ADR AND THE RULE OF LAW UNDER A MODERN JUSTICE SYSTEM

BY

ANNABEL VICTORIA SHAW

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Abstract

Alternative dispute resolution (ADR) has been used around the world as a means to resolve conflict for hundreds of years, and has existed in its more modern form for more than four decades. Despite this long history and widespread use, ADR is still challenged as an illegitimate part of the justice system. This challenge has not gone unheeded and has been met with a vigorous defence. Much of the ensuing debate centres on the comparison between this 'alternative' form of justice and what is often called the more traditional form, adjudication. This paper addresses the longstanding claim made as part of this debate that ADR undermines the rule of law. Specifically, it seeks to determine whether ADR and the rule of law can be reconciled. It does this by firstly laying out and analysing the arguments made for and against ADR in this regard. Following this analysis, it proposes that ADR and the rule of law can be reconciled through the symbiotic relationship that exists between ADR and adjudication within the modern justice system. This theory is then evidenced through a case study by way of an examination of New Zealand's restorative justice practice in the adult criminal justice system. The paper finds that ADR contributes necessary functions to the modern justice system, including the opportunity for broader justice through the wide and encompassing resolution of disputes that it can provide, and is clearly established as an essential component of the modern justice system. It concludes that ADR does not undermine the rule of law and these two can be reconciled.

Word Length

The text of this paper (including abstract, table of contents, footnotes and bibliography) comprises approximately 33,273 words.

Subjects and Topics

Rule of Law, or
Alternative Dispute Resolution (ADR), or
Mediation, or
Restorative Justice.

I Introduction

A The Issue

Since the early development of modern Alternative Dispute Resolution (ADR) in the 1970s there has been a tension between this new system of dispute resolution and the more traditional form, adjudication. One of the key issues at the centre of this conflict is the relationship between ADR and the rule of law. This tension has developed into a vigorous, cross-jurisdictional debate for and against ADR. Those against it claim ADR has a detrimental impact on the judicial system, is inconsistent with justice and threatens to undermine the rule of law. Those in favour of ADR point to failings of the judicial system and claim ADR supports the rule of law. This debate still continues, without resolution, decades later.

Chief High Court Judge Helen Winkelmann drew attention to the issue in New Zealand in 2011 when she expressed concerns about the impact of mediation on the civil justice system, stating:¹

The less desirable adjudication of rights before a court is seen to be, the more desirable, and even inevitable, resolution through mediation. However the anti-litigation narrative carries with it the danger of undermining the civil court system, by eroding confidence in it. Such an outcome is not in the interests of society as ultimately it will undermine the rule of law.

Some discussion followed Justice Winkelmann's comments but there has been little consideration given to the wider debate in this country.² The aim of my research is to put forward a New Zealand focused contribution to this debate. The research question considered is: can ADR and the rule of law be reconciled?

My research claim is that ADR and the rule of law are reconcilable under a modern justice system. Within this system, ADR and adjudication share a symbiotic relationship, through which they both perform functions necessary to the rule of law. For its part, ADR contributes a number of rule of law benefits, including the opportunity for broader justice through its ability to resolve disputes in a wider and more encompassing manner. In this way, I claim that rather than undermining the rule of law, ADR forms a vital part of it under a modern justice system. I also claim that

¹ Helen Winkelmann, Chief High Court Judge, "ADR and the Civil Justice System" (speech to the Arbitrators and Mediators' Institute of New Zealand Conference, Auckland, 6 August 2011) at 4.

² Grant Morris "A Challenge to New Zealand's Constitutional Traditions?: The History of Mediation in New Zealand in the Context of Justice Winkelmann's Defence of the Civil Justice System" (paper presented to "Unearthing New Zealand's Constitutional Traditions", the New Zealand Centre for Public Law Conference, Wellington, 29 August 2013); and Deborah Hart "Whatever Floats Your Boat" (2011) 168 New Zealand Lawyer 16.

there is evidence of this type of system operating in New Zealand through the restorative justice processes in the adult criminal justice context.

B Paper Outline

In this chapter, having briefly introduced the topic of this research, I next provide definitions of the key terms referred to, including the rule of law and ADR.

In chapter II, I consider the debate regarding ADR and the rule of law by identifying the concerns expressed firstly against ADR and then in support of it.

In chapter III, I draw my own conclusions on this debate and propose how ADR and the rule of law may be reconciled. I propose that this can be achieved under a modern justice system. I explain that within this system, ADR and adjudication exist in a symbiotic relationship. Through this relationship, each process fulfils distinct functions as well as contributing benefits to the other and serving a combined function. I set out these various functions and in doing so propose that one of the key contributions ADR brings is wider and more encompassing resolution, a broader concept of justice that forms part of the modern justice system. Through this symbiotic relationship, I claim the rule of law is not only supported but also strengthened. Chapter IV provides the primary case study to illustrate my theory. In this chapter, however, I refer to examples, particularly from New Zealand's employment and weathertight homes regimes, in order to provide practical examples to demonstrate the key points.

Chapter IV provides evidence for the idea of a modern justice system by referring to an example of this concept that can be found in practice. For this purpose, I examine the restorative justice processes administered within New Zealand's adult criminal justice system. In this examination, I provide an overview of restorative justice's development and operation, and then consider how it demonstrates the key ideas of a modern justice system identified in chapter III.

Finally, in chapter V, I provide a summary of how ADR forms a part of the rule of law and can therefore be reconciled with it. I also set out the important issues that can be taken from the debate to inform the modern justice system.

C Definitions of Key Terms

1 Rule of Law

The rule of law is by no means a simple term to define. It is a legal maxim that has been the subject of much theorising and debate over many centuries, and continues to be so today. Brian Tamanaha quite rightly calls it “... an exceedingly elusive notion.”³ The point of this paper is not to provide a comprehensive understanding of this complex concept or to make an original contribution to the debate over its meaning. Rather, its aim is to provide a basic understanding of the concept and the breadth of definitions given to it as background to the discussion of the rule of law and ADR debate.

The rule of law is a notion of ancient origins. Aristotle made reference to it over two thousand years ago, stating: “... the rule of law is preferable to that of any individual.”⁴ This statement provides a broad idea of the concept: the supremacy of legal rules over that of any god, king, citizen or institution. New Zealand constitutional and administrative law expert Philip Joseph explains that, in this way, the rule of law “... seeks to reconcile organised state power and personal autonomy.”⁵ However, it is a much more complex idea than this.

As United Kingdom’s former Master of the Rolls, Lord Chief Justice and Senior Law Lord, Lord Bingham noted “... the meaning of the concept has to some extent evolved over time and is no doubt likely to continue to do so.”⁶ Having an understanding of this historical evolution of the rule of law theory provides insight into its meaning. Following its initial development from Classical Greek thought of the fifth century BC, it survived and continued to exist through the medieval period, though in a basic form. During this time, political theory, including that on the rule of law, was built on “... the principle of the supremacy of law.”⁷

Liberal theorists’ ideas on the post-feudal state of the late 17th and early 18th centuries have been credited with progressing the rule of law significantly from this singular idea. As Tamanaha explains it “... the rule of law today is thoroughly

³ Brian Tamanaha *On The Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004) at 3.

⁴ H W C Davis (ed) *Aristotle’s Politics* (Clarendon Press, Oxford, 1923) vol III at 16 as cited in Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 154.

⁵ Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 153.

⁶ Tom Bingham “The Rule of Law” (2007) 66 CLJ 67 at 69.

⁷ R W Carlyle *A History of Medieval Political Theory in the West* (W Blackwood & Sons Ltd, Edinburgh, London, 1928) at 457 as cited in Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, Wellington, 2014) at 156.

understood in terms of liberalism.”⁸ Thomas Hobbes was a central figure in this development with his initiation of the social contract theory.⁹ He is sometimes referred to as a pre-liberal thinker given his belief that the purpose of this contract was to subject individuals to state control.¹⁰ Later theorist, John Locke, took Hobbes’ social contract idea and applied a purer liberalist approach to it. His text *Second Treatise of Government*¹¹ is seminal in the development of the rule of law. His view of the purpose of the social contract was “... to legitimise government by majority and show that governments have a fiduciary duty to preserve individual rights.”¹² In this way, Locke’s theory (and subsequently that of liberalist theorists Jean-Jacques Rousseau and Charles de Secondat, Baron de Montesquieu) has been credited with founding one of the central ideas of the rule of law: “... the enduring notion of law as the primary means of subjecting governmental power to control.”¹³

Late 19th century theorist, A V Dicey, is another key contributor to the development of the rule of law. He is considered one of the most influential writers on the subject and is credited with popularising it in the English context.¹⁴ His 1885 doctrine provided three components to the rule of law: the supremacy or predominance of regular law; equality before the law; and superiority of common law protection.¹⁵ Some fifty years after Dicey, Friedrich Hayek finessed the theory and provided a definition that captures the rule of law in its more broadly understood, modern form:¹⁶

Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs in the basis of that knowledge.

Thus, in its simplest form, the rule of law can be said to mean the supremacy of law applied equally, ensuring protection against arbitrary power.

⁸ Tamanaha, above n 6, at 32.

⁹ Thomas Hobbes *Leviathan* (Oxford World’s Classics) J C A Gaskin (ed) (Oxford University Press, Oxford, 1996) at 89.

¹⁰ Tamanaha, above n 6, at 47.

¹¹ John Locke *Second Treatise of Government* C B Macpherson (ed) (Hackett Publishing Company, Indianapolis, 1980).

¹² Joseph, above n 5, at 154.

¹³ At 155.

¹⁴ Bingham, above n 6, at 3.

¹⁵ A V Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan & Co, London, 1959).

¹⁶ F A Hayek *The Road to Serfdom* (University of Chicago Press, Chicago, 1994) at 80.

The complexity, and often controversy, develops when looking to define the rule of law any more precisely than this. There are two key competing theories on this point that can generally be said to be reflective of the wider legal debate between the legal positivist theory and the natural law theory. In the context of the rule of law, these opposing theories give rise to ‘formal’ and ‘substantive’ versions of this maxim. Tamanaha explains these two categories as follows:¹⁷

... formal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice and moral principle).

The formalist view is that the rule of law is a purely procedural concept and devoid of any prescriptive content. This school of thought believes the rule of law should not dictate the content of the law nor have any moral substance. Legal theorist Lon Fuller is often referenced in relation to this theory. He argued compliance with his eight procedural principles of legality would lead to substantively good laws.¹⁸ These principles required laws to be general, promulgated, prospective, understandable, consistent, constant, possible, and congruent with their actual administration.¹⁹ Legal philosopher Joseph Raz is also an influential writer on this theory and summarised it as follows: “Public action must be authorized by law, and law as an autonomous body of rules must be general, prospective, accessible, stable and certain.”²⁰ Under this theory, the rule of law requires “... no more than that like cases be decided alike, the law should apply equally to all, and decision-makers should adhere to procedural requirements of natural justice.”²¹

The substantive version of the rule of law proposes that it is wider than a purely procedural concept and also has a standard setting (or normative) function, requiring the embodiment of certain substantive attributes or ideals such as justice, law and order, and human rights. In this way, the rule of law includes the protection of individual rights. Influential American constitutional law scholar Ronald Dworkin called this theory the ‘rights conception’ and said that:²²

It does not distinguish between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.

¹⁷ Tamanaha, above n 3, at 92.

¹⁸ Lon Fuller *The Morality of Law* (Rev ed, Yale University Press, New Haven, 1969).

¹⁹ At 33-94.

²⁰ J Raz “The Rule of Law and its Virtue” in J Raz (ed) *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1970) at 213-214.

²¹ Joseph, above n 5, at 156.

²² Ronald Dworkin “Political Judges and the Rule of Law” (1978) 64 *Proceedings of the British Academy* 259 at 262.

Lord Bingham subscribes to this substantive theory of the rule of law, believing that: “The law must afford adequate protection of fundamental human rights.”²³ This more expansive, substantive approach has also been adopted by the United Nations. The Secretary-General of the United Nations has defined the rule of law as:²⁴

... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

These contrasting definitional theories are sometimes explained metaphorically as a spectrum running from thin to thick, with the narrow, formalist theory having very few requirements at one end and more expansive, substantive theory containing many more components at the other.²⁵ The debate as to which is the more convincing theory has not been resolved. Therefore, as a jurisprudential concept, the rule of law has varying interpretations depending on the theoretical approach of the definer. This lack of an agreed definition means the term is a wide canopy and can be used by different philosophies to justify different claims and policies.²⁶ Some authors even go as far as to claim that ideological abuse and general over-use has rendered the concept meaningless.²⁷ Tamanaha notes that many people use the terms but few “... ever articulate precisely what it means.”²⁸ Most of the contributors to the rule of law and ADR debate fall within this category. Many of their arguments make reference to the term without specifically defining what they mean by it. From the context of their arguments, it appears many of them are using the wider substantive definition, that is, the rule of law including content, particularly justice.

For the purposes of this paper, I will not apply one single, prescriptive definition but instead use the broadest and most inclusive conceptual understandings of the rule of law in order to give this paper the widest scope and capture the breadth of arguments made in relation to ADR. There are a number of definitions that align with this idea,

²³ Bingham, above n 6, at 66.

²⁴ Secretary-General’s Report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* S/2004/616 (2004) at [6].

²⁵ Tamanaha, above n 3, at 91; and William Lucy “Abstraction and the Rule of Law” (2009) 29 Oxford Journal of Legal Studies 481 at 493-509.

²⁶ Richard Reuben “ADR and the Rule of Law Making the Connection” (2010) 16 Disp Resol Mag 4 at 4-5.

²⁷ Judith Shklar “Political Theory and The Rule of Law” in Allan Hutchinson and Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology* (Carswell, Toronto, 1987) 1.

²⁸ Tamanaha, above n 3, at 3.

such as those articulated by writers such Stanley de Smith,²⁹ a leading English constitutional academic writing in the mid 20th century, and Joseph.³⁰ Lord Bingham also provides a helpful framework in this regard, with his following definition.³¹

The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.

He acknowledged this definition “... was not comprehensive and not universally applicable ...”³² and so suggested eight additional and more detailed principles be included: accessibility of law; application of law not discretion; equality before the law; powers of the state must be exercised in good faith; the law must protect fundamental human rights; means for dispute resolution must be provided; trials must be fair; and the state must comply with its international obligations.³³ This is the broad type of concept I mean when referring to the rule of law in this paper.

2 ADR

Although more easily defined than the rule of law, ADR also requires clarification, due to the wide and varying definitions used across practice, scholarship and legislation.³⁴ ADR is a broad term and I am defining it in the context of this paper in a way that allows a manageable scope. I will do so with reference to jurisdiction, era, and process.

In terms of jurisdiction, the focus of this paper is ADR in the common law world, particularly New Zealand, Australia, the United States, and the United Kingdom. There are at least three distinguishable periods of ADR. Jeffrey Stempel makes reference to these as the traditional or old ADR, which has existed for centuries across a multitude of cultures, the semi-modern form, from around the mid 1920s, and the contemporary or new ADR movement, which came into existence in the 1970s.³⁵ It is this latter, modern form of ADR that is the focus of this paper. I do not aim to provide a thorough review of the development of ADR. As with the rule of law, however, its origins inform its meaning and I therefore provide a brief overview of its history.

²⁹ SA de Smith and R Brazier *Constitutional and Administrative Law* (8th ed, Penguin Books London, 1998) at 17.

³⁰ Joseph, above n 5, at 159.

³¹ Bingham, above n 6, at 8.

³² At 37.

³³ At 37-110.

³⁴ Tania Sourdin *Alternative Dispute Resolution* (4th ed, Thomson Reuters, Sydney, 2012) at 4-5.

³⁵ Jeffrey Stempel “Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?” (1996) 11(2) *Ohio St J on Disp Resol* 297 at 310.

Jermone Barrett and Joseph Barrett make reference to the fact that old ADR is often overlooked:³⁶

ADR is often thought of as a new way of resolving disputes. In fact, its roots run deep in human history, and they have long played a crucial role in cultures across the globe.

In their history of ADR, they trace its origins back to traditional societies, such as Hawaiian Islanders, Kalahari Bushmen and the ancient Greeks. As Grant Morris refers to in his history of mediation in New Zealand, Maori have a long tradition of ADR as well.³⁷ Barrett and Barrett also highlight the religious roots of ADR.³⁸ They then trace its development through the Middle Ages to the Age of Discovery in the 17th century,³⁹ and through international diplomacy from the Bronze Age to the peace negotiations following World War I.⁴⁰

Although not using this term, Barrett and Barrett link modern ADR's development back to the form Stempel refers to as 'semi-modern'.⁴¹ It is therefore worth briefly noting some key aspects of this earlier era as a matter of context. There were forms of ADR being used in an industrial context from the late 1800s in New Zealand⁴² and the early 1900s in the United States.⁴³ Negotiation theory was being developed in the 1920s.⁴⁴ This work is said to have influenced the principled or interest based negotiation model developed by Roger Fisher and William Ury in the 1970s.⁴⁵ Barrett and Barrett claim Fisher and Ury's book, *Getting to Yes*,⁴⁶ which was first published in 1981, popularised interest based negotiation.⁴⁷ They also claim the post-World War II industrial disputes heavily influenced modern ADR, saying that it was these "... early struggles for workers' rights that first opened up the possibility of ADR use...".⁴⁸ Expanding rights, such as the civil rights movement of the 1960s in the United States, and a ground swell of community mediation (in the United States and Australia particularly, not in New Zealand) also make up part of this background. Barrett and Barrett say ADR then gained further popularity in the 1970s, attracting

³⁶ Jermone Barrett and Joseph Barrett *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (Jossey-Bass, San Francisco, 2004) at 2.

³⁷ Grant Morris "Towards a History of Mediation in New Zealand's Legal System" (2013) 24 *Australasian Dispute Resolution Journal* 86 at 86.

³⁸ Barrett and Barrett, above n 36, at 9.

³⁹ At 14-18.

⁴⁰ At 19-39.

⁴¹ At 182.

⁴² Industrial Conciliation and Arbitration Act 1894.

⁴³ Barrett and Barrett, above n 36, at 102.

⁴⁴ Mary Parker Follett "Constructive Conflict" (paper presented to the Bureau of Personnel Administration Conference, New York, January 1925).

⁴⁵ Sourdin, above n 34, at 14.

⁴⁶ Roger Fisher and William Ury *Getting to Yes: Negotiating Agreement Without Giving In* (Houghton Mifflin, Boston, 1981).

⁴⁷ Barrett and Barrett, above n 36, at xxix.

⁴⁸ At xvi.

“... a number of new players including ... Bar associations, law schools, universities, states, and nonprofit organizations acted to promote ADR.”⁴⁹ This is the context within which modern ADR developed. As Morris explains it:⁵⁰

The history of mediation in New Zealand can be traced back to developments in industrial relations in the late 19th century, but as a self-aware, dynamic, widespread movement its beginnings are much more recent.

Modern ADR is generally said to have been born out of calls for reform of the traditional justice system that occurred around the world from the early 1970s.⁵¹ Nadja Alexander explains its development as arising from dissatisfaction with the existing system, particularly as a part of the civil justice reform movement that was seeking improved access to justice.⁵² She says one of the most apparent objectives of modern ADR was the efficient resolution of disputes.⁵³ In the United States, this development can be seen taking place through the 1976 ‘USA National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice’ (the ‘Pound Conference’), which was held to address the perceived crisis in access to justice. Stempel notes the central part this conference played in ADR’s development, saying, “The background, theme, and rhetoric of the Pound Conference made ADR fashionable and brought it to the fore of the American adjudicatory scene.”⁵⁴ He says the view the conference was “... the inaugurating event of the modern era [of ADR] ...” is one shared by many.⁵⁵

In the United Kingdom, ADR also developed as part of the civil justice reform movement in which alternatives to the state judicial system were introduced under the ‘access to justice’ motto. Lord Woolf’s ‘Access to Justice’ interim and final reports of the 1990s⁵⁶, written on the instruction of the Lord Chancellor to outline options for consolidating the existing rules of civil procedure, played a central part in this. Writing about the development of ADR in Australia, Hilary Astor and Christine Chinkin say, “The 1970s and 1980s saw the generation of a wave of great enthusiasm for ADR ...”⁵⁷ with significant support for the development coming from proponents

⁴⁹ Barrett and Barrett, above n 36, at 182.

⁵⁰ Morris, above n 37, at 88.

⁵¹ Stempel, above n 35, at 309.

⁵² Nadja Alexander “Global Trends in Mediation: Riding the Third Wave” in Nadja Alexander (ed) *Global Trends in Mediation* (2nd ed, Kluwer Law International, The Netherlands, 2006) 1 at 8.

⁵³ At 9.

⁵⁴ Stempel, above n 35, at 312.

⁵⁵ At 310.

⁵⁶ Lord Woolf “Access to Justice, Interim Report” (Lord Chancellor’s Department, June 1995); and Lord Woolf “Access to Justice, Final Report” (London HMSO, 1996).

⁵⁷ Hilary Astor and Christine Chinkin *Dispute Resolution in Australia* (2nd ed, LexisNexis Butterworths, New South Wales, 2002) at 3.

of access to justice.⁵⁸ In New Zealand, Morris says modern ADR developed in the 1980s.⁵⁹ He explains this in more detail as follows:⁶⁰

New Zealand's mediation movement is part of a global trend, especially in common law jurisdictions. Court overload, high litigation costs, social changes and subsequent challenges to traditional approaches of resolving disputes led to calls for mediation, conciliation and negotiation to supplement, and even replace, adversarial litigation. In New Zealand the response to these issues has been ad hoc and pragmatic, in line with New Zealand's wider legal history and stereotypical "number 8 wire" mentality.

Other countries followed similar journeys to these jurisdictions. In this way, there has been a pattern of increased ADR uptake around the world over the last four to five decades. As a result, it is now a common global phenomenon.

Having briefly touched on the reasons for ADR's development, I now turn to what exactly it was that developed in terms of substance. As previously mentioned, ADR is often used as a wide and generic term. Tania Sourdin makes this point as follows:⁶¹

... it is said to be impossible to construct precise definitions of ADR processes that are accurate in respect of the range of ADR processes available and the contexts in which they operate.

In a general sense, ADR was initially named as such to mean dispute resolution that was 'alternative' to the traditional court process. Hazel Genn reflects this in her definition: "Alternative Dispute Resolution is an umbrella term which is generally applied to a range of techniques for resolving disputes other than by means of traditional court adjudication" ⁶² Australia's National Alternative Dispute Resolution Advisory Council (NADRAC)⁶³ used similar terms, explaining ADR as "... an umbrella term for processes, other than judicial determination" ⁶⁴ In this broadest sense, ADR encompasses any process used to resolve a dispute other than adjudication. This includes many processes such as negotiation, facilitation, mediation, restorative justice, conciliation, neutral fact-finding, case appraisal, evaluation, expert determination, and arbitration. These processes occur in numerous contexts. Although much of the discussion around ADR focuses on civil justice, it extends much more widely than this. As Sourdin explains, "ADR processes may have

⁵⁸ At 3.

⁵⁹ Morris, above n 37, at 88.

⁶⁰ At 101.

⁶¹ Sourdin, above n 34, at 2.

⁶² Hazel Genn, *Judging Civil Justice* (Cambridge University Press, New York, 2010) at 80-81.

⁶³ NADRAC was abolished by the Australian government in November 2013. Its work, however, is still valid and well regarded.

⁶⁴ NADRAC "Dispute Resolution Terms" (September 2003) Australian Government Attorney-General's Department <www.ag.gov.au>.

application across many diverse areas that include commercial, legal, social, environmental, international and political settings.”⁶⁵

This comprehensive definition including the full and diverse range of processes provides too broad a scope for the purposes of this paper. It can be limited, however, within the confines of existing ADR sub-definitions. NADRAC for example, limits its definition of ADR by only including processes “... in which an impartial person assists those in a dispute to resolve the issues between them.”⁶⁶ Sourdin uses a similar definition, saying ADR usually means a process that involves a third party (the ADR practitioner) assisting the parties to the dispute to resolve it.⁶⁷ These definitions therefore exclude direct party settlement or negotiation. This is more than a theoretical distinction, as research shows there is a difference between negotiation and processes involving an ADR practitioner. Deborah Eisenberg’s recent comprehensive analysis of ADR research included comment on this point.⁶⁸

Some critics of ADR contend that mediation is superfluous because litigants can simply reach agreement on their own, without the assistance of a third-party neutral. The Maryland ADR study suggests that there is something significant about participating in the mediation or ADR process itself that generates greater party satisfaction and confidence in the judiciary, separate from the outcome of reaching a settlement on their own.

The Maryland study Eisenberg refers to found that ADR participants are more likely to reach an agreement than those who negotiate.⁶⁹ On the basis of these theoretical and empirical distinctions, I have adopted the definition of ADR to mean processes that involve an ADR practitioner, thereby excluding negotiation. This still leaves a broad scope. I am further limiting it by only including consensual processes in my definition of ADR. This means processes in which the ADR practitioner’s role is to assist the parties to reach a decision by agreement. It excludes determinative processes, in which the ADR practitioner makes a decision about the outcome of the dispute that is potentially enforceable, such as arbitration.⁷⁰ I have chosen to adopt this narrower definition, not only to make the scope manageable, but also because

⁶⁵ Sourdin, above n 34, at 2.

⁶⁶ NADRAC, above n 64.

⁶⁷ Sourdin, above n 34, at 3.

⁶⁸ Deborah Eisenberg “What We Know (And Need to Know) About Court-Annexed Dispute Resolution” (2016) 67 S C L Rev (forthcoming).

⁶⁹ Community Mediation Maryland *Impact of Alternative Dispute Resolution on Responsibility, Empowerment, Resolution, and Satisfaction with the Judiciary: Comparison of Self-Reported Outcomes in District Court Civil Cases* (Maryland Administrative Office of the Courts, April 2014) at 2.

⁷⁰ NADRAC “Alternative Dispute Resolution Definitions” (Australian Government Publishing Services, Canberra, March 1997) at 2.

determinative processes are so similar in nature to adjudication, in fact NADRAC includes adjudication within its definition of determinative processes.⁷¹

Even within this limited definition, there is much variation within the range of ADR processes, making it difficult to provide a more detailed description. However, the focus of this paper is on the theory of ADR as a generic concept, particularly as an alternative to adjudication, and not any one specific process. In the context of this paper, I believe, as Judith Resnik concludes, "... it is appropriate ... to consider ADR as an undifferentiated set of processes."⁷² When authors referenced in this paper refer to a specific process, I will discuss it in terms of the broader ADR term. By way of summary, when used in this paper, ADR means modern ADR in the common law jurisdictions and only includes consensual processes involving an ADR practitioner, excluding negotiation and determinative processes such as arbitration.

3 Adjudication

Writers use a variety of terms to refer to the traditional form of dispute resolution through the court system: litigation, trial, adjudication, judicial decision-making and so on. For the sake of consistency through this paper, I will use 'adjudication' as a broad term to capture all of these.

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At 2.

⁷²

Judith Resnik "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication" (1995) 10 Ohio St J on Disp Resol 211 at 222.

II The ADR and Rule of Law Debate

A Claims Against ADR

Writers and scholars have raised criticisms of ADR undermining the rule of law since the early days of its development. In the early 1980s, Owen Fiss argued that settlements mean justice is sacrificed for peace.⁷³ General concerns about the detrimental impact of ADR on the justice system have been articulated by members of the judiciary alongside Winkelmann,⁷⁴ such as the President of the Supreme Court of the United Kingdom, Lord Neuberger,⁷⁵ as well as renowned scholars such as Professor Dame Hazel Genn⁷⁶ and many other writers.

The criticisms against ADR have been wide ranging. However, they can be grouped together and captured under four main categories. Firstly, ADR implicitly undermines the rule of law by weakening the rule of law function of adjudication. Secondly, ADR explicitly undermines adjudication, and therefore the rule of law, in the way it developed and is promoted. Thirdly, ADR fails to provide access to justice, a requirement of the rule of law under a substantive definition. Lastly, ADR fails to provide equality of law as required by the rule of law.

1 Implicit Undermining – Rule of Law Function of Adjudication

The claim that ADR implicitly undermines the rule of law is made on the basis that ADR fails to satisfy and weakens the rule of law function of adjudication. The arguments made against ADR in this regard can be categorised into two central groups: those that argue ADR impacts the direct rule of law function of adjudication; and those that claim it impacts on more indirect or wider rule of law functions of adjudication.

(a) Direct rule of law function of adjudication

The claim that ADR undermines the direct rule of law function of adjudication is based on the premise that adjudication is a crucial part of the institutional framework of the rule of law. Specifically, it is the institution through which the rights and laws created by parliament are enforced and applied.⁷⁷ This is reflected in Bingham's rule of law definition referred to in chapter I, in which he says society being entitled to laws "... publicly administered in the courts ..." is a core component of the rule of

⁷³ Owen Fiss "Against Settlement" (1984) 93 Yale L J 1073 at 1705.

⁷⁴ Winkelmann, above n 1.

⁷⁵ Lord David Neuberger, Master of the Rolls, "Has Mediation Had its Day?" (The Gordon Slynn Memorial Lecture 2010, London, 11 November 2010).

⁷⁶ Genn, above n 62; and Hazel Genn, "What is Civil Justice For? Reform, ADR, and Access to Justice" (2012) 24 Yale J L & Human 397.

⁷⁷ Stephen Subrin "A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought" (2002-2003) 3 Nev L J 196 at 215.

⁷⁸ Bingham, above n 6, at 8.

law. The argument against ADR is that it does not fulfil adjudication's rule of law function of rights vindication and law application.⁷⁹

A number of writers argue this point. As referred to above, Fiss was one of the early and most influential critics of ADR. He talked more specifically about settlement as opposed to ADR but his criticisms still apply in a general sense. He refers to adjudication as an 'institutional arrangement.'⁸⁰ The Fissian view of ADR has been summarised as viewing ADR as incompatible with the rule of law because it "... denies the application of properly derived legal standards, resulting in outcomes that might be far removed from what society (acting through law) has determined would be appropriate under these circumstances."⁸¹

Fiss is not alone in this criticism of ADR, and the concerns he raised have not diminished over time. Genn is one of the more high profile and outspoken contemporary critics of ADR. She writes within the context of civil justice, and often specifically in terms of mediation. As with Fiss, however, her points can be taken to have wider application to adjudication and ADR generally. Genn identifies ADR as one of the threats contributing to a decline in adjudication.⁸² She quotes the Justice of the Supreme Court, Lord Anthony Clarke in relation to this "... an effective civil justice system is an essential element of our commitment to the rule of law."⁸³ She claims ADR diverting cases away from adjudication subverts this rule of law element.⁸⁴ American professor of law and philosophy David Luban also shares similar views to Fiss. He writes:⁸⁵

Adjudication provides occasions for law, and therefore the politics it codifies, to assume tangible form. Take away those occasions and an essential dimension of human experience, political action, will either be extinguished or else degenerate into interminable and unresolved conflict.

Lord Neuberger is another high-profile commentator on this topic. His seminal lecture delivered in 2010 entitled "Has Mediation Had its Day?"⁸⁶ shows he takes a less adamant position than Fiss and Genn but still expresses concerns about the impacts of

⁷⁹ Harry Edwards "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 Harv L Rev 668; and David Luban "Settlements and the Erosion of the Public Realm" (1995) 83 Geo L J 2619. See also Astor and Chinkin, above n 57, at 64.

⁸⁰ Fiss, above n 73, at 1089.

⁸¹ Reuben, above n 26, at 5.

⁸² Genn, above n 62, at 25.

⁸³ Anthony Clarke "A UK Perspective on EU Civil Justice - Impact on Domestic Dispute Resolution" (EU Civil Justice Day Conference, The Law Society, London, October 2007) at [3] as cited in Genn, above n 62, at 18.

⁸⁴ Genn, above n 62, at 121.

⁸⁵ Luban, above n 79, at 2637.

⁸⁶ Neuberger, above n 75.

ADR on the rule of law. In his lecture he stated that adjudication is a part of the constitutional framework of government: “The courts system is part of the state itself.”⁸⁷ He went on to say that ADR is not a part of that framework and is only an adjunct or complement to the justice system.⁸⁸ Marc Galanter is another well-known ADR critic. Although his work is dated, a number of his arguments continue to be repeated over the years showing they are claims that have not diminished over time. His work from the early days of ADR has been summarised as suggesting:⁸⁹

... that American dispute resolution – long a beacon for the rest of the world – may well be entering an ironic era in which the vast majority of legal disputes are resolved lawlessly, in direct contradiction to the rule of law.

Winkelmann echoes the same sentiment when saying:⁹⁰

A well funded, well functioning court system dealing with both criminal and civil cases is a critical feature of a society which exists under the rule of law. It is a pre-condition to democracy.

These commentators are all expressing the view that adjudication is a vital part of the framework of the rule of law, and that ADR cannot and does not fulfil this rule of law function, thereby denying its application and undermining it.

(b) Wider rule of law functions of adjudication

A further criticism of ADR is that it undermines other rule of law functions that adjudication serves. One such function is the part adjudication plays in the creation of law under the doctrine of stare decisis. In the process of considering rights, adjudication also involves elaborating, clarifying and possibly reconsidering existing rules, as well as potentially developing and creating new rules. The argument against ADR in this regard is that it fails to provide this necessary development of law and binding precedent through the process of public hearings and decisions. In other words, these functions are lost when ADR is used instead of adjudication. This criticism has been summarised as follows:⁹¹

[ADR], it is argued, is used to avoid both of the key elements of a legal system based on stare decisis – governance by existing rules and the enunciation of new rules from the public application of rules to new facts.

⁸⁷ Neuberger, above n 75, at [11].

⁸⁸ At [17].

⁸⁹ Reuben, above n 26, at 5.

⁹⁰ Winkelmann, above n 1, at 5-6.

⁹¹ Carrie Menkel-Meadow “Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)” (1995) 83 Geo L J 2663 at 2679.

Genn has commented on this point. She elaborates on the importance of this function that is compromised through ADR, saying public adjudication is necessary in order to set norms, and make them clear so people and organisations can abide by them and avoid legal risk.⁹² Luban writes that through adjudication, law (the residue of political action) is elaborated and receives reasoned reconsideration through cases that reveal its weak points.⁹³ He believes this is fundamentally important to a rule of law system: “This process is as much as part of politic vitality as free elections and legislative debate.”⁹⁴

A second, wider function of adjudication that is claimed to be lost through ADR, is the public good benefits it provides. Although not specifically articulated by the critics, presumably these benefits are included under the broad, substantive definition of the rule of law. One such claimed benefit is the wider purpose of the *stare decisis* doctrine beyond rule formation, being the creation of predictability and certainty, and the guidance of future behaviour.⁹⁵ Fiss made this claim when he argued that adjudication’s broader function, being justice, was a social and public need, and was compromised by ADR.⁹⁶ Genn has also commented on this point. She says that “... by providing public processes for peacefully resolving civil disputes, enforcing legal rights and for protecting private and personal rights ...”⁹⁷ adjudication goes beyond a private good to a public one as it contributes significantly to “... social justice, economic stability and social order.”⁹⁸ Luban has written about the wider function of adjudication in opposition to ADR as well. He states that adjudication is necessary to achieve a wider good and fulfil societal values such as order and certainty.⁹⁹

A second public good argument made against ADR relates to the function adjudication serves in holding people to public account within society. American jurist and academic Harry Edwards and Luban have both commented in this regard, saying that ADR’s confidentiality means it does not provide public knowledge of wrongdoing and therefore detracts from that public good benefit.¹⁰⁰ Laurence Boule, Virginia Goldblatt and Phillip Green say these concerns are particularly relevant in relation to user-pays ADR. They claim these types of services have the potential to be used by well-resourced individuals and organisations to “... avoid public scrutiny and

⁹² Genn, above n 62, at 74.

⁹³ Luban, above n 79, at 2637.

⁹⁴ At 2637.

⁹⁵ Subrin, above n 77, at 215.

⁹⁶ Fiss, above n 73, at 1085-1087.

⁹⁷ Genn, above n 62, at 3.

⁹⁸ At 16.

⁹⁹ Luban, above n 79, at 2623.

¹⁰⁰ Edwards, above n 79; and Luban, above n 79, at 2619.

accountability [and] ... to conceal their liability ... without being subject to external review.”¹⁰¹ They explain how this is linked to the rule of law, saying, “A privatised process allows for the avoidance of external, socially-determined norms and values.”¹⁰² This ‘private justice’ also means the public education function of adjudication is lost, which has been claimed as a rule of law requirement of dispute resolution.¹⁰³ Astor and Chinkin comment on this point as well, saying the great advantage to parties of ADR as quick, cheap and private may also “... constitute significant disadvantages to third parties and society.”¹⁰⁴ They provide a useful illustration of these issues through the example of a faulty product that has caused harm to purchasers. They explain that:¹⁰⁵

... the privacy and lack of precedential value of [ADR] may be a significant disadvantage to third parties who have been similarly injured ... [and] others who continue to purchase the product without knowledge of the harm it has caused. There may also be harm in that public knowledge and understanding of the relevant issues are prevented and reform may be delayed by lack of information.

The crux of the arguments relating to the rule of law function of adjudication is that ADR diverts people from the rule of law system, undermines it and also deprives society of its wider rule of law functions. These are often referred to as the dangers of ADR privatising justice.¹⁰⁶

2 *Explicit Undermining – Promotion of ADR*

The second category of arguments made against ADR is that it explicitly damages the rule of law in the way it is promoted. As outlined in relation to the history of ADR in chapter I, modern ADR’s development was partially driven by concerns over the failings of adjudication. Therefore, from the very beginning, modern ADR was put forward as superior and preferable to adjudication. This idea is still reflected in much of the promotion of ADR, which is often framed in comparative terms to adjudication, with ADR being claimed to be good (faster, cheaper, less stressful) and adjudication bad (unpleasant, expensive and lengthy). As adjudication is a component of rule of law, this promotion of ADR is criticised as being a direct attack on the rule of law.

¹⁰¹ Laurence Boulle, Virginia Goldblatt and Phillip Green *Mediation: Principles, Process, Practice* (2nd ed, Lexis Nexis, Wellington, 2008), at 105.

¹⁰² At 105.

¹⁰³ Jean Sternlight “Creeping Mandatory Arbitration: Is It Just?” (2005) 57 *Stan L Rev* 1631 at 1661-1665.

¹⁰⁴ Astor and Chinkin, above n 57, at 64.

¹⁰⁵ At 64-65.

¹⁰⁶ Subrin, above n 77, at 216.

Genn is one of the leading voices on this point. She claims the ADR rhetoric, or “... anti-justice, anti-adjudication discourse ...”¹⁰⁷ used to develop and publicise the ADR profession is contributing to an undermining and downgrading of the adjudication system.¹⁰⁸ Judith Resnik talks about ADR procedures having a “... shared aversion to adjudication.”¹⁰⁹ She believes this is a part of the growing hostility against adjudication, something she sees as a factor in its decline.¹¹⁰ Winkelmann made this point in New Zealand in her 2011 speech when she said:¹¹¹

A final point I wish to make is that it is common to promote mediation services by reference to the perceived downsides of court proceedings, or what is commonly referred to in the literature, as an anti-litigation narrative. The less desirable adjudication of rights before a court is seen to be, the more desirable, and even inevitable, resolution through mediation. However the anti-litigation narrative carries with it the danger of undermining the civil court system, by eroding confidence in it. Such an outcome is not in the interests of society as ultimately it will undermine the rule of law.

3 *Fails to Provide Access to Justice*

The third category of claims against ADR is that it fails the rule of law by not providing access to justice. Although not specifically stated by the critics, the implication is that access to justice is a requirement of the rule of law under a substantive definition.

A number of critics make this point. It was the underlying criticism behind Fiss’ claim that ADR means justice is sacrificed for peace.¹¹² Genn has also written extensively on this issue. She believes access to justice means access to adjudication.¹¹³ She argues against ADR saying: “The outcome of [ADR] is not about *just* settlement, it is *just about settlement*.”¹¹⁴ She concludes the goal of the reforms leading to the development of ADR was access to justice but the resulting reality is actually diverting cases away from justice.¹¹⁵ Fiss articulates this same point when saying: “... although dockets are trimmed, justice may not be done.”¹¹⁶ Luban takes a similar position. He believes a determination of facts is necessary to constitute justice and, as

¹⁰⁷ Genn, above n 62, at 73.

¹⁰⁸ At 121.

¹⁰⁹ Judith Resnik “Failing Faith: Adjudicatory Procedure in Decline” (1986) 53 U Chi L Rev 494 at 537.

¹¹⁰ Resnik, above n 72, at 211; and Judith Resnik “For Owen M Fiss: Some Reflections on the Triumph and the Death of Adjudication” (2003) 58 U Miami L Rev 173 at 200.

¹¹¹ Winkelmann, above n 1, at 4-5.

¹¹² Fiss, above n 73, at 1705.

¹¹³ Genn, above n 62, at 115.

¹¹⁴ At 117.

¹¹⁵ At 121.

¹¹⁶ Fiss, above n 73, at 1075.

ADR is not concerned with this, he contends ADR does not provide justice.¹¹⁷ Lord Neuberger makes a similar point in saying ADR cannot be a substitute for justice or provide proper access to justice.¹¹⁸

4 *Fails to Provide Equality*

The fourth and last category of claims against ADR is that it fails to provide the necessary equality of law required by the rule of law. As outlined in chapter I, equality before the law is widely referred to as principle of the rule of law.¹¹⁹ Genn summarises this idea, saying: “Under the rule of law, law stands above all people and all people are equal before it.”¹²⁰ The specific claim made against ADR in this regard is that it increases power imbalances between parties and lacks the protection for less powerful members of society that is available through adjudication, thus being detrimental to the vulnerable.¹²¹ Astor and Chinkin provide a summary explanation as to why power imbalance is a problem in ADR:¹²²

... the outcome of the process may simply reflect the power relationship between the parties themselves. Where power is evenly balanced the outcome may be equitable. Where it is not, mediation may enable one party to enforce a solution which would not have been tolerated by an even handed outsider.

Alexander has also summarised this argument, saying critics claim ADR does not provide the procedural safeguards of a court and therefore offers ‘second-class justice’, especially in cases involving power imbalance between parties.¹²³ She highlights that this argument holds even more weight in the case of mandatory ADR, where parties are forced into this system.¹²⁴

This imbalance of power was one of Fiss’ main criticisms of ADR. His arguments specifically related to people at an economic disadvantage. He identified a number of possible ways the imbalance perpetuated by ADR would impact on poorer parties, claiming it would mean they had less information, a greater need for money, and would be forced into accepting settlement as they could not afford litigation.¹²⁵ Fiss argued that judges are able to reduce this impact through the adjudication process.¹²⁶

¹¹⁷ Luban, above n 79, at 2639.

¹¹⁸ Neuberger, above n 75, at [37].

¹¹⁹ See for example, Dicey, above n 23; and Bingham, above n 6, at 37-110.

¹²⁰ Genn, above n 62, at 114.

¹²¹ Laura Nader “Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology” (1993) 9 Ohio St J on Disp Resol 1; and Trina Grillo “The Mediation Alternative: Process Dangers for Women” (1991) 100 Yale L J 1545.

¹²² Astor and Chinkin, above n 57, at 160.

¹²³ Alexander, above n 52, at 9.

¹²⁴ At 10.

¹²⁵ Fiss, above n 73, at 1076.

¹²⁶ At 1077-1078.

In this way, he claimed ADR “... will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.”¹²⁷

Other writers raise similar issues about the loss of equality through ADR, specifically in relation to women. Laura Nader and Trina Grillo have both written extensively on this topic. Although dated, as theory their conclusions are still sound. In her writing, Nader goes as far as to compare the ADR movement to imperialism or colonisation.¹²⁸ She also refers to it as ‘soft violence’ and cultural or mind control.¹²⁹ She talks specifically about this point as it relates to the rule of law: “In examining harmony ideology in relation to the ADR explosion its function as pacification stands out as a challenge to the idea of rule of law.”¹³⁰ Grillo raises similar issues to Nader. She said of ADR.¹³¹

... it is more, not less, disempowering than the adversary system – for it is then a process in which people are told they are being empowered, but in fact are being forced to acquiesce in their own oppression.

She went on to claim, “Thus, rather than being a feminist alternative to the adversary system, mediation has the potential actively to harm women.”¹³² Grillo said that although the adversarial process is not perfect, it provides more in the way of equality as it “... aspires to a rule of law as its governing principle, a worthy aspiration for any decision making process.”¹³³

In their more recent research, Mary Noone and Lola Akin Ojelabi identify inherent power imbalances as one of the key issues raised in relation to ADR, and make reference to potential difficulties it poses for disadvantaged parties, including women.¹³⁴ These issues of power inequality are often referred to as rendering restorative justice inappropriate for victims in cases of partner, family and sexual violence. The Law Commission highlighted this in relation to sexual offending, saying that, “Due to the particular dynamics of the offending, including inherent power imbalances and risk to the safety of victims, restorative justice has not traditionally been used in sexual offending cases.”¹³⁵

¹²⁷ At 1076.

¹²⁸ Nader, above n 121 at 9-10.

¹²⁹ At 10.

¹³⁰ Laura Nader “The ADR Explosion - The Implications of Rhetoric in Legal Reform” (1998) 8 Windsor YB Access Just 269 at 287.

¹³¹ Grillo, above n 121, at 1610.

¹³² At 1545.

¹³³ At 1559.

¹³⁴ Mary Noone and Lola Akin Ojelabi “Ensuring Access to Justice in Mediation Within the Civil Justice System” (2014) 40(2) Mon L R 528 at 532.

¹³⁵ Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 48.

In their article, Richard Delgado and others write about the inequality of ADR in relation to minorities more generally. This research is also from the earlier period of ADR scholarship, but still provides relevant theory. They claim, “ADR increases the risk of prejudice toward vulnerable disputants.”¹³⁶ They draw on empirical evidence, referring to social science studies that show people are more likely to act on their prejudices in informal settings. They apply this to ADR, claiming its informality, compared to the formality of adjudication, means minority disputants suffer a greater disadvantage.¹³⁷ They write about the fact that adjudication is based on an assumption of inequality and specifically provides protection from prejudice through formal procedure and rules.¹³⁸

Astor and Chinkin summarise the concerns raised in relation to ADR and equality when saying:¹³⁹

The protections [adjudication] offers, particularly to powerless groups and individuals, are fragile and sometimes illusory. The gains are hard won and easily taken away. Nevertheless, they are public and can be publicly asserted. ... ADR [does] not have these qualities and important issues of fairness, impact on third parties and the development of law and the legal system are obscured.

B Claims Supporting ADR

Although I have found there is less research on this side of the debate,¹⁴⁰ the claims in support of ADR have been equally as adamant as those set out in opposition to it. These claims can be grouped into three categories. Firstly, that ADR directly supports and enhances the functioning of the rule of law in a number of ways. Secondly, that ADR does provide equality before the law. Lastly, there are claims rebutting the criticism against ADR privatising justice.

1 Supports Rule of Law Function

As outlined above, critics make a number of arguments against ADR on the basis that it undermines adjudication and therefore corrodes the functioning of the rule of law system. However, there are a number of claims made in direct opposition to this that contend ADR in fact promotes the functioning of the rule of law system. American academic Richard Reuben expresses this view when saying, “... the relationship

¹³⁶ Richard Delgado and others “Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution” (1985) *Wis L Rev* 1359 at 1400.

¹³⁷ At 1400.

¹³⁸ At 1371.

¹³⁹ Astor and Chinkin, above n 57, at 67.

¹⁴⁰ This may be due to the fact the authors writing against ADR are, on the whole, more likely to be from the legal profession, which has a stronger academic tradition than ADR. The other notable feature of the pro-ADR writing is that there is less of it found in highly ranked journals.

between ADR and the rule of law is more paradox than enigma in that a closer look reveals a substantial capacity for ADR to promote the rule of law.”¹⁴¹ As set out below, it is argued that ADR achieves this promotion in several ways: it provides access to justice; it supports the doctrine of stare decisis; and it is inherently a part of the rule of law.

(a) Provides Access to Justice

As outlined above, access to justice is a component of the rule of law under a substantive definition. One of the key arguments made in support of ADR enhancing the rule of law is that it provides access to justice. As summarised in chapter I, access to justice was one of the founding motivations and objectives behind ADR, in response to perceived failings of the traditional adjudication system. Specifically, the failure to provide access to justice brought about due to inherently high costs and long waits for hearings. Writers claim that ADR addresses these issues of cost and delay, which enhances the efficiency of, and access to, justice and thereby enhances the rule of law.¹⁴²

These claims that ADR provides better access to justice can be seen to fall into two groups. The first is that better access occurs directly through ADR processes. In this regard, it is claimed ADR is accessible as it is relatively informal, cheap and quick. Although Genn, Winkelmann, Lord Neuberger and others argue there is little to support these claimed benefits of ADR¹⁴³ there is evidence to the contrary. Alexander says there is an increasing amount of research showing the cost and time benefits claimed of ADR.¹⁴⁴ Sourdin makes reference to research that has shown “... significant benefits in using ADR ...” including speed and cost.¹⁴⁵ Eisenberg’s recent comprehensive analysis of randomised studies found ADR can result in “... quicker disposition times and cost savings for the court and the parties.”¹⁴⁶

The second group of arguments states that ADR provides better access by way of judicial efficiency. Specifically, it is claimed that as more disputes are resolved through ADR, waiting lists and judicial workloads diminish, reducing demands on the system and allowing matters that cannot be resolved through ADR faster and cheaper

¹⁴¹ Reuben, above n 26, at 6.

¹⁴² Menkel-Meadow, above n 91, at 2669-2670; Reuben, above n 26, at 4; and Robert Grey “Promoting the Rule of Law by Facilitating Alternative Dispute Resolution” (2009) 16 *Disp Resol Mag* 29.

¹⁴³ Hazel Genn and others *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure* (United Kingdom Ministry of Justice Research Series 1/07) (May 2007) at 70; Winkelmann, above n 1, at 12-13; and Neuberger, above n 75, at 9.

¹⁴⁴ Alexander, above n 52, at 16.

¹⁴⁵ Sourdin, above n 34, at 35.

¹⁴⁶ Eisenberg, above n 68.

access to adjudication.¹⁴⁷ Sourdin makes this claim when saying, “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.”¹⁴⁸ Reuben reiterates this in stating that by diverting cases that do not require adjudication away from that system, ADR creates an obvious benefit in terms of judicial efficiency.¹⁴⁹

There is even some argument being made for a change in the meaning of access to justice on the basis of ADR use. In relation to civil cases, it has been suggested that it does not mean unrestricted access to adjudication in every circumstance, but in some cases only where the parties have attempted to resolve matters between themselves. Jeremy Gormly, former Chair of NADRAC, is one of those making this argument:¹⁵⁰

We are slowly but, correctly I suggest, forming the view that judges and judicial resources should not have to be accessible to anyone at any time at the whim of parties to a civil dispute. If there is urgency or oppression, a question of liberty or a matter of law or some established inability to resolve, then access to a judge in a civil dispute should be unfettered. But if it is a fight over whether wet weather overruns should be paid, or a dividing fence, I suggest we start to think that parties’ obligations to try and resolve a dispute precedes their right of access to a judge.

As outlined above, a number of critics claim that ADR does not provide justice and therefore cannot claim to provide access in this regard. Supporters of ADR refute this. Jean Sternlight is among them. She does not believe adjudication is necessary to achieve justice, and argues it can be realised through ADR.¹⁵¹ Alexander also defines access to justice as meaning more than getting to court, and something that is available through ADR.¹⁵² Stephen Subrin responds to criticism that there is no rights vindication and therefore no ‘justice’ in ADR with a number of counter-arguments.¹⁵³ Firstly, he refers to research that shows the reality of adjudication does not contain as much law and fact articulation as assumed.¹⁵⁴ Secondly, he claims ADR “... frequently does much more to bring law to bear on facts than traditional litigation.”¹⁵⁵ He cites the law and fact exploration occurring in mediation through the

¹⁴⁷ Alexander, above n 52, at 9.

¹⁴⁸ Tania Sourdin “A Broader View of Justice?” in Michael Legg (ed) *The Future of Dispute Resolution* (LexisNexis Butterworths, Australia, 2013) 155 at 165.

¹⁴⁹ Reuben, above n 26, at 6.

¹⁵⁰ Jeremy Gormly “A Change in Dispute Culture: The Civil Dispute Resolution Act 2011” in Michael Legg (ed) *The Future of Dispute Resolution* (LexisNexis Butterworths, Australia, 2013) 107 at 108.

¹⁵¹ Sternlight, above n 103, at 1669-1670.

¹⁵² Alexander, above n 52, at 10.

¹⁵³ Subrin, above n 77, at 218-221.

¹⁵⁴ At 218.

¹⁵⁵ At 128.

parties' overviews, issue identification, and mediator's risk assessment as evidence of this.¹⁵⁶ Some writers respond by making similar claims about adjudication, saying it too fails to provide justice. Boule, Goldblatt and Green claim the "... depiction of justice according to law is somewhat idealistic and misleading."¹⁵⁷ The Law Commission sets out this argument in relation to the criminal justice system in more forceful terms:¹⁵⁸

The traditional criminal justice process is limited in its ability to deliver "justice". There is much research to suggest that it is often experienced by those participating in it as an artificial, alienating and disempowering process that does not produce an outcome in which they have confidence.

(b) Supports Stare Decisis

A number of supporters of ADR have responded to claims that ADR undermines the rule of law-required doctrine of stare decisis. Reuben is one of these. He argues the opposite, saying one of the benefits of ADR created judicial efficiency is that it clears the way for cases requiring adjudication, specifically those that provide interpretation or establish necessary precedent.¹⁵⁹ In this way, he claims, ADR improves the efficacy of the stare decisis system.¹⁶⁰ Subrin has also responded to this criticism. He says the claim ADR will undermine the creation of precedent is not proven by numbers and finds there is no empirical evidence to show that ADR has substantially reduced cases and therefore the workings of stare decisis.¹⁶¹ Carrie Menkel-Meadow argues that ADR does not preclude the creation of precedent and claims it is both relevant and necessary to ADR.¹⁶² She states, "To charge that [ADR] is ungoverned by precedent is to be grossly insensitive to the contexts in which [it] occurs."¹⁶³

(c) Part of Rule of Law

Reuben goes further than what he says are the obvious rule of law benefits of ADR, such as those outlined above, and claims ADR is "... inextricably tied to the rule of law."¹⁶⁴ He justifies this on the basis that ADR is authorised through statutes and contracts, the confidentiality of the process is protected by law, and agreements from ADR are enforced through courts if needs be.¹⁶⁵ In this way, he claims, "Doing what the law permits is the essence of the very freedom that the rule of law in part strives to

¹⁵⁶ At 220.

¹⁵⁷ Boule, Goldblatt and Green, above n 101, at 95.

¹⁵⁸ Law Commission, above n 135, at 7.

¹⁵⁹ Reuben, above n 26, at 6.

¹⁶⁰ At 6.

¹⁶¹ Subrin, above n 77, at 223.

¹⁶² Menkel-Meadow, above n 91, at 2680.

¹⁶³ At 2680.

¹⁶⁴ Reuben, above n 26, at 7.

¹⁶⁵ At 7.

secure.”¹⁶⁶ Morris’ examination of the history of ADR in this country shows that statute law has been the principle way of incorporating ADR into New Zealand’s legal system,¹⁶⁷ making Reuben’s argument particularly relevant here. Reuben goes on to argue, however, that even forms of ADR that are not specifically allowed by law are still consistent with the rule of law, as they have not been precluded by it.¹⁶⁸

2 *Provides Equality*

A number of writers have replied to the claim that ADR fails to ensure there is equality before the law by virtue of it being detrimental to vulnerable parties. Most of them counter this argument by saying the same is true of adjudication. Although writing in the early days of modern ADR, Galanter is still widely referred to in the ADR debate, particularly in relation to his theoretical work. Despite the fact he is most often quoted on the other side of the debate, some of his research supports this claim in relation to adjudication. In his analysis of different types of parties to adjudication, he concluded those with more power, wealth and status enjoyed advantages in adjudication.¹⁶⁹

What this analysis does is to define a position of advantage in the configuration of contending parties and indicate how those with other advantages tend to occupy this position of advantage and to have their other advantages reinforced and augmented thereby. This position of advantage is one of the ways in which a legal system formally neutral as between “haves” and “have-nots” may perpetuate and augment the advantages of the former.

More recent writers continue to reiterate Galanter’s findings. Subrin, for example, makes the same point, claiming that in adjudication the more powerful party is at an advantage, having more resources for preparation and litigation.¹⁷⁰ Retired judge Wayne Brazil even acknowledges this, saying “... many cases of modest economic value and many litigants of limited means have been effectively priced out of the court system.”¹⁷¹ Another former member of the judiciary, Geoffrey Davies, also argues that adjudication is unfair when parties are of unequal bargaining power.¹⁷² Michael Legg and Sera Mirzabegian make the same point, claiming, “... power

¹⁶⁶ At 7.

¹⁶⁷ Morris, above n 37, 88.

¹⁶⁸ Reuben, above n 26, at 6-7.

¹⁶⁹ Marc Galanter “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 Law & Soc Rev 95 at 103-104.

¹⁷⁰ Subrin, above n 77, at 221.

¹⁷¹ Wayne Brazil “Rights and Resolution in Mediation: Our Responsibility to Debate the Reach of Our Responsibility” (2009) 16 Disp Resol Mag 9.

¹⁷² Geoffrey Davies “The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System” (2003) 12 J J A 155 at 158.

imbalances, especially due to lack of resources, can also be exploited in litigation.”¹⁷³ Subrin points out that adjudication is not a panacea to protect the weak against inequality.¹⁷⁴ Sourdin identifies a range of influences that can impact adjudicative decision-making and therefore the equality of the justice delivered by adjudication, such as personal values and decision fatigue, and down to when and what the decision-maker has eaten and the attractiveness of the individuals involved.¹⁷⁵

Arguments about inequality in the adjudication system are also made in relation to the criminal justice system. Michael King and others summarise the claims made in this regard. They say that on one hand the system is said to be biased in favour of defendants, due to the procedural safeguards being too stringent and the ability for proceedings to be manipulated by “... smart, wealthy and determined criminals.”¹⁷⁶ Whilst on the other hand, they say, it is argued that the system favours the prosecution, as defendants often do not have the ability and resources to challenge technical state evidence, particularly in these days of limited legal aid. This leads them to conclude: “Within this framework, truth and justice are seen to be secondary to the outcome of the conflict in the interests of one or other of the parties.”¹⁷⁷

Additional arguments are made that ADR provides the equal access to justice that adjudication does not. Robert Grey makes this claim, saying ADR “... increases access to justice for disadvantaged persons who would otherwise not be able to afford lengthy and costly litigation”¹⁷⁸ Others argue that there are measures that can be taken in ADR to help promote equality. Subrin is among them. He says lawyers’ involvement in ADR, ADR practitioners that explore the law with parties and the realistic threat of easily accessible litigation, which is something he says ADR enables, all assist in this regard.¹⁷⁹ Legg and Merzabegian say that the procedural protections that can be particularly significant where power imbalances exist can be adopted in ADR processes.¹⁸⁰ Reuben makes specific reference to ADR’s ability to be culturally appropriate, by allowing resolution in a way that is suitable to a particular community.¹⁸¹ Other writers say ADR has the potential to better meet the needs of

¹⁷³ Michael Legg and Sera Mirzabegian “The Continuing Role for Litigation” in Michael Legg (ed) *The Future of Dispute Resolution* (LexisNexis Butterworths, Australia, 2013) 117 at 121.

¹⁷⁴ Subrin, above n 77, at 221.

¹⁷⁵ Sourdin, above n 148, at 164.

¹⁷⁶ Michael King and others *Non-Adversarial Justice* (Federation Press, Sydney, 2009) at 3-4.

¹⁷⁷ At 3-4.

¹⁷⁸ Grey, above n 142, at 29.

¹⁷⁹ Subrin, above n 77, at 221.

¹⁸⁰ Legg and Mirzabegian, above n 173, at 157.

¹⁸¹ Reuben, above n 26, at 6.

Indigenous communities.¹⁸² In this way, ADR is argued to provide better equality than adjudication.

Astor and Chinkin provide one of the more balanced considerations of equality in ADR in their review of the issue of power imbalance, particularly in relation to gender. After weighing up the competing claims and perspectives they find that the results of research into the impact of gender on ADR have been variable.¹⁸³ They say adjudication is:¹⁸⁴

... certainly flawed in providing real equality rather than the comforting liberal illusion of notional equality, it is nevertheless a system which knowingly struggles against inequalities. ... [However, it] is not conspicuously successful in rectifying imbalances of power.

They say that framing the discussion about protecting the vulnerable "... as if the options were [adjudication] on the one hand and [ADR] on the other misrepresents reality."¹⁸⁵ It is their opinion that in reality there are a range of dispute resolution options, and fairness of a process "... may depend upon choice of appropriate process and the resources to provide support that will create equality for that dispute in that particular process."¹⁸⁶ They conclude that issues of power can be handled in ADR by being "... perceived, understood and dealt with appropriately."¹⁸⁷

Restorative justice will be examined in depth as a case study in chapter IV, however, recent developments in its theory and practice make it relevant to consider here, as they highlight counter-claims to the argument that the use of ADR is inappropriate or damaging to the vulnerable in situations of power imbalance. This more traditional view was the initial perspective taken, with family and sexual violence cases being specifically excluded from any of the early restorative justice pilots.

¹⁸² Janet Fanslow "Understanding the Prevalence of Violence Against Women in New Zealand: Implications for Restorative Justice" in Anne Hayden and others (eds) *Restorative Approach to Family Violence: Changing Tack* (Ashgate Publishing Ltd, Surrey, 2014) 29 at 38; and Gitana Proietti-Scifoni and Kathleen Daly "Gendered Violence and Restorative Justice: The Views of New Zealand Opinion Leaders" (2011) 14(3) *Contemporary Justice Review*, 269 at 285-286.

¹⁸³ Astor and Chinkin, above n 57, at 167.

¹⁸⁴ At 74.

¹⁸⁵ At 74.

¹⁸⁶ At 75.

¹⁸⁷ At 162.

Heather Strang claims that thinking in this area began to change as a realisation developed that New Zealand's traditional criminal justice system was having little impact on rates of offending. As she explains it:¹⁸⁸

... dissatisfaction with a strictly formal approach in dealing with family violence, and violence against women in particular, has grown in recent times with the recognition that it continues to be a widespread problem, despite both a heightened awareness of its criminal nature and a much more proactive response by police and other agencies when it is disclosed There is no doubt that family violence remains an issue that our communities and our criminal justice systems struggle to address.

The Law Commission's 2012 review of criminal trial processes shows there was also growing dissatisfaction with the adjudicative response to sexual offending.¹⁸⁹

Despite changes in the past 15 to 20 years, there is widespread consensus that the current criminal justice system still does not deal well with sexual offending As a result, it is commonly reported by victim support agencies that victims do not have confidence that the system will be able to deliver them justice. That is partly because the current process for determining guilt beyond reasonable doubt often re-victimises the victim.

The report went on to propose restorative justice as a possible reform in sexual offending.¹⁹⁰ Subsequently, the Ministry of Justice amended its *Principles of Best Practice* in 2013 to bring family and sexual violence cases within the ambit of restorative justice. The Sentencing Amendment Act 2014 then made it mandatory to consider restorative justice in all cases. This shift in thinking was highlighted in a speech by the Minister of Justice, Amy Adams, in 2015 in which she said the focus was on *how* restorative justice could work in this area, not *whether* it should.¹⁹¹ One of the key points made by a panel at the Family Violence and Restorative Justice Conference 2015 reflected the same view:¹⁹²

Restorative justice has a valuable role to play in responding to family violence when used at the right time and in the right way. The question is not whether restorative justice is appropriate but when is it appropriate and how can it best be tailored to the unique challenges of family violence?

¹⁸⁸ Heather Strang "Concluding Thoughts" in Anne Hayden and others (eds) *Restorative Approach to Family Violence: Changing Tack* (Ashgate Publishing Ltd, Surrey, 2014) 221 at 223.

¹⁸⁹ Law Commission, above n 135, at 49.

¹⁹⁰ At 50.

¹⁹¹ Amy Adams, Minister of Justice, "Restorative Justice Part of Supporting Family Violence Victims" (speech to the Family Violence, the Law and Restorative Justice Conference, Wellington, 7 May 2015).

¹⁹² Chris Marshall, Chair in Restorative Justice "Family Violence, the Law and Restorative Justice" (Victoria University of Wellington, May 2015) at 8.

This development in the field of restorative justice provides an illustration of the claim that ADR is not *prima facie* inappropriate in cases of possible power imbalance, as has been traditionally argued.

3 *Privatisation of Justice*

Writers have also responded to the criticism that ADR causes rule of law losses to the community through the privatisation of justice. Subrin claims ADR does not detract from the public good function of the rule of law as it in fact allows people more direct involvement in the process: “Statistically, mediation may actually provide more private citizens experience hearing about the law and actively resolving disputes than the jury system.”¹⁹³ In this way he believes educating people about the law can happen through ADR. In relation to the public knowledge of wrongdoing or systemic change that is claimed to be lost through ADR, he argues that ADR can have more systemic benefit than litigation in that parties agree to change their practices or behaviours, and that if a party wants public knowledge they could negotiate this as part of settlement, or choose not to settle.¹⁹⁴ Sternlight addresses the criticism that ADR does not perform the public purposes of a justice system, saying:¹⁹⁵

... while it seems clear that litigation *can* serve these important public interests, it also seems clear that other modes of dispute resolution can also provide similar justice... . In short, without the formality or written decisions of litigation, many if not all of the norms of public justice can be met.

¹⁹³ Subrin, above n 77, at 225.

¹⁹⁴ At 224-225.

¹⁹⁵ Sternlight, above n 103, at 1670.

III Reconciling ADR and The Rule of Law

A Chapter Overview

Although there is a significant body of literature arguing either side of the debate between ADR and the rule of law, little has been written seeking to reconcile these two positions. The exception to this is in the field of international law. There is a body of work developing in this area, with scholars pointing to international rule of law initiatives as an example of ADR being incorporated as a part of the rule of law.¹⁹⁶ In this chapter, I outline how I believe ADR and the rule of law can be reconciled. This requires rethinking the perspective taken on the debate and considering it within the context of the modern justice system. Within this framework, it becomes clear that both ADR and adjudication are necessary to best satisfy the rule of law. Specifically, within the modern justice system there is a symbiotic relationship between ADR and adjudication. In this way, I conclude that rather than undermining the rule of law, ADR forms a vital part of it under the modern justice system.

B The Debate

The traditional approach to the debate has been to frame it as a competition between ADR and adjudication, with authors arguing that one form of dispute resolution is superior to the other. Sternlight highlights this, saying: “At the extremes, some commentators seem to believe that only their own preferred form of dispute resolution is consistent with justice.”¹⁹⁷ She refers to the competing commentators as the ‘litigation sentimentalists’ versus the ‘mediation evangelists’.¹⁹⁸ Genn uses similar labels calling these opposing factions the ‘litigation romanticists’ and the ‘mediation zealots’.¹⁹⁹ When viewed from the divergent positions these two groups take, the question becomes one of determining the rule of law superiority of *either* adjudication *or* ADR. Approached in this polarised way, it is very difficult to see how the debate can be settled. Indeed, as Genn has concluded, these positions cannot be reconciled.²⁰⁰ This then reduces the discussion to an argument between two irreconcilable positions, creating a perpetual state of impasse.

¹⁹⁶ See for example Michal Alberstein, “ADR and Transitional Justice as Reconstructing The Rule of Law” (2011) J Disp Resol 127; William Davis and others “Implementing ADR Programs in Developing Justice Sectors: Case Studies and Lessons Learned” (2009) 16 Disp Resol Mag 16; Steven Hendrix “Guatemalan “Justice Centers”: The Centerpiece for Advancing Transparency, Efficiency, Due Process and Access to Justice” (2000) 15 Am U Int’l L Rev 101; and Jean Sternlight, “Is Alternative Dispute Resolution Consistent With the Rule of Law?” (2006) 56 DePaul L Rev 596.

¹⁹⁷ Jean Sternlight “Dispute Resolution and the Quest for Justice” (2007-2008) 14 Disp Resol Mag 12 at 12.

¹⁹⁸ At 12.

¹⁹⁹ Genn, above n 62, at 82-85.

²⁰⁰ At 125.

This polarised view is not only futile it is also unrealistic. It fails to take into account the context within which ADR and adjudication now exist. The justice system has evolved over many decades since modern ADR first developed, with increasing and continuing use of ADR. In New Zealand, for example, ADR is referred to in 191 statutes.²⁰¹ It is now a well-established component of the system, alongside adjudication. It is artificial to attempt to determine between these two processes in a vacuum, divorced from the reality of the context within which they both exist. This further demonstrates that we cannot make this determination and reconcile the debate by taking a segregated approach.

In addition to the context the debate must be taken in, its content provides further reason to disregard the dichotomous approach. Firstly, as Sternlight says, each extreme contains elements of truth but is also flawed.²⁰² The debate illustrates that adjudication is designed to provide ‘justice’ in the purest sense,²⁰³ and provides society with wider rule of law functions, such as the necessary development of law, binding precedent, and public accountability.²⁰⁴ However, it can be inaccessible (due to high cost and low speed) and therefore not provide proper access to justice.²⁰⁵ Further, there is evidence to suggest adjudication is not impervious to the exploitation of power imbalances.²⁰⁶ On the other side, ADR provides a relatively informal, cheap and quick dispute resolution process,²⁰⁷ assists with judicial efficiency,²⁰⁸ and adds to the public good function of the rule of law.²⁰⁹ However, it does not produce public precedents,²¹⁰ and may allow more powerful parties to take advantage over weaker ones, being potentially detrimental to the vulnerable, particularly women and minorities.²¹¹ These arguments identify the weaknesses of both processes in contrast to the strengths of the other. This illustrates that both processes have their own rule of law benefits and limitations. Secondly, many of the rule of law criticisms made against each process are made on the basis of that process existing in isolation, that is, as a replacement for, or instead of, the other. In these ways, the arguments made in

²⁰¹ Ministry of Business, Innovation and Employment *Dispute Resolution: Best Practice Report 2 of 2 to Joint Ministers* (March 2014) at 18. In its first report (Ministry of Business, Innovation and Employment *Dispute Resolution: Best Practice Report of 1 of 2 to Joint Ministers* (October 2013) at 7), the Ministry identifies the scope of ADR to include facilitation, mediation and conciliation, with a primary focus on mediation. This makes it consistent with the definition of ADR adopted in this paper.

²⁰² Sternlight, above n 199, at 12.

²⁰³ Luban, above n 79, at 2639; and Neuberger, above n 75, at [37].

²⁰⁴ Winkelmann, above n 1, at 6; Edwards above n 79; Luban, above n 79.

²⁰⁵ Sternlight, above n 199, at 12.

²⁰⁶ Galanter, above n 169, at 103-104; Subrin, above n 77, at 221; Legg and Mirzabegian, above n 173, at 121; and Sourdin, above n 148, at 164.

²⁰⁷ Alexander, above n 52, at 16.

²⁰⁸ Reuben, above n 26, at 6.

²⁰⁹ Subrin, above n 77, at 225.

²¹⁰ Genn, above n 62, at 74; Luban, above n 79, at 2637.

²¹¹ Nader, above n 121; Grillo, above n 121; and Delgado and others, above n 136.

the debate make it clear that neither ADR nor adjudication fully satisfies the rule of law.

C A New Perspective – The Modern Justice System

It is the reality of the modern justice system that provides an alternative answer as to how we may reconcile the debate. As outlined in reference to context above, ADR and adjudication are both parts of that system. Within it, they both “... serve indispensable purposes.”²¹² As they do not exist in isolation, they cannot be considered in isolation. By shifting away from the segregated position and taking this integrated view, the debate takes on a different meaning and serves a more useful purpose. Instead of being an adversarial, and ultimately unresolvable, competition, the debate can point the way to reconciliation, not by requiring a decision for one side or the other, but by bringing them together. In other words, the debate can be reconciled by looking at the totality of the system. By recasting the way it is viewed, it can be used to help resolve the very dilemma it raises. In this way, the debate is an important phase in the development of our modern justice system.

Recasting the debate and viewing it within the modern justice system establishes that neither ADR *nor* adjudication is the ultimate rule of law process. Adjudication can be viewed as serving a larger proportion of the rule of law system, however, it is not absolute and does not, and cannot, serve it completely. Rather, each process contributes different rule of law benefits, and both are necessary, as it is the combined effect that best serves that rule of law. In this way, they are both vital components of the modern justice system. It is in taking this view of the modern justice system as a whole, that ADR and the rule of law can be reconciled, as ADR fulfils a rule of law role within that system. It achieves this through the symbiotic relationship it shares with adjudication.

D Symbiosis Between ADR and Adjudication

A symbiotic relationship refers to two dissimilar systems living together and achieving a balance that can only be attained through the two systems working together. A mutualism type of symbiotic relationship is one of mutual benefit, under which, each system gains benefits from the other. They are connected in order to survive. ADR and adjudication are two such dissimilar bodies. They are symbiotic in that working jointly they achieve rule of law outcomes they are unable to achieve separately. They are not only necessary in their own right but are also mutually reinforcing of one another. In this way, the combined effect of these two separate processes enhances the rule of law.

²¹²

Luban, above n 79, at 2642.

ADR and adjudication work together symbiotically in two central ways. Firstly, they each serve complementary, yet, distinct functions. Secondly, they serve a combined function. In these ways, the existence of both creates a collective effect that best serves the rule of law.

E Distinct Functions

There are different types of legal issues that need to be served by a justice system in order to ensure the rule of law is fulfilled. Some disputes are "... served best by formal systems of justice, others are served best by informal approaches."²¹³ ADR can best provide some of these, and adjudication others. In this way, they fulfil separate functions that the other cannot. This has been referred to as co-existential-justice.²¹⁴ For example, there are some legal disputes that the judicial system was not designed, nor has the capacity, to deal with. These would remain unaddressed without access to an alternative system of resolution. Consumer and citizen complaints are examples of these types of disputes. Nader wrote about this topic in the early days of ADR. At that time, she said "... the legal system is seldom responsive in a complex industrial society to issues that affect the quality of everyday life."²¹⁵ She argued that people with these disputes were not getting access to justice and this was causing "... a serious deficiency..." in the justice system.²¹⁶ Access to resolve these types of disputes is still an issue. Sourdin talks about the 'vast' system of industry-based schemes in Australia that is dealing with disputes that would not be pursued through adjudication.²¹⁷ The European Union has recognised the important role ADR plays in dealing with consumer disputes, particularly in cross-border conflicts.²¹⁸ ADR in the form of these dispute resolution schemes provides systems for dealing with these disputes that would otherwise remain unaddressed.

Astor and Chinkin outline other distinct features that ADR offers. They say ADR has the ability to provide a wider range of remedies than adjudication that can more specifically meet the needs of the particular parties in dispute.²¹⁹ By way of example, they refer to a study that shows the most common agreed outcomes from ADR in employment discrimination cases are apologies and changes in policy or practice.²²⁰ Boule, Goldblatt and Green also make reference to the ability of ADR to allow for more appropriate remedies, particularly when there is a need for flexible outcomes.²²¹

²¹³ Sternlight, above n 199, at 14.

²¹⁴ Alexander, above n 52, at 6.

²¹⁵ Laura Nader "Disputing Without the Force of Law" (1979) 88 Yale L J 998 at 1001.

²¹⁶ At 1021.

²¹⁷ Sourdin, above n 34, at 17.

²¹⁸ Directive 2013/11/EU on Consumer ADR [2013] OJ L165/63.

²¹⁹ Astor and Chinkin, above n 57, at 69.

²²⁰ At 69.

²²¹ Boule, Goldblatt and Green, above n 101, at 186.

Astor and Chinkin further note that ADR is better suited to disputes involving multiple parties and identify this is another of its distinct functions, saying it works in these disputes “... in ways that are not possible in the bilateral framework of the adversarial process.”²²²

In these ways, ADR plays a unique role in filling a gap in the justice system. Adjudication also has a unique function within the symbiotic relationship, and fills a gap ADR cannot. Under the rule law, some disputes require a determination of rights, the creation of precedent or the development or clarification of a particular law. These outcomes can only be provided for through adjudication.

New Zealand’s Employment Relations Act 2000 provides a good example of legislative recognition of these distinct functions. The Act explicitly highlights the importance of prompt, flexible, low level problem solving through mediation, as well as recognising that there will always be some cases that require judicial intervention and that difficult issues of law will need to be determined by higher courts.²²³ In this way, the Act identifies and acknowledges the unique functions of both ADR and adjudication. The employment context also provides examples of some of the distinct features of ADR identified above. Employment mediation is able to easily accommodate groups of employees in conflict, or multi-party collective bargaining. It also allows for a wide range of outcomes to be agreed by the specific parties. Karen Radich and Peter Franks say the opportunity to explore a wide range of solutions is one of the primary benefits of employment mediation.²²⁴ They further state that it allows creative and flexible outcomes, such as apologies, provision of counselling or even charitable donation made in one party’s honour.²²⁵

Sternlight summarises the point on distinct functions with reference to the different interests a justice system needs to address.²²⁶

... no single procedure can likely serve all of these interests, and ... societies are often best off providing multiple processes including, for example, the use of formal litigation for some disputes (to serve the public interests in lawmaking, consistency of results, deterrence, etc.) and private, nonadversarial processes such as mediation for others (to serve private interests in speedy, low-cost, accessible processes).

²²² Astor and Chinkin, above n 57, at 69.

²²³ Section 143.

²²⁴ Karen Radich with Peter Franks, *Employment Mediation* (2nd ed, Brookers, Wellington, 2013) at 1.

²²⁵ At 118-119.

²²⁶ Sternlight, above n 103, at 1668.

The aim of this paper is not to define these different types of disputes or interests any more exhaustively or to provide a system for determining which issues are best served by which process. I make this point to highlight that different types of disputes and interests exist. Establishing how the modern justice system should most effectively operate, such as determining how to appropriately choose between processes, and how much of each process is required to achieve balance within the justice system is the next step. That step will require “... a clear understanding of the qualities and characteristics of the various processes.”²²⁷ The debate can help inform that understanding, and issues of process choice and appropriateness can be best addressed once the focus of the discussion moves away from the adversarial impasse of the debate.

F Combined Function

As well as serving separate purposes within the modern justice system, ADR and adjudication are symbiotic in their interdependency. In 1995, Menkel-Meadow said, “The more thoughtful of the settlement critics ... have begun to realise the “dialogic” or interactive relation between adjudication and settlement processes.”²²⁸ This realisation has continued to grow. Astor and Chinkin say that perceiving adjudication and ADR as separate processes is a ‘false dichotomy’ and the reality of the relationship between them is, in fact, one that is “... interactive, even enmeshed.”²²⁹ Alexander makes reference to this point in noting, “ADR processes are now recognised not only as a distinct system of dispute resolution but also as a system that interacts interdependently with the justice system.”²³⁰ Boulle, Goldblatt and Green talk about the ‘increasing interconnectedness’ between the two processes.²³¹ Michael Legg says it is necessary to recognise, “... that ADR and the courts may actually go hand in hand so that the most beneficial or efficient outcome may require a combination of both.”²³² Moffitt is even more emphatic on this point, saying, “Each depends on certain contributions from the other in order to thrive – and perhaps even to survive.”²³³ Sourdin makes direct reference to the relationship as symbiotic.²³⁴

The reality is that the relationship between the parts of the system that focus on dispute resolution is symbiotic – each is reliant on the other and each is required

²²⁷ Astor and Chinkin, above n 57, at 51.

²²⁸ Menkel-Meadow, above n 91, at 2676.

²²⁹ Astor and Chinkin, above n 57, at 43.

²³⁰ Alexander, above n 52, at 6.

²³¹ Boulle, Goldblatt and Green, above n 101, at 93.

²³² Michael Legg “Changes” in Michael Legg (ed) *The Future of Dispute Resolution* (LexisNexis Butterworths, Australia, 2013) 3 at 8.

²³³ Michael Moffitt “Which is Better, Food or Water: The Rule of Law or ADR” (2009) 16 *Disp Resol Mag* 8 at 13.

²³⁴ Sourdin, above n 148, at 166.

to support a just society. Institutionalised justice is supported by informal justice, and informal justice requires institutions and impartial judicial determination.

Even some of the more critical scholars, such as Genn, who have thought deeply on this topic, recognise the interdependency between the two processes.²³⁵ It is clearly not a new idea that ADR and adjudication are connected. My thesis, however, contends that in contributing to one another, ADR and adjudication work in combination to support the rule of law. It also provides (in the following chapter) evidence of how this symbiosis works in practice.

The Employment Relations Act provides an example of the integrated system reflected through legislation. In Part 10, the Act establishes a hierarchy of processes, from mediation, to a quasi-judicial, investigative form of arbitration in the Employment Relations Authority (the Authority), to adjudication in the Employment Court. In setting out the objects in relation to these dispute resolution processes, the Act explicitly recognises the functions these processes each serve as part of the one, broader system to deal with employment relationship problems.²³⁶

1 Adjudication Contributions

Adjudication contributes to ADR in a number of ways. It provides the necessary framework, threat, and enforcement for ADR to be most effective, as well as remedying concerns of inequality raised in relation to ADR. Sourdin articulated the role of adjudication in this regard as follows:²³⁷

... it is important to recognise that the role of an independent court system and impartial adjudication is critical in the weaving of the social fabric of a civilised society and creating social justice where liberty and equality remain critical values. It is under these circumstances that effective ADR that is 'just' can thrive.

(a) Framework, threat and enforcement

The adjudication system provides a framework for ADR to occur within. Without this structure, ADR could still function, but the framework enhances its functioning. Nader referred to this early on in the development of ADR when saying, "... ultimate access to the legal system is crucial if extralegal processes are ever to provide effective relief ...".²³⁸ Menkel-Meadow also makes this point: "If one party does not

²³⁵ Genn, above n 62, at 125.

²³⁶ Section 143.

²³⁷ Sourdin, above n 148, at 157.

²³⁸ Nader, above n 215, at 1000.

accede to the settlement, the default is to return to law, so law remains, in a sense, a constant baseline of choice and comparison.”²³⁹

The threat of coercion is a specific element provided by the adjudication framework. An element Genn believes is necessary for ADR to succeed.²⁴⁰ A realistic threat of litigation provides the necessary encouragement for parties to at least attempt to resolve matters between themselves. “[ADR] without the credible threat of judicial determination is the sound of one hand clapping.”²⁴¹ Without this possible consequence, there is less incentivising resolution. Genn and Luban talk about this as the necessary ‘shadow’ within which bargaining and resolution can take place.²⁴² Winkelmann uses the same terminology when saying that cases settle “... in the shadow of the law.”²⁴³ The threat of sanction through adjudication not only provides this bargaining incentive but also influences ADR in a more indirect way. It can create behavioural boundaries in ADR that assist the success of that process, for example, Moffitt says it discourages fraud, coercion, and false evidence.²⁴⁴

The employment regime again provides a good example of this. As explained above, the Employment Relations Act establishes a clear framework for dealing with employment disputes through the creation of a full hierarchy of institutions from mediation to Court. It explicitly recognises the role of higher courts in determining issues of law,²⁴⁵ thus making the threat of coercion or the shadow of the law clear and apparent. Radich and Franks say it is important for parties to ADR to understand the likely chances of success if their claim were to proceed to the Authority or Court.²⁴⁶ They view this legal risk analysis or ‘reality testing’ as a central part of the ADR process.²⁴⁷ This demonstrates recognition of the importance of the shadow of the law in practice as well as in legislation.

Adjudication also provides the mechanism for enforcing the outcome of ADR processes, thereby giving effect to the rights and obligations agreed between the parties.²⁴⁸ In this way, adjudication not only serves a practical function, but it also

²³⁹ Menkel-Meadow, above n 91, at 2677-2678.

²⁴⁰ Genn, above n 62, at 21.

²⁴¹ At 125.

²⁴² At 21; and Luban, above n 79, at 2641.

²⁴³ Winkelmann, above n 1 at 3.

²⁴⁴ Moffitt, above n 233, at 14.

²⁴⁵ Section 143(g).

²⁴⁶ Radich and Franks, above n 224, at 60 and 125.

²⁴⁷ At 60.

²⁴⁸ Here I am referring to legally based resolutions. Not all ADR agreements will give rise to legally enforceable outcomes, for example, behavioural agreements coming out of interpersonal conflict.

increases the credibility of ADR, as Moffitt suggests, by providing assurance ADR agreements will take effect.²⁴⁹

The Employment Relations Act illustrates this point as well. It provides clear mechanisms for the enforcement of mediated settlements through adjudication.²⁵⁰ It also gives the Authority the power to impose a penalty on any party who breaches a settlement.²⁵¹ Further, the Employment Court has the power to impose a fine, sequester property or even imprison a person in default of a compliance order made in regards to a settlement by the Authority.²⁵² These potentially serious penalties send a clear message about the importance of mediated agreements and in doing so increases the credibility of the process. The Weathertight Homes Resolution Services Act 2006 similarly provides a specific mechanism for enforcement of mediated outcomes.²⁵³

(b) Inequality

This threat of adjudication, and ultimate access to it, can help address the concerns about inequality raised in relation to ADR.²⁵⁴ Although adjudication does not provide complete protection against power imbalance between parties (as even Fiss accepted²⁵⁵), it provides procedural safeguards that can assist in keeping power inequalities in check. The knowledge that adjudication is readily accessible may provide a balancing influence in ADR. It can also provide an alternative, if the inequality is such that a dispute is not best suited to ADR but better served through adjudication. As Nader says:²⁵⁶

Disputes between people of unequal power are unlikely to be settled fairly by mediation or arbitration unless the force of law is available as a last resort. Courts should be available, especially in cases in which the parties have unequal power ...

Legg was making this same point when saying, “The use of ADR can be beneficial but litigation must remain an option.”²⁵⁷ These two different expressions of the same opinion reflect the shift from the older, more oppositional stance, articulated by Nader, to the newer, more integrated approach as set out by Legg.

The Employment Relations Act provides an example of a legislative mechanism for dealing with issues relating to inequality. Whilst ADR is specified as the primary

²⁴⁹ Moffitt, above n 233, at 14.

²⁵⁰ Section 151.

²⁵¹ Section 149(4).

²⁵² Section s 140(6).

²⁵³ Section 87.

²⁵⁴ See chapter II A 4 above.

²⁵⁵ Fiss, above n 73, at 1077.

²⁵⁶ Nader, above n 215, at 1020.

²⁵⁷ Legg, above n 232, at 5.

mechanism for resolving disputes,²⁵⁸ and it is clearly anticipated that it should be used prior to parties taking claims to the Authority or Court, the Act provides grounds for exception. Specifically, it requires the Authority and Court to direct matters before them to mediation unless they consider it will: not be in the public interest; not contribute constructively to resolving the matter; or, in the case of the Authority, be otherwise inappropriate.²⁵⁹ Boulle, Goldblatt and Green say cases of sexual harassment or other abuse are the types of situations where this discretion may be appropriately exercised to bypass ADR and protect against inequality.²⁶⁰

2 ADR Contributions

The mutualistic nature of the symbiosis between ADR and adjudication means it is not a one sided relationship. Just as adjudication provides rule of law benefits to ADR, ADR does the same, in a number of ways.

(a) Access

The fear that justice through the courts was inaccessible was one of the factors that drove the development of modern ADR.²⁶¹ Research from the mid-1990s suggested there was an increasing rate of conflict occurring in society, and that this increase, combined with growing populations, would lead to "... a spiralling rate of disputing..." and an increased litigation rate.²⁶² New Zealand's latest Court figures show relatively consistent litigation rates,²⁶³ indicating the fear in relation to an increased litigation rate has not been borne out. This does not necessarily mean, however, that rates of disputing are not increasing. Court reporting, however, does not capture the level of disputing in society, or even fully reflect the number of cases filed. As the High Court report notes, the majority of civil cases settle before proceeding to trial, and these are not included in its data.²⁶⁴ King and others have found that "The increase in population has resulted in increasing numbers of disputes."²⁶⁵ The access to justice concern remains relevant if this increase does move through to adjudication.

All of these disputes going to adjudication will have serious consequences for the rule of law. The adjudication system is not equipped to cope with increasingly high volumes of cases. This would result in increased delays and ultimately have a

²⁵⁸ Section 3(a)(v)

²⁵⁹ Section 159 and s 188.

²⁶⁰ Boulle, Goldblatt and Green, above n 101, at 246.

²⁶¹ See chapter I C 2 above.

²⁶² Luban, above n 79, at 2642-2643.

²⁶³ Helen Winkelmann, Chief Judge *Report From the High Court 2014* (7 May 2015) at 11; and District Courts of New Zealand *Annual Report 2015* at 32-33, 45, 53, 65. Sourdin makes reference to Australian research showing the same trend: see Sourdin, above n 34, at 252.

²⁶⁴ Winkelmann, above n 263, at 45

²⁶⁵ King and others, above n 176, at 10.

corrosive effect on access to justice. Additional resourcing of adjudication systems does not fully resolve the issue. A high litigation rate poses a problem in its own right. The volume of law that would be produced as a result can have a detrimental effect on the quality of law. As Luban says: “If the number of adjudications increases, then worse craftsmanship, worse thinking, and worse law will likely result.”²⁶⁶ More simply put: “Too many cases make bad law.”²⁶⁷ This impact is even more profound within a system of stare decisis, under which the principle of precedent can result in bad law having a compounding effect. Again in Luban’s words: “One piece of bad adjudication may forestall thousands of good pieces.”²⁶⁸ ADR can address this issue. As Moffitt expresses it, ADR enables articulation and enforcement of the rule of law as it means not all grievances go to adjudication, thus allowing institutional capacity and ensuring the right cases get to adjudication through what he calls ‘docket-thinning’ and ‘triaging’.²⁶⁹ This allows the judicial system’s resources to better serve the rule of law.

Both the employment and weathertight regimes provide a good example of the access to justice benefit ADR contributes to the modern justice system. There is a high level of disputing in New Zealand’s workplaces. The latest government figures available, for the year to 30 June 2012, show that the Department of Labour contact centre received more than 140,500 enquiries relating to employment relations issues.²⁷⁰ A 2014 survey of employees reported that a quarter of them had experienced workplace conflict in the preceding year.²⁷¹ Not all of these issues come through to the justice system. Past experience, however, shows us that even the number that do, present too high a volume to be adequately dealt with by adjudication. In their history of the Employment Relations Act, George Lafferty and Robyn May state that prior to the passing of the Act, the body that dealt with all industrial disputes and personal grievances, the Employment Tribunal, had a backlog of more than 3,000 cases. They refer to media reports at the time that said parties were waiting six months for an adjudication hearing and then over a year for a decision.²⁷² Radich and Franks quote Department of Labour figures from 1999 saying that in some areas the waiting time for adjudication was almost two years.²⁷³ Lafferty and May say these delays showed

²⁶⁶ Luban, above n 79, at 2645.

²⁶⁷ At 2646.

²⁶⁸ At 2645.

²⁶⁹ Moffitt, above n 233, at 14.

²⁷⁰ Department of Labour *Annual Report for the year ended 30 June 2012*, at 48. Since the Department became a part of the new Ministry of Business, Innovation and Employment on 1 July 2012, the reporting has changed and this detail as to numbers is no longer provided.

²⁷¹ FairWay Resolution *Conflict in New Zealand Workplaces Study* August 2014 at 2.

²⁷² George Lafferty and Robyn May “Legislation, Mediation and Unions: New Zealand’s Employment Relations Act 2000” (paper presented at the Labour Movements in the 21st Century Conference, University of Sheffield, 2 July 2004) at 3.

²⁷³ Radich and Franks, above n 224, at 8.

“... an evident need for a more effective framework for the resolution of workplace disputes.”²⁷⁴ This is reflected in the objects of the Act itself, which specifically include promoting mediation as the primary problem-solving mechanism and reducing the need for judicial intervention.²⁷⁵ This demonstrates an understanding by the legislature that adjudication is unable to deal with the high volume of workplace disputes. The Act provides an illustration of the justice system being managed in a way to reduce and prevent delays through the use of ADR, thereby ensuring access to justice and best serving the rule of law.

The weathertight regime illustrates a more proactive approach to access to justice concerns. The weathertight or ‘leaky homes’ issue arose in New Zealand in the early 2000s, when it became apparent that a perfect storm of failures in residential building regulation, practices, materials, and design had resulted in thousands of leaking homes being built.²⁷⁶ A report by PricewaterhouseCoopers found “The total number of affected dwellings is estimated to fall within the range of 22,000 to 89,000.”²⁷⁷ This potential volume of litigation would have created real access to justice issues for the court system. The Weathertight Homes Resolution Services Act of 2002, and then that of 2006, were drafted in response to these concerns following this crisis, and set up a system to deal with the disputes.²⁷⁸ The purpose of the 2006 Act was “... to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for the assessment and resolution of claims relating to those buildings.”²⁷⁹ This primarily meant mediation, with access to a specialist Tribunal if that mechanism proved unsuccessful.²⁸⁰ This provides a further illustration of ADR being used in New Zealand to specifically address access to justice concerns.

As outlined above, some critics argue that ADR reducing the volume of disputes going to adjudication in this way adversely impacts the stare decisis system. There are two rebuttals to this claim. Firstly, the reality of the legal system is that most cases settle through direct negotiations between the parties before they reach

²⁷⁴ Lafferty and May, above n 272, at 3.

²⁷⁵ Section 3(a)(v) and (vi).

²⁷⁶ *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority* (31 August 2002); Morris, above n 37, at 94; and Boulle, Goldblatt and Green, above n 101, at 247-248.

²⁷⁷ PricewaterhouseCoopers *Weathertightness – Estimating the Cost* (Department of Building and Housing, 29 July 2009) at 3.

²⁷⁸ Boulle, Goldblatt and Green, above n 101, at 248.

²⁷⁹ Section 3(a).

²⁸⁰ Morris, above n 37, at 94.

adjudication.²⁸¹ Therefore much of the concern related to ADR diverting cases from adjudication is not factually substantiated, as they never get there anyway, regardless of ADR. This demonstrates the second point of rebuttal, that cases have been settling and stare decisis has still been functioning. From this, it can be concluded that a large volume of cases is not required to develop precedent and create an effective stare decisis system.

Again, New Zealand's employment and weathertight regimes provide good examples of these claims bearing out in reality. In 2014, it was reported that the Ministry of Business, Innovation and Employment carries out approximately 4,000 employment mediations a year.²⁸² This figure does not capture all mediations, as it excludes those conducted by private mediators, of which there is no reporting. It is, however, the best data available. The Employment Relations Authority issued approximately 20% of this figure by way of determinations in that same year.²⁸³ Analysis in 2009 found that nine out of every ten eligible weathertight claims were being resolved by ADR and negotiation, as opposed to adjudication.²⁸⁴ These figures show that in both of these areas of law, the large majority of disputes are resolved through ADR. There were specific concerns raised about the appropriateness of this in relation to weathertight claims. Due to the wide spread nature of the leaky homes problem and the high level of public interest involved, there was a view that all cases needed to be dealt with through adjudication, in part to allow the stare decisis system to be effective.²⁸⁵ These concerns have been proven unfounded. Experience now demonstrates that even with a predominant use of ADR, a sufficient number of relevant cases in both areas are still making it to the adjudication stage for the necessary development of law. This can be seen, for example, in relation to the law determining the scope of local authorities' liability to building owners in weathertight cases,²⁸⁶ and in recent, significant developments in redundancy law in employment.²⁸⁷

As these examples demonstrate, by clearing the way for cases requiring adjudication, such as those needed to provide interpretation of law or establish necessary precedent, to get there more promptly and efficiently, ADR in fact works in conjunction with

²⁸¹ See for example, Genn, above n 62, at 21; Boule, Goldblatt and Green, above n 101 at 88; and Michael Black "The Relationship Between the Courts and Alternative Dispute Resolution" in Michael Legg (ed) *The Future of Dispute Resolution* (LexisNexis Butterworths, Australia, 2013) 87 at 87.

²⁸² Maria Dew "Employment Mediation in the New MBIE Resolution Services Teams" *LawNews* (ADLS, Auckland, 10 October 2014).

²⁸³ A Westlaw search shows the Authority issued 869 determinations in this period.

²⁸⁴ Stuart Robertson and Sarah Palmer "Update on Leaky Homes – Is Progress Being Made?" (8 December 2009) Conferenz <www.conferenz.co.nz>.

²⁸⁵ Boule, Goldblatt and Green, above n 101, at 103.

²⁸⁶ See for example, *Body Corporate No. 207624 v North Shore City Council* [2012] NZSC 83 [Sunset Terraces].

²⁸⁷ See for example, *Grace Team Accounting Limited v Brake* [2014] NZCA 541.

adjudication to enhance and support the stare decisis system. ADR can also improve other functioning of the rule of law system such as law making.²⁸⁸

Some [ADR] might then facilitate an “equilibrium” level of appropriate numbers and quality of judicial production to have the kind of reasoned public discourse contemplated. Thus, [ADR], both by its increased use of publicity in important cases, and its ability to remove some cases from the system, might actually improve the quality of public discourse or law making in the public realm, more broadly conceived of, than in traditional adjudication.

In these ways, ADR works symbiotically with adjudication to support the rule of law by protecting against bad law, and assisting in the creation of good law.

(b) Justice

As outlined above, ADR can assist in providing *access* to justice, that is, cases getting to adjudication. However, this is not the full extent of the access to justice benefit of ADR. It can also provide a form of justice in its own right in some cases. It is accurate to say that ADR does not provide an articulation of law or determination of rights. However, the outcome of a dispute is not the only element of justice. Although there is on-going jurisprudential debate about whether justice is only substantive (about outcome) or can also be procedural (about fairness of process), there is a level of acceptance that procedural justice is a valid form of justice.²⁸⁹ It is particularly arguable in relation to this paper, given Fuller’s rule of law theory was based on procedural requirements and he made specific reference to law being “... procedural as distinguished from substantive.”²⁹⁰ Additionally, research has shown that process plays a vital role in people’s perceptions of justice, with some even finding “... the process is more important to people than the outcome.”²⁹¹ A raft of studies have identified the elements that need to be present for people to perceive a process as fair: the ability to speak, be heard (often referred to as ‘voice’), and participate, neutrality of the third party, trustworthiness of the third party, and whether they were treated with respect.²⁹²

Rebecca Hollander-Blumhoff and Tom Tyler explain how this is related to ADR, stating: “... procedural justice, provides an important perspective on how ADR systems can help maintain societal values that are consistent with the rule of law.”²⁹³

²⁸⁸ Menkel-Meadow, above n 91, at 2682.

²⁸⁹ Noone and Akin Ojelabi, above n 134, at 535-536.

²⁹⁰ Fuller, above n 18, at 96-97.

²⁹¹ Cynthia Alkon “Lost In Translation: Can Exporting ADR Harm Rule Of Law Development?” (2011) J Disp Resol 165 at 173-174.

²⁹² At 174; Rebecca Hollander-Blumhoff and Tom Tyler “Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution” (2011) J Disp Resol 1 at 5-6; and King and others, above n 176, at 14.

²⁹³ Hollander-Blumhoff and Tyler, above n 292, at 2.

Astor and Chinkin are more measured about ADR's procedural justice benefits. They say that the processual strengths of ADR are significant but in order for them to be realised, "Adequate training of mediators and funding of mediation schemes are essential to enable mediators to deal properly with power issues in mediation."²⁹⁴

ADR can therefore be said to provide justice if: the process provides the elements of procedural justice referred to above; people have awareness of the law and their legal rights; people are educated and aware of their choices in relation to processes for dispute resolution, that is, they have the ability to make fully informed decisions about how they resolve their dispute; they have the ability to easily access adjudication if they choose to; and the ADR provided is properly resourced. In these ways, the combined effect of having both ADR and adjudication easily available can be said to be access to justice through ADR itself.

In addition to access to justice, there are other, related rule of law functions ADR can fulfil in its own right. Luban, for example, says ADR can achieve "... values central to public-life conception: openness, political transparency, legal justice, and public-good creation."²⁹⁵

(c) Confidence and compliance

ADR also contributes to the rule of law by creating confidence in it, and encouraging voluntary compliance with it. As Rueben says: "... the capacity exists for the perception of the [dispute resolution] process to influence the perception of the rule of law that supports it."²⁹⁶ Delays, expense, and, at worst, the complete inability to pursue a dispute at all through the justice system can undermine the rule of law by negatively impacting on society's confidence in its ability to function effectively. ADR can help address some of these issues. As outlined above, ADR can provide better access to adjudication and can serve some disputes that adjudication cannot. These benefits enhance the functioning of the justice system as a whole. In this way, ADR plays a part in enhancing society's confidence in the justice system.

This is true within the employment context, where ADR serves disputes adjudication cannot. As explained in more detail below, the Act was drafted to allow a broad range of disputes to have access to mediation.²⁹⁷ This means that disputes that do not fit the criteria for a personal grievance or other legal claim and therefore cannot be addressed by the Authority or Court, such as relationship issues and other conflicts, are still able to be resolved.

²⁹⁴ Astor and Chinkin, above n 57, at 162-163.

²⁹⁵ Luban, above n 79, at 2647.

²⁹⁶ Reuben, above n 26, at 7.

²⁹⁷ Section 144.

The inability to pursue a dispute at all can have a more drastic effect than impacting confidence in the rule of law. It can also impact compliance with it. As Nader says in relation to the failures of adjudication to address consumer and citizen complaints: “Some observers have suggested that the cumulative effect of little injustices is endemic lawlessness.”²⁹⁸ By serving some disputes adjudication cannot, ADR plays a part in voluntary rule compliance.

ADR contributes to rule compliance in another way as well. The rule of law requires the majority of individuals to voluntarily comply with laws, as mass enforcement of every law would be a practical impossibility. Hollander-Blumhoff and Taylor further explain this point:²⁹⁹

Because a system of command and control, with reliance on complete surveillance, enforcement, and punishment, is not feasible in a society of our size and complexity, a system of voluntary deference to authority is critical to the functioning of society.

Procedural justice can influence this voluntary deference. As Reuben states “... rule compliance is more a function of the process of rule creation and enforcement than it is based upon one’s substantive belief in the correctness of the rule.”³⁰⁰ Alkon explains how this idea specifically relates to the legal system:³⁰¹

... it seems clear that one important part of rule of law is the attitudes of ordinary citizens towards their legal system and whether they believe it is a legitimate system, and therefore follow the law... . Legitimacy as a whole is a “key precondition” to people voluntarily complying with the laws and legal authorities.

Beliefs about whether a system has legitimacy are influenced by people’s perceptions of the system. As outlined above, perceptions about procedural justice are determined by factors including voice, participation, neutrality, trust, equality, and respect. If people feel these are achieved, they are more likely to believe the system is legitimate and therefore comply with it.³⁰² Good ADR processes provide these procedural justice features, and can even allow an enhanced opportunity for some of them, such as voice and participation. Parties experiencing ADR with those procedural values are therefore more likely to comply with the rule of law. Hollander-Blumhoff and Taylor also draw this conclusion:³⁰³

... when elements of each ADR process are crafted to ensure maximum procedural justice for participants, they will experience the process as more

²⁹⁸ Nader above n 215, at 1019.

²⁹⁹ Hollander-Blumhoff and Tyler, above n 292, at 7.

³⁰⁰ Reuben, above n 26, at 6.

³⁰¹ Alkon, above n 291, at 171-172.

³⁰² At 172.

³⁰³ Hollander-Blumhoff and Tyler, above n 292, at 13.

legitimate and worthy of deference; again, this legitimacy may help to keep the ADR processes in sync with the aims of the rule of law.”

Reuben goes as far as to say that procedural justice values are “... a touchstone for balancing the tension between ADR and the rule of law.”³⁰⁴ He says that if ADR is consistent with these values then it is likely that ADR supports or enhances the rule of law by furthering its “... twin goals of compliance and legitimacy.”³⁰⁵ There is research to support this theory. Hollander-Blumhoff and Taylor refer to “... a robust body of research in social psychology ...” that shows “... procedural justice drives the satisfaction that people have with their outcomes, and also predicts future adherence to outcomes and agreements.”³⁰⁶ The recent Maryland study found ADR participants are more likely to be satisfied with, and have confidence in, the judicial system.³⁰⁷ Other studies “... have found the compliance rate for settlement agreements reached in mediation to be higher than for court-imposed orders.”³⁰⁸ In these ways ADR plays a significant role in society’s compliance with, and confidence in, the rule of law.

Genn’s argument about the promotion of one process through criticism of the other³⁰⁹ is relevant to this consideration of compliance and confidence. Given the symbiotic and interdependent relationship between ADR and adjudication, actively promoting one process as superior or criticising the other as inferior has an undermining effect on the rule of law system as a whole. It should be noted, there is a distinction between the promotion of a process and the analysis or critique of it. The latter is necessary as a part of essential public debate and should not be discouraged.

(d) Wide and encompassing resolution

For the rule of law to operate, the majority of society needs to be at peace, with recourse available through the state to the minority in dispute. Society being at peace relies more on individuals’ behaviour than state involvement, as Moffitt explains:³¹⁰

Even under the most totalitarian, expansive vision of the role of government, the rule of law depends more on the decisions of private actors than it does on the intervention of the state.

ADR provides a way to proactively facilitate peace within society. This has an impact on the majority, and is a much wider function than reactively providing recourse to specific disputes. As Astor and Chinkin explain, the law only recognises a limited

³⁰⁴ Reuben, above n 26, at 7.

³⁰⁵ At 7.

³⁰⁶ Hollander-Blumhoff and Tyler, above n 292, at 3.

³⁰⁷ Community Mediation Maryland Report, above n 69, at 2.

³⁰⁸ Eisenberg, above n 68.

³⁰⁹ See chapter II A 2 above.

³¹⁰ Moffitt, above n 233, at 14.

category of harms and “Real disputes do not always fit easily into recognised legal categories.”³¹¹ There is much conflict in society that does not fall within the traditional legal framework. Addressing this large volume of issues means conflict can be resolved before it potentially escalates into legal claims. It also prevents conflict from remaining unaddressed, causing on-going disharmony in society. This should be a recognised function of a modern justice system. As ADR can address conflict generally and is not only concerned with legal rights and disputes it can serve this function. ADR also has a strong focus on the parties themselves and has the potential to improve relationships between them. Additionally, ADR can play a part in influencing behaviour. It can teach parties wider conflict resolution and management skills. This can have a broader impact beyond the immediate conflict and may influence behaviour in a way that prevents future conflicts arising. As Moffitt expresses it:³¹²

We engage in transactions, resolve differences, and move on with our lives in ways that are consistent with the underlying themes of the rule of law because of interaction patterns rooted in dispute resolution.

King and others talk about the idea of preventative law as a part of the wider system, saying, “Prevention, or early intervention, is clearly better than post-conflict or post-harm interventions.”³¹³

These broader conflict resolution and prevention effects of ADR contribute to keeping peace within society, thus supporting the underpinning functioning of the rule of law. This is a wider and more encompassing view of resolution than is generally considered under the traditional justice system. Given the link between ADR’s wider resolution benefits and the rule of law, an argument can be made for incorporating this expanded concept of resolution into the notion of ‘justice’ and making it an explicit aim of the system. In other words, to best serve the rule of law, the modern justice system should seek the resolution of disputes in a wider and more encompassing way than it has through the traditional, more rigid definition of justice.

Boulle, Goldblatt and Green make reference to this idea of wider resolution when they include changing relationships and prevention of conflict as possible purposes of ADR.³¹⁴ They further note ADR’s ability “... to be responsive to the parties’ interests and future needs...”³¹⁵ and specifically suggest ADR “... offers an alternative conceptualisation of justice”³¹⁶ Astor and Chinkin also refer to this concept of

³¹¹ Astor and Chinkin, above n 57, at 67.

³¹² Moffitt, above n 233, at 14.

³¹³ King and others, above n 176, at 19.

³¹⁴ Boulle, Goldblatt and Green, above n 101, at 15-16.

³¹⁵ At 186.

³¹⁶ At 107.

wider resolution when saying that remedies available through ADR can look to the future, require acceptance of personal responsibility for actions, and focus on future dealings between parties in ways adjudication cannot.³¹⁷ This is also what they are talking about when they say that framing issues as legal claims can distort the real dispute and result in it being only partially addressed.³¹⁸

As mentioned above, the Employment Relations Act does not limit access to ADR to only those with legal claims. Section 144 states the mediation services shall be provided to support all employment relationships.³¹⁹ The Act specifies that this relationship is that, not only between employers and employees, but also between employees, unions and their members, different unions, unions and employers, employers involved in multi-employer bargaining,³²⁰ and even those not in employment relationships but in 'work-related' relationships, such as contractors.³²¹ In these ways the Act provides for a broad range of parties to have access to mediation to deal with a broad range of issues, including relationship problems and interpersonal conflict. These issues may not constitute legal claims but they still have significant impact on individuals and the workplace.³²² Radich and Franks list the benefits this broad approach provides, saying it allows for mediation to assist in wide-ranging ways, including isolating key issues; gaining understanding; identifying workplace conflict; preventing it escalating and avoiding personal grievances; identifying systemic issues in a workplace, such as poor communication or conflict management; facilitating behavioural changes; and improving relationships, for example between an employer and union prior to collective bargaining.³²³ They further talk about the ability of mediation to meet parties' procedural, psychological and substantive needs.³²⁴ In making ADR available in this broad and encompassing manner, the Act reflects the importance of addressing conflict and providing for its resolution in a wider way than the traditional, purely legally focused system.

This idea of a justice system that incorporates wider resolution aims is already more explicitly evident in some jurisdictions. There are claims the development of mediation in Denmark and the Netherlands was partially influenced by the worldwide Ghandi peace movement.³²⁵ It is suggested that Germany also sought something more than the traditional access to justice benefit in its use of ADR, and has successfully

³¹⁷ Astor and Chinkin, above n 57, at 68.

³¹⁸ At 67.

³¹⁹ Section 144(1).

³²⁰ Section 4(2).

³²¹ Section 144A.

³²² See for example, the FairWay Resolution Study, above n 271, at 8-9.

³²³ Radich and Franks, above n 224, at 34-35 and 136.

³²⁴ At 136.

³²⁵ Alexander, above n 52, at 20.

achieved this through processes such as its victim-offender programme, about which has been said: "... mediation can be much more than a simple dispute-resolving mechanism. Mediation possesses the potential to transform the way people think and act towards each other in conflict."³²⁶ There is also research to support this view. The Maryland study found ADR participants are more likely than adjudication participants to feel all of the underlying issues came out and were completely, as opposed to partially, resolved with increased levels of responsibility for wrongdoing.³²⁷

There are increasingly compelling reasons why this broader justice view should prevail. Societal changes require the justice system to adapt in order for the changes to be appropriately addressed. The increasing rate of disputing referred to above is one of these changes. The nature of conflict in society is another. Alexander claimed that increasing privatisation, globalisation, and the decline of the culturally homogenous state were having an impact on how disputes were best resolved.³²⁸ King and others identified a number of additional economic, demographic, and social factors they argue are causing increased pressure for change in the dispute resolution system.³²⁹ These included growing populations, increasing sensitivity to indigenous issues, burgeoning prison populations, social diversity, and technological advances.³³⁰

There are many other issues that will impact on the nature of conflict and how to best resolve it, some of them on a global scale, and all of them relevant to New Zealand. These issues include international trade deals, such as the recent Trans-Pacific Partnership Agreement, increasing refugee populations, rising elder population, increasing pressure on resources such as food and water, climate change, and economic goals increasingly clashing with environmental goals. These issues are all likely to give rise to complex conflict that adjudication may not always be best placed, or even able, to serve. As Menkel-Meadow says: "Some settlement processes may be better adapted for the multiplex, multiparty issues that require solutions in our modern society than the binary form of plaintiff-defendant adjudication."³³¹ The justice system needs to adapt alongside society in order to provide for broad resolution of these types of disputes.

³²⁶ Nadja Alexander, Walther Gottwald and Thomas Trenczek "Mediation in Germany: The Long and Winding Road" in Nadja Alexander (ed) *Global Trends in Mediation* (2nd ed, Kluwer Law International, The Netherlands, 2006) 223 at 258.

³²⁷ Community Mediation Maryland Report, above n 69, at 2.

³²⁸ Alexander, above n 52, at 6-7.

³²⁹ King and others, above n 176, at 10-11.

³³⁰ At 10-11.

³³¹ Menkel-Meadow, above n 91, at 2692.

As Sternlight says, the justice system can do more than just resolve disputes or enforce rights.³³² A modern justice system should not only be concerned with the direct outcome of a dispute. It should seek to resolve conflict in a wider and more encompassing way than traditional justice. The system should not only allow, but also promote, the most appropriate form of dispute resolution for a dispute. NADRAC made this point when it stated, "... ADR needs to be understood as a bundle of versatile tools that enables the extension of ... justice far beyond the areas that courts can or should even reasonably required to reach."³³³ As Sourdin explains, this does not undermine or detract from the role of adjudication.³³⁴

In adopting a broader view of justice, there need not be a rejection of the notion that 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.

Within the symbiotic system, justice can be provided through different processes in various forms in a way that actively supports the rule of law. One of those forms should be an expanded notion of justice. Sternlight makes this same point:³³⁵

... without for an instant suggesting that a modern system of justice should abandon its emphasis on protecting rights and helping promulgate the law, I do believe that the modern system of justice should also aspire to do more.

In my view, the 'more' Sternlight refers to is promoting wide and encompassing consensual resolution of conflict. ADR provides a way to achieve this. This is not inconsistent with the rule of law. On the contrary, it is necessary to support and enhance it, as the broader resolution or peace ADR can achieve supports the underlying functioning of that very doctrine. This makes ADR even more important to the rule of law and provides a further way the two can be clearly reconciled.

³³² Jean Sternlight "ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice" (2003) 3 Nev L J 289 at 301.

³³³ NADRAC "Submission to the Productivity Commission's Inquiry into Access to Justice Arrangements" (November 2013) Australian Government Attorney-General's Department <www.ag.gov.au>.

³³⁴ Sourdin, above n 148, at 155.

³³⁵ Sternlight, above n 332, at 302.

IV The Modern Justice System In Practice

A Chapter Overview

In this chapter, I provide evidence for the idea of a modern justice system by referring to an example of this concept that can be found in practice. Specifically, I examine the restorative justice process administered within New Zealand's adult criminal justice system. In this examination, I provide an overview of how restorative justice operates within this context and then consider how it demonstrates the key ideas of a modern justice system identified in chapter III.

B Definition

Although it is a unique and distinct practice, restorative justice falls under the wide, umbrella definition of ADR set out in chapter I. This inclusion is not inconsistent with other literature.³³⁶ It is worth noting, however, that there are some distinctions between restorative justice and other forms of ADR, such as mediation. Firstly, it is not directly between the same parties to the adjudication. In adjudication the parties are the state and the offender, whereas in restorative justice they are the victim and the offender. In most other ADR contexts, the parties would be the same in both processes. Secondly, it is most common for both restorative justice and adjudication to be used to deal with a single case, whereas, in other contexts, ADR may be used as an alternative to adjudication. Restorative justice still provides a relevant example of modern justice in practice, however, as the parties remain involved in both processes, providing a clear illustration of the symbiosis between them. Additionally, the examples provided by reference to the employment and weathertight regimes in the previous chapter have already illustrated the theory in relation to the other forms of ADR.

As with ADR generally, there is no single, agreed definition of restorative justice. It has been described as both a way of thinking about crime and a process for responding to it.³³⁷ One widely used and often quoted definition is that provided by Zehr:³³⁸

Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.

³³⁶ See for example, Sourdin, above n 34, at 99.

³³⁷ New Zealand Restorative Justice Trust *New Zealand Restorative Justice Practice Manual* (2000) at 13.

³³⁸ Howard Zehr *The Little Book of Restorative Justice* (Good Books, Pennsylvania, 2002) at 37.

Restorative justice can be used in different contexts, such as schools, workplaces, social agencies, regulatory authorities, and international settings.³³⁹ As stated above, the focus of this paper is restorative justice within the context of New Zealand's adult criminal justice system. Even within this framework, there is no specific legislative definition of restorative justice. The Ministry of Justice provides the following definition in its informational material:³⁴⁰

The idea behind restorative justice is that it is a process that allows those affected by crime to work together to repair the damage the offending has caused for the victims.

As well as there being a lack of a clear definition of the concept or theory of restorative justice, there is also no one, prescribed way as to how restorative justice is delivered. As Fred McElrea says:³⁴¹

Restorative justice is not a single technique or procedure... [Rather, it is] ... an approach to wrongdoing that brings together those most affected by the wrong - both victims and offenders - preferably in a face-to-face meeting, to acknowledge the harm done and consider how best to redress that harm and prevent similar harm in the future.

The Ministry of Justice acknowledges the flexibility of restorative justice processes, saying, "There is no one way that restorative processes should be delivered."³⁴² The Ministry goes on to refer to Allison Morris' definition of the process:³⁴³

... the essence of restorative justice is not the adoption of one form rather than another; it is the adoption of *any* form which reflects restorative values and which aims to achieve restorative processes, outcomes and objectives.

This overview makes it apparent that, as with ADR more broadly, restorative justice is a flexible process founded on a values-based theory.

³³⁹ See Fred McElrea "Twenty Years of Restorative Justice in New Zealand" (10 January 2012) Tikkun <www.tikkun.org>; and Declan Roche "Dimensions of Restorative Justice" (2006) 62(2) *Journal of Social Issues* 217 at 217-218.

³⁴⁰ Ministry of Justice "More Information About Restorative Justice" <www.justice.govt.nz>.

³⁴¹ McElrea, above n 339.

³⁴² Ministry of Justice "Restorative Justice Standards for Family Violence Cases – What is Restorative Justice?" <www.justice.govt.nz>. The Ministry provides all of its information relating to restorative justice in online form through its website.

³⁴³ Allison Morris "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42(3) *Brit J Criminol* 596 at 600, as cited in Ministry of Justice, above n 342.

C Development of Restorative Justice

Declan Roche says New Zealand has a claim as the birthplace of the restorative justice movement.³⁴⁴ It clearly has a relatively long and unique history of restorative justice use in the criminal justice system, as Strang explains:³⁴⁵

For all that restorative justice may be the oldest way of resolving disputes and conflicts throughout the world, it was New Zealand who took the world by surprise in the late 1980s by engineering and promoting its modern manifestation.

As with ADR generally, this modern form of restorative justice developed over time in an ad hoc manner that “... has been primarily practice-driven rather than theory-driven.”³⁴⁶ In New Zealand, it is said to have its genesis in the family group conferences of the youth justice jurisdiction of the 1980s. Although often referred to as restorative justice retrospectively,³⁴⁷ these conferences were not specifically designed nor referred to as such at the time. Rather, they were developed “... in response to Maori community concerns that existing justice system responses ... disregarded their traditional concept that wrongdoing involves collective responsibility and that they failed to address underlying issues.”³⁴⁸ Consequentially, they were designed around Maori based approaches to offending.³⁴⁹ Their use was initially informal and sporadic, by way of referrals from judges. This gained momentum, until they were formally adopted as part of the justice system in the Children, Young Person and Their Families Act 1989.

Although the Youth Court model was not specifically restorative justice based, the development of that process in the adult system not only followed a similar path to it but was also heavily influenced by it.³⁵⁰ Following the introduction of family group conferences, there was some advocacy for the adoption of a similar process within the adult justice system.³⁵¹ The first use of restorative justice in this context was by way of informal referrals by a small number of judges in the early 1990s. Judicial and political interest in the process grew, both in New Zealand and overseas. In 1994, a

³⁴⁴ Roche, above n 339, at 219.

³⁴⁵ Strang, above n 90, at 221.

³⁴⁶ King and others, above n 176, at 40.

³⁴⁷ See for example McElrea, above n 339.

³⁴⁸ King and others, above n 176, at 41.

³⁴⁹ Douglas Mansill “Community Empowerment of Institutional Capture and Control: The Development of Restorative Justice in New Zealand’s Adult Systems of Social Regulation, Control and Punishment” (PhD Thesis, Auckland University of Technology, 2013) at 106.

³⁵⁰ McElrea, above n 339.

³⁵¹ See Mansill, above n 349, at 109.

proposal for its use was made at the District Court Judges' National Conference.³⁵² Shortly after this, the Ministry of Justice issued a discussion paper seeking submissions on the topic.³⁵³ The Crime Prevention Unit³⁵⁴ then funded a three-year pilot scheme of court referred restorative justice conferences to community based providers, with the aim of diverting adult offenders appearing before the criminal courts.³⁵⁵ In 2001, a number of subsequent pilot schemes began in the Auckland, Waitakere, Hamilton and Dunedin District Courts. These later programmes included cases of more serious offending than had previously been considered appropriate for restorative justice, such as property offences with a maximum sentence of two or more years of imprisonment, and all other offences in which there was a victim and that had a maximum sentence of one to seven years.³⁵⁶ In this way, New Zealand became the first in the world to "... use and evaluate restorative justice in cases of serious offending."³⁵⁷

Restorative justice was officially introduced for the first time in 2002 through the passing of three Acts: the Sentencing Act 2002, Parole Act 2002, and Victims' Rights Act 2002. This legislative development was part of an overhaul of the criminal justice approach to sentencing that came about following a national debate on violent crime. This was heavily influenced by a citizens initiated referendum that flowed from a petition organised by Norm Withers, the son of a murder victim.³⁵⁸ The Ministry explained the functioning of this legislation as follows.³⁵⁹

The Sentencing and Parole Acts ensure that the outcomes of any restorative justice processes are taken into account in decisions about the sentencing and parole of offenders. The Victims' Rights Act 2002 states that if a suitable person is available to arrange and facilitate a meeting between a victim and offender, a judicial officer, lawyer for the offender, court staff, probation officer or prosecutor should encourage a meeting between the victim and the offender but only if they agree to meet, resources are available and that the meeting is otherwise practicable and appropriate in all circumstances.

³⁵² Fred McElrea "Restorative Justice - The New Zealand Youth Court: A Model for Development in Other Courts?" (Paper for National Conference of District Court Judges, 6-9 April 1994).

³⁵³ Ministry of Justice "Publications Archive - Restorative Justice: A Discussion Paper" <www.justice.govt.nz>.

³⁵⁴ This was a unit within the Office of Prime Minister and Cabinet until it became a part of the Ministry of Justice in 2000.

³⁵⁵ Ministry of Justice "Background Information About Restorative Justice in New Zealand" (December 2010) <www.justice.govt.nz> at 3.

³⁵⁶ Vernon Jantzi "Restorative Justice in New Zealand: Current Practise, Future Possibilities" (August 2001) Eastern Mennonite University <www.emu.edu>.

³⁵⁷ Ministry of Justice, above n 355, at 3.

³⁵⁸ Claire Hamilton *Advances in Criminology: Reconceptualising Penalty: A Comparative Perspective on Punitiveness in Ireland Scotland and New Zealand* (Ashgate Publishing Group, Surrey, 2014) at 90.

³⁵⁹ Ministry of Justice, above n 355, at [7].

Between them, these Acts:³⁶⁰

... gave a greater recognition to the legitimacy of the restorative justice process, encouraged the use of restorative justice (where possible) and allowed for restorative justice processes to be taken into account in the sentencing and parole of offenders.

Restorative justice continued to grow following this legislative development. By 2004, there were 17 restorative justice programmes supported and administered by the government.³⁶¹ In 2010, this had risen to 26 and that the majority of District Courts had access to restorative justice services.³⁶² In 2014, the Sentencing Act was amended to require District Courts to refer cases for consideration of restorative justice pre-sentencing where an offender has pleaded guilty, there is one or more victims, and there is access to an appropriate restorative justice process.³⁶³ Section 24(A) states that in these cases:

- (2) The court must adjourn the proceedings to -
 - (a) enable inquiries to be made by a suitable person to determine whether a restorative justice process is appropriate in the circumstances of the case, taking into account the wishes of the victims; and
 - (b) enable a restorative justice process to occur if the inquiries made under paragraph (a) reveal that a restorative justice process is appropriate in the circumstances of the case.

The historical development of modern day restorative justice in New Zealand shows its growth from ad hoc beginnings to a well established, and now legislated, process. It also shows this process has been largely created by the justice system, and exists as a component within it.

D Restorative Justice Services

Restorative justice at the pre-sentencing stage in the District Courts, as provided for by the provisions of the Sentencing Amendment Act, is the most common form of restorative justice to take place within the adult criminal justice system.³⁶⁴ It does also occur at other points in the process, for example, as part of the Police Adult Diversion procedure and post-sentence in the parole of offenders as part of their reintegration back into the community.³⁶⁵ The latter is the least common.³⁶⁶ The focus of this paper

³⁶⁰ Ministry of Justice, above n 340.

³⁶¹ Ministry of Justice, above n 355, at 3.

³⁶² At 2.

³⁶³ Sentencing Amendment Act 2014, s 24A(1).

³⁶⁴ Ministry of Justice “Restorative Justice in New Zealand Best Practice” <www.justice.govt.nz>.

³⁶⁵ Ministry of Justice, above n 355, at [9].

is pre-sentencing restorative justice as it is most prevalent and also as it is ancillary to adjudication, providing a particularly good example of the symbiotic relationship between the two processes.

Restorative justice services are funded by the Ministry of Justice and delivered by community-based restorative justice providers. These providers train and employ the facilitators who run the restorative justice processes. As outlined above, restorative justice is a flexible practice and there is no fixed way these processes must be delivered. There is some governmental direction provided, however. In 2004, following consultation with the restorative justice sector, the Ministry published *Restorative Justice: Best Practice in New Zealand*.³⁶⁷ This document sets out the principles, values and processes that guide how restorative justice should be used, and that all providers must comply with.³⁶⁸ The principles are: voluntariness, full participation, well-informed participants, offender accountability, flexibility and responsiveness, emotional and physical safety of participants, effective process, and appropriateness. Of these, the Ministry says the main principles underpinning the restorative justice process are victim safety, voluntary participation and offender accountability.³⁶⁹ The 2014 amendment to the Sentencing Act does not undermine this voluntary participation principle, as it does not mandate participation. The process still requires informed consent from both the victim and the offender to proceed, and parties can opt out at any time. Two new principles were added to the *Best Practice* guidelines in 2013 when the application of restorative justice processes was widened to include family violence and sexual offending cases. These stipulated that the process is victim/survivor driven, and designed to maximise both the opportunity to experience a sense of justice and the chances for healing, and to minimise chances for harm. The guidance says there two new principles will take priority.³⁷⁰

Beyond these principles, the detail of exactly how a restorative justice process will proceed remains flexible. King and others claim:³⁷¹

... there is general agreement that ... restorative practices involve facilitated meetings where victims and offenders are involved in dialogue concerning the offence, its effects and what reparation is to be made. These meetings involve

³⁶⁶ Ministry of Justice, above n 364.

³⁶⁷ Ministry of Justice “Restorative Justice: Best Practice in New Zealand” (2004) <www.justice.govt.nz>.

³⁶⁸ Ministry of Justice “Restorative Justice in New Zealand” <www.justice.govt.nz>.

³⁶⁹ Ministry of Justice, above n 340.

³⁷⁰ Ministry of Justice “Restorative Justice Standards for with Offending Cases” <www.justice.govt.nz>.

³⁷¹ King and others, above n 176, at 40.

narrative, promotion of understanding, addressing emotional issues and reparation.

The Ministry of Justice's information on the process aligns with this general approach.³⁷² It says restorative justice will usually involve the facilitators first meeting with the victim and the offender separately to assess if the case appears suitable and if both parties wish to participate. If a meeting goes ahead, it usually involves the victim and offender and their support people, and may also include community representatives. The meeting is relatively informal and will usually cover establishment of the basic facts of the offence, the parties' stories, and the consequences. The facilitators manage the conversation to "... ensure all participants have their say and are heard."³⁷³ The victim and offender may make an agreement as a result of the meeting. These may include:³⁷⁴

... activities aimed at repairing the harm caused, eg, payment by the offender for damage, or replacement of goods, and activities aimed at addressing the causes of the offending behaviour, such as attendance at drug and alcohol programmes, or stopping violence programmes.

The facilitators provide a report to the Court that outlines the interactions at the meeting and any agreements reached. This is taken into account at sentencing.

E Example of Modern Justice

Restorative justice in the adult criminal jurisdiction demonstrates the key features of the modern justice system outlined in chapter III. It provides a clear and obvious illustration of this system, as it shows ADR and adjudication working together, not as separate alternatives. The same concepts still apply to other forms of ADR in different settings, however, as my thesis is about the system as a whole.

Restorative justice and adjudication exist in a symbiotic relationship. Firstly, they fulfil clearly distinct functions. Adjudication takes place between the state and the offender. Its role is to weigh evidence and determine whether criminal wrongdoing has occurred (where a defendant denies culpability), and to impose penalties. It also performs a function in the development of the law by delivering "... clarifying pronouncements on broader normative harm."³⁷⁵ Restorative justice does not fulfil any of these functions. Rather, it provides an opportunity for resolution not otherwise available through adjudication, between the victim and the offender, and the wider community. Secondly, restorative justice and adjudication work together

³⁷² Ministry of Justice, above n 355, at 4-5.

³⁷³ At 4.

³⁷⁴ At 5.

³⁷⁵ Tony Foley *Developing Restorative Justice Jurisprudence: Rethinking Responses to Criminal Wrongdoing* (Ashgate Publishing Ltd, Surrey, 2014) at 200.

interdependently, contributing various attributes to each other that provide an enhanced combined function.

F Adjudication Contributions to Restorative Justice

Adjudication provides a number of necessary functions to restorative justice. Firstly, it provides the framework within which restorative justice occurs. There is nothing to prevent restorative justice from taking place at any time but it is specifically included in the criminal justice framework by way of the Sentencing Amendment Act 2014. As outlined above, this requires the court to refer cases for consideration of restorative justice. This provides a legislated pathway of access.

Secondly, adjudication can provide an incentive to encourage resolution through restorative justice. Section 8(i) of the Sentencing Act 2002 requires the court to take into account any outcomes of restorative justice processes as one of the principles of sentencing offenders. Section 10 further provides that in sentencing an offender, the court must take into account any offer of amends, agreement to remedy any wrong, loss, or damage, the response of the offender, and any remedial action taken or to be taken by the offender. By making restorative justice outcomes directly relevant to sentencing in this way, these provisions provide offenders with a form of incentive to attempt to reach a satisfactory resolution with the victim.

Thirdly, adjudication can be a vehicle of enforcement if parties to restorative justice agreements decide the outcomes they reach should be binding. Roche says the most effective forms of restorative justice are those coupled with the threat of tougher enforcement.³⁷⁶

Fourthly, adjudication can be used as a sole process if issues of power inequality render restorative justice unsafe for victims. This has been a particular issue in cases of partner, family, and sexual violence, where there are concerns about "... power imbalances of victims and perpetrators in face-to-face meetings and the potential for re-victimising victims."³⁷⁷ The fact restorative justice must be assessed for suitability in each case³⁷⁸ and is a voluntary process, provides safeguards to protect against this, as such cases can be dealt with solely through adjudication. As outlined in chapter III, however, there is a shift in thinking about the use of ADR in these types of cases. The strength and advantage of the symbiotic relationship between restorative justice and

³⁷⁶ Roche, above n 339, at 235.

³⁷⁷ Kathleen Daly and Dannielle Wade "Sibling Sexual Abuse: Offending Patterns and Dynamics in Conferences" in Anne Hayden and others (eds) *Restorative Approach to Family Violence: Changing Tack* (Ashgate Publishing Ltd, Surrey, 2014) 185 at 185.

³⁷⁸ Sentencing Act 2002, s 24(A)(2)(a).

adjudication in this context has been recognised by a number of authors. Strang is among them.³⁷⁹

... a consensus may be emerging in which conventional criminal justice and restorative justice may be able to work together so that the seriousness of the crime can be recognised via a court sanction while the community input available via restorative justice can provide a mechanism for the perpetrator's reintegration.

Anne Hayden makes a similar point.³⁸⁰

Participating in a restorative justice conference may pose risks (as does participation in the criminal justice system). This is especially so if victims and perpetrators wish to continue their future together... . But it does not have to be either a criminal justice system or a restorative justice process. Processes involving both appropriately skilled and informed restorative justice practice and the criminal justice system can and do offer a moderate and more empowering experience for victims and perpetrators and a path forward after family violence.

The shift to bring sexual and family violence cases within the ambit of restorative justice not only challenges the view that ADR is inappropriate in cases of power differences, it also demonstrates the strength of the symbiotic relationship between the two processes.

G Restorative Justice Contributions to Adjudication

In turn, restorative justice provides a number of necessary functions to adjudication. Firstly, even though restorative justice occurs in addition to adjudication, it provides an access to justice benefit. Research has shown that restorative justice can result in resource savings for courts, including fewer trials.³⁸¹ Additionally, as referred to below in more detail, restorative justice has been proven to reduce recidivism.³⁸² This impact on future behaviour reduces demand on the adjudication system and allows other cases faster access to it. There has been some criticism that the Sentencing Amendment Act's mandatory requirement to consider restorative justice in all cases is

³⁷⁹ Strang, above n 188, at 226.

³⁸⁰ Anne Hayden "Reflections on Family Violence and Restorative Justice: Addressing the Critique" in Anne Hayden and others (eds) *Restorative Approach to Family Violence: Changing Tack* (Ashgate Publishing Ltd, Surrey, 2014) 211 at 218.

³⁸¹ Mark Umbreit, Robert Coates and Betty Vos "Juvenile Victim Offender Mediation in Six Oregon Counties" (Center For Restorative Justice and Peacemaking; University of Minnesota, Minneapolis 2001); and Mark Umbreit, Betty Vos and Robert Coates "Restorative Justice Dialogue: Evidence-Based Practice" (Center For Restorative Justice and Peacemaking; University of Minnesota, Minneapolis, 2006).

³⁸² See Ministry of Justice "Reoffending Analysis for Restorative Justice Cases 2008-2011" (April 2014) <www.justice.govt.nz>; and Lawrence Sherman and others "Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review" (2015) 31 J Quantitative Criminology 1.

resulting in delays and backlogs.³⁸³ This may be seen as restorative justice hindering, as opposed to assisting, access to justice. This is not due to the process itself, however, but to resourcing. Having legislated for it, government must adequately resource for it. As Chris Marshall says, “It cannot choose to stimulate demand without also addressing issues of supply.”³⁸⁴ Addressing this issue will address any concern about delaying access to justice. One of Winkelmann’s key points, which she calls a constitutional principle, includes comment on the importance of the adjudication system being well funded.³⁸⁵ Adequate resourcing is obviously an issue across the whole justice system.

Secondly, restorative justice can provide justice in its own right. Unlike adjudication, restorative justice does not provide an articulation of law, determine guilt, or impose a penalty. As already discussed, however, these are not the only determining factors of justice, and restorative justice provides others. Restorative justice is a process between the victim and offender directly, unlike adjudication, where the victim may be a witness but never a party to the proceedings, and the prosecutor is acting in the public interest, not on behalf of the victim. In this way, restorative justice provides a forum for justice between the parties themselves that is not available through adjudication. Within that forum it provides elements of justice that are also otherwise unavailable. Restorative justice can provide voice, validation, vindication and meaningful accountability, elements that are claimed to often be what victims need most, and are not provided through adjudication.³⁸⁶ This makes it a particularly robust process in terms of procedural justice, especially in relation to voice. Mary Koss’ research conducted over several years found 94% of offenders and 83% of victims felt justice was done through the restorative justice process.³⁸⁷ Additionally, restorative justice can provide a public accountability element of justice when taking Leigh Goodmark’s view that the ‘public’ of community, available through restorative justice, is sometimes even more important than the ‘public’ of the public justice system.³⁸⁸

Foley’s examination of theories of justice is relevant here. His research led him to propose evaluative criteria for assessing whether a particular response to wrongdoing

³⁸³ See for example Anne Clarkson “Restorative Justice Issues Bring Court to a Halt” *The Press* (online ed, Christchurch, 27 January 2015).

³⁸⁴ Chris Marshall, Chair in Restorative Justice “New Legislative Provisions Requiring Court to Adjourn Cases for Restorative Justice” (media release, 21 January 2015).

³⁸⁵ Winkelmann, above n 1, at 5.

³⁸⁶ Leigh Goodmark “Keynote Address” (speech to the Family Violence, the Law and Restorative Justice Conference, Wellington, 7 May 2015).

³⁸⁷ Mary Koss “The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcome” (2014) 29(9) *Journal of Interpersonal Violence* 1623 at 1648.

³⁸⁸ Goodmark, above n 386.

is just or unjust.³⁸⁹ His evaluative justice measures are: *desert*, the response gives people what they deserve in both a positive and negative sense; *equality*, the response treats people equally while accommodating their differences; *rights*, the response treats people consistently with their rights and gives effect to those rights; and *harmonious social relationship*, the response promotes these relationships between people impacted by wrongdoing, and is characterised by dignity, respect and concern.³⁹⁰ Foley applied these criteria to restorative justice and adjudication. In relation to adjudication he found it had:³⁹¹

... good potential to meet the desert and rights measures and to meet the equality standard in its emphasis on notions of formal equality ... [but] ... little commitment or capacity to meet the harmonious social relationships... .

His application of the same measures to restorative justice found its:³⁹²

... strongest claims to justice in its potential to satisfy the harmonious social relationship criterion and, to a lesser degree, in its ability to meet the equality standard in ways that more fully accommodate difference [Restorative justice] has lesser potential to satisfy the rights standard and much poorer potential to meet the negative aspects of the desert criterion.

This demonstrates the unique justice benefits restorative justice contributes to the system. As Foley concludes, "... fuller recognition of restorative approaches provides a clear means to fill the substantial gaps in law's ability to deliver justice."³⁹³

Thirdly, restorative justice plays a role in confidence and compliance. It does this by serving a dispute that adjudication cannot. As referred to above, adjudication deals with crime as a matter between the state and the offender. This does not address the dispute or conflict that arises as a result of the crime directly between the offender and victim. Restorative justice provides a process to achieve that. As outlined in chapter III, by serving a dispute that adjudication cannot (in this case between the offender and victim), restorative justice plays a part in maintaining society's confidence in the wider rule of law system and ensuring the necessary voluntary rule compliance. Meta-analysis studies provide direct evidence of this point, showing higher compliance rates with restorative justice outcomes, such as restitution payments, as opposed to those reached through adjudication.³⁹⁴

³⁸⁹ Foley, above n 375, at 37.

³⁹⁰ At 48-49.

³⁹¹ At 95.

³⁹² At 95.

³⁹³ At 199.

³⁹⁴ Jeff Latimer, Craig Dowden, and Danielle Muise "The Effectiveness of Restorative Justice Processes: A Meta-Analysis" (2005) 85 *The Prison Journal* 127, at 136; and Mark Umbreit, Robert Coates and Betty Vos "Victim-Offender Mediation: Three Decades of Practice and Research" (2004) 22 *Conflict Resolution Quarterly* 279, at 291.

Restorative justice also enhances confidence in the wider system through the positive perception people have of it. In addition to Koss' research showing the majority of participants felt justice was done through restorative justice,³⁹⁵ there are a number of studies showing high levels of satisfaction with the process for both victims and offenders.³⁹⁶ One study found higher levels of satisfaction amongst offenders in restorative justice as compared to court.³⁹⁷ Another found both victims and offenders were more likely to feel they had been fairly treated by the criminal justice system if they used restorative justice instead of adjudication.³⁹⁸ This positive perception of restorative justice has the capacity to influence the perception of the rule of law system that supports it, thus enhancing confidence in the wider system. This is particularly important in areas where there may otherwise be a negative perception of the system as a result of the experience through the adjudication process, such as in cases of sexual offending. The Law Commission identified this as an issue in its 2012 report.³⁹⁹

Because victims are merely “witnesses” for the prosecution, they have very limited input into, and no control over, the way in which evidence is presented to the court. That can lead to a sense of disempowerment and alienation: a belief that the system is not designed to protect their interests or concerns and that their needs are largely irrelevant to it. ... If that does [happen], ... he or she is likely to feel dissatisfied and aggrieved with the process, regardless of the outcome.

There is research demonstrating restorative justice's contribution in this area as well, for example, Koss' study found over 90% of participants involved in restorative justice relating to sexual offending were satisfied with the process.⁴⁰⁰

Lastly, restorative justice provides wide and encompassing resolution. It presents a strong argument for the acceptance of the extended notion of justice referred to in chapter III. As restorative justice takes a different perspective on crime it provides an avenue for addressing the damage caused by offending in a way adjudication does not. As its name suggests, restorative justice is concerned with the restoration of relationships in the aftermath of an offence. Zehr explains how the concept of relationships is relevant in the context of criminal offending. He says crime “... represents a violation of human relationships ... [and] a ruptured relationship between the victim and offender. Even if they had no previous relationship, the crime

³⁹⁵ Koss, above n 387, at 1648.

³⁹⁶ King and others, above n 176, at 64; and Strang, above n 190, at 225.

³⁹⁷ Jaimie P Beven and others “Restoration or Renovation? Evaluating Restorative Justice Outcomes” (2005) 12(1) *Psychiatry, Psychology and Law* 194.

³⁹⁸ Lawrence W Sherman and Heather Strang *Restorative Justice: The Evidence* (The Smith Institute, London, 2007) at 4.

³⁹⁹ Law Commission, above n 135, at 40.

⁴⁰⁰ Koss, above n 387, at 1647.

creates a relationship.”⁴⁰¹ One of the key purposes of restorative justice is to restore damaged relationships.⁴⁰² This approach provides resolution in a broader way not otherwise available through the traditional justice system. Hayden explains this point in more detail:⁴⁰³

Restorative justice is a new way of thinking about justice. Conventional understandings are based on seeing crime as a violation of the criminal law and as a violation against the state, on blaming and punishing offenders and on decision making by criminal justice professionals who act on the behalf of victims. Restorative justice, on the other hand, sees crime as a violation of relationships between victims and perpetrators and attempts to address these relationships as well as the harms done. It seeks to provide a voice to those most affected by the offences about not only how best to deal with them but also how to deal with the reasons underlying them and their consequences.

The restoration restorative justice seeks to achieve is wide and encompassing. According to King it includes addressing the “... material and psychological harm done to victims ... [as well as] ... the offenders’ underlying issues and any stigmatic effects of shame.”⁴⁰⁴ It goes even further than these broader needs of the victim and offender. As Koss explains, restorative justice takes the view that crime “... causes negative impacts beyond those to the direct victim.”⁴⁰⁵ It also “... assumes that desistence from future offending is facilitated by maintaining wrongdoers’ connection with law-abiding citizens and supporting community re-integration.”⁴⁰⁶ For these reasons restorative justice reaches beyond the people directly involved to include whānau and the wider community, and seeks to reverse the damage done to this broader group as well.⁴⁰⁷ In this way, it can have a far-reaching restorative or peace-keeping effect in society. These effects are not purely speculative or aspirational. Restorative justice provides direct evidence of the peace-keeping benefits ADR can bring to the rule of law system. Strang claims that restorative justice has been more widely researched than almost any other justice innovation, including imprisonment. She says the resulting body of research “... clearly concludes that restorative justice ... can reduce re-offending and benefits those willing to participate.”⁴⁰⁸

⁴⁰¹ Howard Zehr *Changing Lenses: A New Focus for Crime and Justice* (3rd ed, Herald Press, Scottdale, 2005) at 181.

⁴⁰² Heather Strang “Restorative Justice Programmes in Australia: A Report to the Criminology Research Council” Canberra: Research School of Social Sciences, Australian National University (March 2001).

⁴⁰³ Hayden and others (eds) *Restorative Approach to Family Violence: Changing Tack* (Ashgate Publishing Ltd, Surrey, 2014) 1 at 1.

⁴⁰⁴ At 47.

⁴⁰⁵ Koss, above n 387, at 1624.

⁴⁰⁶ At 1624.

⁴⁰⁷ King and others, above n 176, at 47.

⁴⁰⁸ Strang, above n 190, at 221.

There is research showing that restorative justice achieves the emotional restoration it seeks to.⁴⁰⁹ As set out above and explained by Strang and Hayden,⁴¹⁰ this ADR provided benefit works well in connection with the functions delivered through adjudication, such as sanction. The restoring of relationship is of utmost importance where offending involves people known to each other, such as in cases of family or sexual violence, where parties have been, and often continue to be, in close personal relationships.⁴¹¹ There is specific research showing the benefits of restorative justice use in these cases.⁴¹² Research also shows the benefits of restorative justice's wider and more encompassing resolution, through which victims are more likely "... to feel better about their experience and are less likely afterwards to feel angry or fearful than those victims whose perpetrators were dealt with by the courts."⁴¹³ Restorative justice also provides evidence that this wide and encompassing resolution has a positive rule of law impact, in that restorative justice reduces both the rate and frequency of recidivism, for example, the most recent Ministry research found:⁴¹⁴

... it is estimated that the 1,569 restorative justice conferences held during the 2011/2012 financial year will lead to 1,100 fewer offences being committed, and 650 fewer prosecutions being required, over the next three years.

There is considerable overseas evidence that supports the Ministry's findings. Sherman and others' quantitative research, for example, provides particularly strong evidence in relation to reduced offending. They conducted a meta-analysis of randomised trials measuring recidivism, spanning five jurisdictions across three continents and including a total of 1,880 offenders. Based on this, they found restorative justice conferences "... are a cost-effective means of reducing frequency of recidivism."⁴¹⁵ This research also showed that there was more of an effect in cases of violent crime compared to property crime.⁴¹⁶ The authors suggested that the high emotional interaction facilitated through restorative justice (which is more likely in cases of violence) may be a turning point that triggers desistance and that this may be a possible explanation for the impact restorative justice has on recidivism.⁴¹⁷ This is a clear example of restorative justice's wide and encompassing resolution providing benefit to the rule of law.

⁴⁰⁹ Heather Strang and others "Victim Evaluations of Face-to-Face Restorative Justice Conferences: a Quasi-Experimental Analysis" (2006) 62 *Journal of Social Issues* 281 at 302.

⁴¹⁰ Strang, above n 190, at 226; and Hayden, above n 380, at 218.

⁴¹¹ See for example, Koss, above n 387, at 1649.

⁴¹² Venezia Kingi "The Use of Restorative Justice in Family Violence: The New Zealand Experience" in Anne Hayden and others (eds) *Restorative Approach to Family Violence: Changing Tack* (Ashgate Publishing Ltd, Surrey, 2014) 145 at 156.

⁴¹³ Hayden and others, above n 403, at 2.

⁴¹⁴ Ministry of Justice, above n 382.

⁴¹⁵ Sherman and others, above n 382, at 1.

⁴¹⁶ At 19-20.

⁴¹⁷ At 19-20.

Studies from the United States show restorative justice being used specifically because of its preventative benefits to the justice system. For example, based on research showing that students suspended or expelled from school were significantly more likely to be involved in the criminal justice system,⁴¹⁸ the United States Department of Education encouraged the use of alternative disciplinary processes, such as restorative justice, in schools. Studies of restorative justice in this context show a significant decrease in suspensions and expulsions,⁴¹⁹ which, given the correlation referred to above, will reduce rates of involvement in the criminal justice system. This shows restorative justice being used to deal with conflict in a broader way in order to create positive flow on effects in reducing offending.

As King and others say, “Restorative justice seeks to promote a more comprehensive and satisfying resolution of disputes between people.”⁴²⁰ As set out above, the benefits of this wide and encompassing type of resolution are supported by a growing body of evidence. These proven, broader conflict resolution and prevention effects of restorative justice contribute to keeping peace within society, thus supporting the underpinning functioning of the rule of law. This is not to say that restorative justice provides the perfect or complete criminal justice response. The broader resolution benefit is only one function of the wider justice system. Within the symbiotic relationship, restorative justice delivers certain aspects and adjudication others. Both of them are necessary. As Foley says, “Offering restorative justice as a complete substitute would simply replace old deficiencies with new ones.”⁴²¹

H Symbiosis

Restorative justice within the adult criminal justice system provides a clear illustration of the symbiotic relationship between adjudication and ADR. Foley’s justice measures reflect this. He claims, “... all four measures need to be met in any institutional response to wrongdoing ... for it to be considered just.”⁴²² His examination referred to above shows neither adjudication nor restorative justice meet all of those measures, and neither “... alone provides a full or indeed adequate ‘justice discourse’ for responses to wrongdoing.”⁴²³ In combination, however, they meet all four. This demonstrates the wider point, that separately restorative justice and adjudication each provide some parts of the whole, but together they provide a more

⁴¹⁸ Tony Fabelo and others “Breaking Schools’ Rules: A Statewide Study on How School Discipline Relates to Students’ Success and Juvenile Justice Involvement” (Council of State Governments Justice Centre and the Public Policy Research Institute, New York, July 2011).

⁴¹⁹ See David Simson “Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline (2014) 61 UCLA L Rev 506 at 554-556.

⁴²⁰ King and others, above n 176, at 64.

⁴²¹ Foley, above n 375, at 198.

⁴²² At 48-49.

⁴²³ At 71.

complete justice system. This symbiotic relationship they share allows the criminal justice system to more comprehensively serve differing interests in a way that is not only consistent with the rule of law but also strengthening of it.

V Conclusion

A ADR as a Part of Rule of Law

The ADR versus adjudication debate is enduring. Winkelmann's 2011 speech reflected arguments that are decades old, and these same themes were contained in Lord Neuberger's recent 2015 speech to the United Kingdom's Civil Mediation Conference.⁴²⁴ Despite ADR's on-going growth over this period, it continues to be characterised as inconsistent with the rule of law. As this paper sets out, however, there is a way to resolve this longstanding debate. This can be achieved by accepting the reality of the modern justice system: that both ADR and adjudication hold crucial roles within that system; that when considered separately they both have rule of law limitations; that they contribute significantly, and are necessary, to each other in order for them both to be the most effective rule of law instruments; therefore they are distinct yet interdependent processes that share a symbiotic relationship; and, as part of that system, ADR not only does not undermine the rule of law, it supports it. In this way, ADR and the rule of law are reconciled. This makes it apparent that neither ADR nor adjudication is superior to the other, rather: "Each needs the other in order to meet its potential."⁴²⁵ On this basis, we can, and must, move beyond the polarised positions pitting ADR and adjudication against each other.

B Lessons for the Modern Justice System

The debate should not be disregarded, however. It highlights important issues that should inform how the modern justice system is now developed and realised. The first of these issues is that raised by Genn in relation to one process being claimed and promoted as superior to the other.⁴²⁶ Lord Neuberger recently reiterate this point, "[ADR] must not be invoked and promoted as if it was always an improved substitute for litigation."⁴²⁷ This is just as true in reverse. Both anti-adjudication and anti-ADR assertions undermine the rule of law. As Sourdin says, "To support justice, all components of the system must be considered and supported in a civil advanced society."⁴²⁸ The 'oppositional contrasting', as Koss calls it,⁴²⁹ does not serve the justice system and should not continue.

⁴²⁴ Lord David Neuberger "A View From on High" (Civil Mediation Conference 2015, London, 12 May 2015) at [7]-[11]

⁴²⁵ Moffitt, above n 233, at 14.

⁴²⁶ Genn, above n 62, at 121.

⁴²⁷ Neuberger, above n 424, at [9].

⁴²⁸ Sourdin, above n 34, at 166.

⁴²⁹ Koss, above n 387, at 1655.

Secondly, the debate highlights the issue of resourcing, mentioned by Winkelmann⁴³⁰ and articulated by Michael Black as follows:⁴³¹

One of the challenges for the future is to ensure that the growth of ADR is not the occasion or justification to under-resource the courts and to diminish their role in society.

As outlined, both processes serve different functions that are crucial to the rule of law. One should not, therefore, be used as a reason for reducing funding to another. This does not only apply to the resourcing of adjudication as referred to by Winkelmann and Black. It is necessary to appropriately resource ADR as well. As this paper shows, ADR is an integral component of the justice system. It should therefore be financially recognised as such. Neglecting to do so has the potential to detrimentally affect the wider system. The concerns raised about delays and backlogs following the passing of the Sentencing Amendment Act 2014 in the restorative justice example demonstrate this.

This example highlights a third, and related, issue, that of system development. The concerns about delays around restorative justice demonstrate the disadvantages of hasty, ad hoc development and the importance of good, long-term policy decision making to ensure there are high quality, well resourced systems in place with the capacity to respond to demand. Failure, through poor system development, is often perceived as a failure of the process itself. As outlined above, poor perceptions of process have a negative impact on wider perceptions of the rule of law. This highlights the importance of developing the system in a way that ensures it is set up to operate effectively.

Fourthly, the debate raises an issue in relation to how the modern justice system should be structured. Adjudication and ADR exist separately and in their own right but function symbiotically as parts of a wider system. Their benefits rely in part on their distinct natures. In this way, one is not a part of the other and they are not the same system. ADR is not a component of adjudication or vice versa. This is not only important from a theoretical perspective but also when considering the structuring of the system. It means operationally these two processes can be connected but must maintain some separation and one must not be allowed to co-opt the other. Restorative justice again provides a good example of this in practice. A District Court judge recently interpreted s24A(2)(a) of the Sentencing Act 2002 to mean that the court should make the determination as to whether a restorative justice process is

⁴³⁰ Winkelmann, above n 1, at 5-6.
⁴³¹ Black, above n 281, at 91.

appropriate.⁴³² As outlined in chapter IV, this suitability assessment is a part of the restorative justice process. It is not a function of adjudication. Restorative justice runs in tandem with adjudication and informs it but it is a separate process and should be free from Court control.

Fifthly, the debate emphasises that the modern justice system should be flexible. As identified in chapter III, different disputes may be best served by either ADR or adjudication, and some consideration should be given to determining which dispute goes where. However, this should be done in a way that reflects the reality that, “It is difficult to specify criteria for the allocation of disputes to a particular process in advance or in the abstract.”⁴³³ Due to this, fixed prescription of how the system is structured should be limited. This may mean presenting adjudication and ADR as different pathways or as parallel processes, such as occurs with the restorative justice example. This notion of pathways reflects the symbiotic nature of these processes and the way in which this is consistent with the rule of law.⁴³⁴

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.

The final lesson to be learned from the debate and inform the modern justice system comes from one of the benefits ADR brings to the rule of law, by way of an expanded notion of justice through wide and encompassing resolution. This benefit is not simply conjecture. Restorative justice proves this theory in practice, as the body of evidence referred to in chapter IV attests. Foley summarises this point on broader justice when saying:⁴³⁵

Criminal justice should be as much about restoration as it is about retribution or rehabilitation. It should be as much about repairing harm as it is about crime reduction or punishment. This is a valuable justice investment not beyond the ambit of the criminal justice law.

New Zealand is in a unique position to realise the benefits of a modern justice system as it “... has gone further than most modern countries in its implementation of restorative justice for dealing with offences.”⁴³⁶ This position should be capitalised upon and other opportunities to realise it pursued.

⁴³² *New Zealand Police v Grimwood* DC Christchurch CRI-2014-009-002203, 22 July 2015 at [26].

⁴³³ Legg and Mirzabegian, above n 173, at 127.

⁴³⁴ Sourdin, above n 148, at 162.

⁴³⁵ Foley, above n 375, at 211.

⁴³⁶ Hayden and others, above n 403, at 1.

To allow the modern justice system to operate most effectively, it is necessary to move away from the adversarial perspective of the debate. There are already some encouraging signs of this movement, in both theory and practice. In her examination of the empirical data on ADR, Eisenberg talks about moving on to the next generation of research, which focuses on the specific impact of ADR and the most effective process strategies.⁴³⁷ Evidence of this movement can also be found in practice as the emphasis starts to shift away from *whether* ADR should be used to *how* ADR should be used. This is demonstrated by the restorative justice example, with the move to widen its application to include family and sexual violence offending. Shifting the focus to accepting and better understanding the modern justice system as a whole best supports the rule of law.

Sourdin expresses the relationship between adjudication and ADR within the context of the broader system in which they co-exist:⁴³⁸

Justice is perceived as a much broader concept and the litigation system is more simply perceived as a part of this broader justice system. From this lens, judicial dispute adjudication is viewed as a smaller although critical dimension of the justice system that includes the far broader alternative dispute resolution (ADR) environment.

Astor and Chinkin express a similar view:⁴³⁹

These different ways of handling disputes should not be seen as distinct and separate processes. Instead, the benefits of the imbrication of formal and informal processes should be recognised and deliberately used for the benefit of each.

It is within this context that the answer to the research question can be found. Through the symbiotic relationship ADR shares with adjudication, ADR and the rule of law are reconcilable. Further, ADR is clearly established as a necessary component of the modern justice system, one that brings with it a number of benefits, including broader justice through wide and encompassing resolution.

⁴³⁷ Eisenberg, above n 68.

⁴³⁸ Sourdin, above n 148 at 155.

⁴³⁹ Astor and Chinkin, above n 57, at 44.

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