more clearly locate and support ADR options across the system.

In determining the boundaries of the system and articulating the ethical values at the core of the system that is founded on rights, principles, and characteristics of “justice” – freedom, equality and fairness (from a humanistic and egalitarian perspective) -- and returning to a core value approach might assist to ensure that justice objectives are met and may also support the work of courts and the ADR system into the future. An ethical value approach might also assist to delineate between different process choices and articulate sub-objectives for the judicial adjudication, facilitative, advisory, and determinative forms of ADR which can in turn provide more guidance for disputants, practitioners, courts, judges, and governments and potentially assist to evaluate the effectiveness of processes and the extent to which they meet objectives.⁷⁹

⁷⁹ A Framework Justice approach has been suggested in Australia. See *An Evidence Base for the Civil Justice System*, AUSTL. GOV'T, ATTORNEY GEN. DEP'T (Apr. 21, 2015), <http://www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx>.