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Maritime Arbitration and the Rule of Law

Georgios I. Zekos*

I
INTRODUCTION

Conflict resolution institutionalizes principled decision making that can be widespread within the community of practice in which it activates. Arbitration is one type of Alternative Dispute Resolution ("ADR") and it is an adjudicatory type of ADR.[1] Arbitration is the process by which a difference among parties as to their mutual legal rights is referred and determined with binding effect by the application of law by an arbitral tribunal instead of a court. Arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.[2] "Furthermore, arbitration enhances access to justice by permitting claimants to bring claims they could not afford to bring in court.[3] It is worth noting that private arbitration predates the public court system.[4] In arbitrations dating back to the Oxyrynchus Papyri from 427 A.D., merchants enthusiastically

* BSc(Econ), JD, LLM, PhD, Attorney at law-Economist zekosg@yahoo.com

[1]Carrie Menkel-Meadow, Arbitration Symposium Article: Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not, 56 U. Miami L. Rev. 949, 949 (2002); at 949 ("Arbitration is simply a usually (but not always) private process of adjudication in which parties in a dispute with each other choose decision-makers (sometimes one, often a panel of three) and the rules of procedure, evidence and decision by which their dispute will be decided) Katherine V.W. Stone, Arbitration – National, Encyclopedia of Law and Society (David S. Clark, ed.) available at http://ssrn.com/abstract=7810204 at 2 ("Arbitration is part of a larger movement toward alternative dispute resolution ("ADR"), a movement that attempts to develop substitutes for an increasingly dysfunctional civil justice system.").

[2]Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

[3]Theodore Eisenberg & Elizabeth Hill, Arbitration and Litigation of Employment Claims: An Empirical Comparison, Disp. Resol. J., Nov. 2003/Jan. 2004, at 44, 45. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."). BLACK'S LAW DICTIONARY 112 (8th ed. 2004) ("A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.").

[4]William Holdsworth, xiv A History of English law 187 (A.L. Goodhart & H.G. Hanbury eds. 1964).

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accepted as final the decisions of fellow merchants with knowledge and expertise in the related field.[5] Arbitration has, for that reason, historically functioned as an independent adjudicative dispute resolution mechanism. During the French Revolution, arbitration was believed to be the natural way of settling disputes and rendering justice; the national courts should simply be a subsidiary system. The French Revolution not only considered expansion of arbitration, but also the exclusion of professional judges altogether.[6]

Maritime arbitration, like the commercial arbitration out of which it arose, is a creature of contract. Moreover, maritime arbitration has become popular as an alternative to litigation, because of the costs, delay and procedural complications of court proceedings.[7] Maritime arbitration is covered within the "general" conventions on commercial arbitration[8] involving decisions

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[5]Margit Mantica, Arbitration in Ancient Egypt, 12 Arb. J. 155, 155-59, 160-61 (1957) Henry P. de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts, 57 Tulane L. Rev. 42, 43 (1982) (explaining that arbitration thrived among commercial groups that preferred to keep their differences "in the family"). Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions, 99 MICH. L. REV. 1724, 1785 (2001) Lawrence M. Friedman, A History of American Law 45 (2d ed. 1985) (reporting Quakers' establishment of an arbitration system to resolve citizen disputes in colonial Pennsylvania); Sabra A. Jones, Historical Development of Commercial Arbitration in the United States, 12 Minn. L. Rev. 240, 246-47 (1927) (noting New Amsterdam's 1647 ordinance establishing "The Board of Nine Men" to resolve disputes outside of courts in order to avoid "the great expense, loss of time and vexation" of litigation).

[6]Isser Woloch, The New Regime: Transformations Of The French Civic Order, 1789-1820S, *at* 312-17 (1994). Thinkers during the French Revolution not only considered all obligations, statutes and society as founded on the will of the people and the idea of contract (*contrat social*, Jean-Jacques Rousseau), but as a consequence, arbitration was considered a *droit naturel*. Moreover the Constitution of 1791 (Art. 86) and the Constitution of Year III (Art. 210) proclaimed the constitutional right of citizens to resort to arbitration.Huys and Keutgen, L'arbitrage en droit belge et international (Brussels 1981) p. 6. Clère, L'Arbitrage Revolutionnaire: Apogée et Déclin d'une Institution (1790-1806*)*, Revue de l'arbitrage (1981) p. 3 et seq. See Constitution of Greece 1827, Article 139.

[7]W. Tetley, International Conflict of Laws, 1994 at p. 390: "Arbitration is ... the settling of disputes between parties who agree not to go before the courts, but to accept as final the decision of experts of their choice, in a place of their choice, usually subject to laws agreed upon in advance and usually under rules which avoid much of the formality, niceties, proof and procedure required by the courts."

[8]European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 3, 330 U.N.T.S. 3, 21 U.S.T. 2517, United Nations Convention on the Carriage of Goods by Sea, March 31, 1978, art. 22, 17 I.L.M. 603, Convention on International Multimodal Transport of Goods, art. 27, U.N. TDBOR, U.N. Doc. TD/MT/CONF/17 (1981), International Convention on Salvage, Apr. 28, 1989, art. 23, 1953 U.N.T.S.193. In addition, Maritime arbitration has developed on both an interstate and a transnational relations level. With regard to the former, that is, the law of the sea, arbitration provides one of the means for peaceful settlement of disputes provided by international law and, more notably, by the Convention on the Law of the Sea of December 10, 1982 ("Montego Bay Convention"). Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982). It should also be noted that the International Court of Justice may hold simultaneous jurisdiction over a maritime dispute with the International Tribunal for the Law of the Sea and arbitrators. G Zekos, Competition or Conflict in the Dispute Settlement Mechanism of the Law of the Sea, 2003 Hellenic Review of International Law (RHDI) 153.

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relating primarily to factual questions rather than legal questions.[9] Courts have treated "maritime" issues as "commercial" matters, in that way placing these disputes within the scope of the New York Convention.

Every legal system in world history has implicated rules and discretion.[10] The rule of law is a concomitant of a society that is successful and, in all probability, just but it does not assure justice or social welfare. However, it does associate with justice and social welfare. The essence of the concept of the rule of law embraces a perception that society should be ordered around a set of laws that apply equally to all on the basis of doctrines deducible from the rules and not dependent of the identity of the rulers.

The US Constitution, in Article III, vests the judicial power in courts and no one else. By this means Congress is restricted to its approval ("advice and consent") of the individuals who will interpret and apply the laws.[11] The Seventh Amendment to the U.S. Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."[12] Rule 38 of the Federal Rules of Civil Procedure provides that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."[13] The Supreme Court has considered the right to trial by jury in a civil action as a "basic and fundamental" right that is "sacred to the citizen" and therefore "should be

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Tullio Treves, Nuove Tendenze, Nuovi Tribunali, Le Controversie Internazionali 35 (Milan, Italy, 1999) ("The experience of the so-called transnational arbitration . . . evidences that borderlines between the law of intergovernmental relationships and that regulating international relationships amongst individuals are uncertain. Moreover, dispute resolution mechanisms used by private actors may present strong analogies with jurisdictional or arbitral proceedings used for intergovernmental dispute resolution."). Tullio Scovazzi, The Evolution of the International Law of the Sea: New Issues, New Challenges, 286 Recueil Des Cours 53, 122-24 (2000).

[9]Kazuo Iwasaki, A Survey of Maritime Arbitration in New York, 15 J. Mar. L. & Com. 69, 70 (1984) (indicating that an arbitrator's impartiality and knowledge of maritime business are the most important factors in choosing an arbitrator and, in fact, are more important than knowledge of the applicable or maritime law).

[10]Kenneth C. Davis, Discretionary Justice: A Preliminary Inquiry 17 (1969) ("Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been *a government of laws and of men*."); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 24–25 (1990) ("[F]or more than two millennia, the field of jurisprudence has been fought over by two distinct though variegated groups. One contends that law is more than politics and in the hands of skillful judges yields . . . correct answers to even the most difficult legal questions. The other contends that law is politics through and through and that judges exercise broad discretionary authority.").

[11]U.S. CONST. art. III, § 1. As Justice Marshall long ago recognized in *Marbury v. Madison*, "The very essence of civil liberty certainly consists in the rights of every individual to claim the protection of the law, whenever he receives an injury." 5. U.S. 137, at 163 (1803).

[12]U.S. CONST. amend. VII.

[13]FED. R. CIV. P. 38.

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jealously guarded by the court."[14] On the other hand, one of the most commonly used alternatives to traditional litigation is arbitration. Contracting parties can agree to the procedural rules that will regulate the enforcement of their contract and it is now common for parties to agree to have disputes resolved by arbitration rather than by litigation or by the court of a specified venue[15] improving the cost-effectiveness of their prospective enforcement mechanism.

The aim of this analysis is the investigation of the role of maritime arbitration in the development of the rule of law

II
THE RULE OF LAW

The core of the rule of law is that authority and supremacy ought to be used only in ways allowed by the law.[16] The rule of law entails that the ruler be subject to, or at least not above, the law; and that the law be applied equally, or at least equitably, to all members of society.[17] The Constitution

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[14]Jacob v. New York City, 315 U.S. 752, 752–53 (1942).

[15]Judith Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 626 (2005). The Bremen v. Zapata Off Shore Co., 407 U.S. 1, 9 & n.10 (1972) (noting that early American courts refused to enforce forum selection clauses because they "ousted" courts of their jurisdiction and citing cases and treatises). The Supreme Court quoted its decision in *Szukhent* for the proposition that "'[i]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.'" The Bremen v. Zapata Off Shore Co., 407 U.S. 1, 11 (1972) (quoting Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 315–16 (1964)). Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 550-51, 554-55 (2003) (explaining that when parties agree to be bound by arbitration, they may prefer vague terms); at 558 (noting that arbitration permits vague terms to be enforced by industry experts rather than by courts). Debra T. Landis, *Contractual Jury Trial Waivers in Federal Civil Cases*, 92 A.L.R. FED. 688 (2003) (The cases herein uniformly support the view that, with knowing and voluntary consent, the right to a jury trial in a federal civil action may be waived by a contract that was not made in, or as an incident of, any particular litigation.). G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 433 (1993) ("[T]he modern Court has shown more fidelity to an absolute principle of freedom to contract than the Courts that preceded it" including "the reputedly conservative *Lochner* era Court . . . ."); 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice And Procedure: Evidence § 5039.5, at 860 (2d ed. 2005) ("Ironically, the growth of 'bargain justice' in the late 20th Century has seen a return to the commodification of evidence law that Wigmore championed."); Michael E. Solimine, *Forum Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L.J. 51, 52 (1992) ("The rise of forum selection clauses is a manifestation of the increasing deference to party autonomy in jurisdictional and related matters. Not coincidentally, the last two decades have also seen the enforcement of contractual choice of law clauses, and the upholding of waivers of personal jurisdiction and service of process requirements.").

[16]J. Raz, *The Authority of Law* (Oxford, 1977), 211. Dicey, Albert Venn, Introduction to the Study of the Law of the Constitution (8th ed). London: Macmillan and co. 1914.

[17]Dicey, A.V, Introduction to the Study of the Law of the Constitution, London: Macmillian and Co., Limited. 1920.

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establishes a rule of law state.[18] Rule of law is understood in its substantive aspect as attributing to the state a vital role as guardian of a set of foundational communally embraced substantive norms that are to be preserved and advanced through the use of state power grounded in law.[19] Friedrich Hayek[20] said that the rule of law "means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to see with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."

The relationship of law and social life is an indispensable basis of the rule of law.[21] The rule of law serves not only to impose the results of the democratic legislative process, but also to safeguard individuals against arbitrary government action. The rule of law is a pledge to limitations that assure greater stability rather than any precise endpoint for law and for government. In addition, the concept of the rule of law is an ideal lying behind and informing both constitutional and non-constitutional doctrines.[22]

Law is a set of neutral rules. Moreover, law's key role in society is dispute resolution, and society depends on formal legal adjudication for stable

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[18]*Marbury* v. *Madison*, 5 U.S. 137 (1803) (treating the constitution as legally enforceable and as the highest law of the land). Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects, in* Constitutionalism, Identity, Difference And Legitimacy: Theoretical Perspectives 39, 40-41 (Michel Rosenfeld, ed., 1994) (identifying modern constitutionalism as based on popular sovereignty, on the supremacy of law and the primacy of constitutional law within a political community, on governance through democratic principles (including limited government, checks and balances, civilian control of the military, judicial control of the police power, and an independent judiciary), on respect for international norms of human rights, on self-determination, and on the creation of an independent power to compel compliance with these principles). North, Douglas C, Institutions, Institutional Change and Economic Performance, Cambridge: Cambridge Univ. Press, 1990. Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse", 97 *Colum. L. Rev.* 1, 7 (1997), at 1 ("The Rule of Law is a much celebrated, historical ideal, the precise meaning of which may be less clear today than ever before.").

[19]Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 Corn. L. Rev. 430, 450 (1987) ("A close relation between the rule of law and separation of powers is evident in both the liberal and democratic elements of liberal democratic theory."). Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and Synthesis*, 124 U. Pa. L. Rev. 45, 93 (1975) ("There exists a due process right to an independent judicial determination of constitutional rights . . . ."). Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 122 (1st ed 1993), at 67 ("[A] combination of powers is bad because it admits *ad hoc* law making, not permanent and general laws but orders cut for the occasion—all according to the will of whomever holds combined powers. Separated powers, on the other hand work to induce government within the rule of law.").

[20]Friedrich A. Hayek, The Road to Serfdom, (1944) Chicago: University of Chicago Press, p. 80

[21]Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 8-9 (1997).

[22]Miranda v. Arizona, 384 U.S. 436, 479-80 (1966); Olmstead v. United States, 277 U.S. 438, 485 (1928).

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and predictable dispute resolution. Furthermore, law functions as a vehicle by facilitating the elaboration and implementation of public values and the productive engagement of normative inquiry among relevant institutional actors. The focal point of the rule of law is to guarantee law-bounded qualities that tend in the direction of better and more just legal systems.[23]

III
LAW AND NORMS

Law is the instrument holding the social system together against individual efforts to take advantage of others.[24] Law is justified and applied based on public reason which is free of personal religious, philosophical and moral doctrines.[25] Hence, law is secularized and independent from religion, morality, and other social norms but its substance has amalgamated all these values.

Norms affect laws and in response law influences norms.[26] The imposition of law can destabilize norms that are already operating successfully. Norms are more predictable than law.[27] Legal norms will not wholly displace informal ones, and custom will not overcome law. Professor Rosa Ehrenreich

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[23]Randy Barnett, The Structure of Liberty: Justice and the Rule of Law, (2001)Oxford: Clarendon Press, pp. 136-144; Ronald A. Cass, The Rule of Law in America, (2001) Baltimore: Johns Hopkins University Press.

[24]John Locke, *Of Civil Government Second Treatise* 67, 68, Introduction by Russell Kirk, (Henry Regnery 1955). J. Finnis, "Natural Law and Legal Reasoning," 38 *Cleve. St. L. Rev.* 1, 6 (1990). John Finnis considers that law is a "cultural object, constructed or posited by creative human decision . . . an instrument we adopt because we have no other way of agreeing amongst ourselves over significant spans of time about precisely *how* to pursue our moral project *well*...the law seeks to provide sources of reasoning—statutes and statute-based rules, common law rules, and customs—capable of ranking (commensurating) alternative dispute resolutions as right or wrong, and thus better or worse." J. Finnis, *Natural Law and Natural Rights* (1980). O. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.").

[25]Rawls, John, Political Liberalism, (paperback ed., New York, Columbia University Press) 1996. David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?*, 27 Cardozo L. Rev. 2005, 2005–11 (2006) (deriving from Albert Venn Dicey's late nineteenth-century account of the relationship between the rule of law and what we would designate an emergency the idea that there can be no "legal black hole, in which the state acts unconstrained by law," and instead that, even during emergency, "there is no prerogative attaching to any institution of state to act outside of the law"); H. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 801 (1961) ("Justice is expressed in principles and laws none of which can ever reach the uniqueness of the concrete situation.")

[26]Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2025–29 (1996).

[27]Haini Guo & Bradley Klein, *Bargaining in the Shadow of the Community: Neighborly Dispute Resolution in Beijing Hutongs*, 20 Ohio St. J. On Disp. Resol. 825, 885–86 (2005) (stating that in China, formal law is "muddy" and more unpredictable than social norms).

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Brooks[28] says that fixed legal norms obstruct rule of law efforts. Can norms only be generalized by imposing them on others, either all the way through another case or through a general rule?[29] Norms compete with each other, coexist, or develop each others' efficacy and legitimacy.[30]

Law is a formalized way of bringing political preferences into the society. Moreover, law allocates benefits, risks and duties backed by the prospective for enforcement through the use of state power if the choices are not followed by those at whom they are aimed.[31] In law the consent is not on the honesty of the proposition itself but on the authority and authenticity of the decision-makers. Margaret Radin[32] says that: "Rules are created and continue to exist not only because a legislature says so, but also by virtue of their being embedded in [society]. A judge's decision in response to a rule responds necessarily to the community as a whole and not just what the legislature has said." Law is totally contextual and cannot be detached from its social and political environment.

Law is about generating systems that cultivate the competence of actors in different settings to identify, engender, and revise norms, and to form systems that are more likely to generate desired conditions and practices. Concerning the role of law Robert Cover[33] argues that "To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be". . ." Moreover, Roscoe Pound[34] explained that while law may

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[28]Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 Mich. L. Rev. 2275, 2283–89 (2003).

[29]Susan P. Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 67-69 (2004).

[30]David Trubek & Louise Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, or Transformation* 2-3 (Univ. of Wis. Law Sch., Legal Studies Research Paper Series, Paper No. 1022, 2006). Jean L. Cohen, Regulating Intimacy: A New Legal Paradigm 164-79 (2002).

[31]Lawrence M. Friedman, *American Law* 257 (1984) "Law carries a powerful stick: the threat of force. This is the fist inside its velvet glove."

[32]Radin, Margaret Jane, Reconsidering the Rule of Law, 1989 Boston University Law Review 69: 781-819 at 808-09.

[33]Robert Cover, The Supreme Court 1982 Term. Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 9 (1983) at 10.

[34]Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 Am. L. Rev. 729, 731 (1906) ("The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. . . . Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand."), at 732–33 ("Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society.").

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assist justice, justice is a notion encompassing more things than merely law. Aristotle and Plato considered that all components of the society are joining together to bring justice.

IV
LAW AND EQUITY

The many paths of extrajudicial dispute resolution have been trodden for centuries, and probably always will be.[35] For centuries the Anglo-American legal system administered justice through the systems of Law and Equity[36]. The Law courts guaranteed consistency and certainty, while courts in Equity moderated the law to the requests of the specific case. Over time the Law courts embraced many of the best practices of Equity.[37] Complexity and pro-

[35]Valerie A. Sanchez, Back to the Future of ADR: Negotiating Justice and Human Needs, 18 Ohio St. J. On Disp. Resol. 669 (2003). Paul L. Sayre, Development of Commercial Arbitration Law, 37 Yale L.J. 595 (1928); Earl S. Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132, 132–34 (1934), James B. Boskey, A History of Commercial Arbitration in New Jersey, 8 Rutgers-Cam. L.J. 1 (1976) (tracing English and colonial roots of commercial arbitration); Edward Brunet, Questioning the Quality of Alternative Dispute Resolution, 62 TUL. L. REV. 1, 47–48 (1987) (exploring the competitive aspects of the relationship between ADR and publicly financed courts). E. Wendy Trachte-Huber & Stephen K. Huber, Alternative Dispute Resolution: Strategies For Law And Business 3–4, 29 (1996); (suggesting that ADR is "not a new or even recent development," and citing decision of King Solomon, Federal Arbitration Act of 1925, and use of arbitration and mediation to resolve trade and labor disputes).

[36]Frederic William Maitland, Equity and The Forms of Action at Common Law: Two Courses Of Lectures 4–5 (A.H. Chaytor ed., 1920), at 17 ("[F]or two centuries before the year 1875 the two systems had been working together harmoniously."). Roscoe Pound, An Introduction To The Philosophy Of Law 54 (rev. ed. 1954) ("Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates."); Kenneth C. Davis, Discretionary Justice: A Preliminary Inquiry 17 (1969) ("Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been *a government of laws and of men*."); Richard A. Posner, The Problems Of Jurisprudence 24–25 (1990) ("[F]or more than two millennia, the field of jurisprudence has been fought over by two distinct though variegated groups. One contends that law is more than politics and in the hands of skillful judges yields . . . correct answers to even the most difficult legal questions. The other contends that law is politics through and through and that judges exercise broad discretionary authority.").

[37]Douglas M. Gane, *The Birth of a New Equity*, 67 Solic. J. & Wkly Rep. 572, 572 (1923). Colin P. Campbell, *The Court of Equity—A Theory of its Jurisdiction*, 15 GREEN BAG 108, 110 (1903) (noting the intimacy of the relations among the basic principles of "equity, honesty, generosity, and good conscience"). Frederic William Maitland, Equity and The Forms of Action 19 (A.H. Chaytor ed., 1909) ("I do not think that any one has expounded or ever will expound equity as a single, consistent system, an articulate body of law. It is a collection of appendixes between which there is no very close connection."); Alexander Holtzoff, *Equitable and Legal Rights and Remedies Under the New Federal Procedure*, 31 Cal. L. Rev. 127, 130 (1942–1943) (referring to the separate systems of law and equity as "accidents of history"). Brendan F. Brown, *Lord Hardwicke: Science of Trust Law*, 11 Notre Dame L. Rev. 319, 321 n. 10 (1936). at 325 ("In the eighteenth century . . . not only was Chancery following the Law, but the Common Law in turn was becoming more and more equitized.").

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cedural technicalities turned equity into a *jus strictum* differing little from the Common Law. Law and Equity were merged into a single system[38] in the late nineteenth and early twentieth centuries and the substance of equity lost much of its strength in the merged system.

The occasional need to depart from the strict law likewise animated the development of the system of Equity. Equity[39] acknowledges and implements principles which in reality govern society in general, whether embodied in the so-called rules of law or not. Equity followed the Law and the very purpose of a separate system was to correct or to mitigate injustices caused by the rigor of the Common Law.[40]

Equity could be invoked to "correct" the Law. The interaction of law and equity enriches them.[41] When the strictness of the Law courts was unsuccessful to keep pace with the growing wants of society, the discretionary and flexible system of Equity provided the sensible remedies.[42] The steady introduction of procedural rules and structural orthodoxy in the end caused Equity to crumple under the weight of its own precedents and processes.

The accurate and original peculiarity between law and equity is one not between two conflicting bodies of rules, but between a system of judicial administration based on fixed rules and a rival system governed exclusively by judicial freedom of choice.[43] The system of Equity evolved from the royal

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[38]William Searle Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 Yale L.J. 1, 1 (1916) (accumulating evidence that common law judges in the twelfth through fourteenth centuries "administered both law and equity"); Aaron Friedberg, *The Merger of Law and Equity*, 12 St. John's L. Rev. 317, 318 n.2 (1938) ("[D]uring the reign of Henry II, both equity and common law were administered under the same system of procedure and were quite undistinguishable from each other.").

[39]Colin P. Campbell, *The Court of Equity—A Theory of its Jurisdiction*, 15 GREEN BAG 108, 110 (1903) (noting the intimacy of the relations among the basic principles of "equity, honesty, generosity, and good conscience"), at 110 (noting that principles of equity are a part of the larger concept of fairness and justice upon which all law must be based).

[40]Christopher St. German, Doctor and Student 97 (T.F.T. Plucknett & J.L. Barton eds., Selden Society 1974) (Equity "followeth the law in all particular cases where right and Justice requireth.").

[41]2 John Millar, An Historical View Of The English Government 358 (1789). "Law and equity should be in continual progress, with the former constantly gaining ground upon the latter. Every new and extraordinary interposition is, by length of time, converted into an old rule. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next."

[42]Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 Va. L. Rev. 753, 756 (1945) ("There is no definition of equity that will satisfy."); at 753 ("Equity is a thing of continuous growth, and not the sort of Phoenix that dies ever so often."). Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. VA. L.Q. 21, 23 (1919–1920) ("It was the firm policy of the Norman kings to concentrate all power within themselves . . . ."); at 27 ("Many cases arose in which all men of sense admitted that there should be a remedy provided, but which the narrow-minded judges denied.").

[43]John Salmond, Jurisprudence 1–5 (13th Ed. 1906).

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prerogative of kings, as the source of justice, to make certain that justice was administered in each case.[44]

Separate systems of Law and Equity joined to govern the laws for centuries with both firmness and discretion.[45] According to G. Radbruch[46] "The dilemma that equity is to be better than justice and yet not quite opposed to justice, but rather a kind of justice, has troubled men as early as Aristotle's famous chapter V 14 of the Nichomachean Ethics."

Equity intervened in cases to amend the severe effects of the Common Law, but also in the end had a major reforming effect on the Law courts.[47]

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[44]George Tucker Bispham, The Principles Of Equity: A Treatise On The System Of Justice Administered In Courts Of Chancery 1 (11th ed. 1931) (1874) ("Equity is that system of justice which was developed in and administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction."); Melville M. Bigelow, Elements Of Equity 9 (1879) ("[T]he jurisdiction of courts of chancery now extends to all civil cases proper, in good conscience and honesty, for relief or aid, as to which the procedure of the common-law courts is unsuited to give an adequate remedy, or as to which the common-law courts, when able to extend their aid, have refused to do so."); Charles E. Phelps, Juridical Equity 192 (1894) ("By juridical equity is meant a systematic appeal for relief from a cramped administration of defective laws to the disciplined conscience of a competent magistrate, applying to the special circumstances of defined and limited classes of civil cases the principles of natural justice, controlled in a measure as well by considerations of public policy as by established precedent and by positive provisions of law."); William Searle Holdsworth, *The Early History of Equity*, 13 Mich. L. Rev. 293, 294 (1915) ("In the latter half of the fourteenth and in the fifteenth centuries the common law tended to become a fixed and rigid system. It tended to be less closely connected with the king, and therefore less connected with, and sometimes even opposed to, the exercise of that royal discretion . . . .").

[45]Giorgio Del Vecchio, Justice 173 n.13 (Edinburgh Univ. Press ed., 1952) (noting that "the worst misfortune of a civilized people is doubt about the impartiality of justice."

[46]G. Radbruch, Einführung In Die Rechtswissenschaft 75 (9th Ed. 1952).

[47]George Palmer Garrett, *The Heel of Achilles*, 11 Va. L. Rev. 30, 31 (1924) ("The Common Law has plagiarized many things from Chancery."). 2 William Searle Holdsworth, A History Of English Law, (7th ed. 1956); at 456 (noting that the "competition of the chancellor" awakened "even the most conservative common law to the necessity of endeavouring to meet these demands."). Warren B. Kittle, *Courts of Law and Equity—Why They Exist and Why They Differ*, 26 W. Va. L.Q. 21, 23 (1919–1920) ("It was the firm policy of the Norman kings to concentrate all power within themselves . . . ."); Slade's Case, 4 Coke Report 92b, 76 ER 1074 (KB 1602) (presuming existence of a promise from the fact of a debt and allowing Assumpsit to be brought on a simple promise to pay money). John Mitford (Lord Redesdale), Pleadings In Chancery 112 (John S. Voorhies ed., 1833) (noting that equity exercised jurisdiction where "the principles of law, by which the law courts were guided, give a right, but the powers of those courts were not sufficient to afford a complete remedy, or their modes of proceeding were inadequate to the purpose . . . [or] where the courts of ordinary jurisdiction were made instruments of injustice"). 1 John Fonblanque, A Treatise Of Equity § 3 (A. Strahan & W. Woodfall eds., 1793) ("So there will be a necessity of having recourse to natural principles, that what is wanting to the finite may be supplied out of that which is infinite. And this is properly what is called equity, in opposition to strict law. . . . And thus in chancery every particular case stands upon its own particular circumstances; and, although the common law will not decree against the general rule of law, ye chancery doth, so as the example introduce not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here.").

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According to Thomas O. Main[48] "The moral growth of the law is the record of the slow emergence of equity into the mainstream of the law." Unfortunately the pathogens of strict law plagued alike the Common Law and equity.[49]

V
COURTS AND ADR

Formal and informal methods each have their virtues and vices.[50] While formal rule-based systems can offer more certainty and transparency, such systems are normally slower and more costly, and they often fail to make a

[48]*Thomas O. Main,* ADR: The New Equity, Vol. 74 2003 *University Of Cincinnati Law Review* 329 at 400. Robert L. Munger, *A Glance at Equity*, 25 Yale L.J. 42 (1915); (discussing the history and progress of equity "from conscience to precedent"); Percy J. Bordwell, *The Resurgence of Equity*, 1 U. Chi. L. Rev. 741, 747 (1934) ("In an indiscriminate 'fusing' or an indiscriminate borrowing, these principles are likely to be lost. They are likely to be lost even in the administration of equity itself by judges with only a legal point of view."), at 750 ("The equity of today becomes the right of tomorrow."); Frederic R. Coudert, Certainty And Justice 1 (1914) ("On the one side is made an appeal to progress, on the other to precedent.").

[49]2 John Lord Campbell, Lives of The Lord Chancellors and Keepers of The Great Seal of England 134 (5th ed. 1868) ("They are the foundation of the practice of the Court of Chancery, and are still cited as authority.").Carleton Kemp Allen, Law in The Making 228–29 (1927) ("The situation was bad enough at law, but much worse in equity."); A.S. Diamond, Primitive Law 349 (2d ed. 1950) ("Gradually the rules of equity themselves came to suffer the fate of rules of law, and became stereotyped."). Frederick Pollock, *The Transformation of Equity*, *in* Frederick Pollock, Essays in Jurisprudence and Ethics 293 (1882) (noting that Chancery became "as regular a court of jurisdiction as any other"); Cook v. Fountain, 3 Swans. 585, 591 (1672) (discussing the logic of consistency); H.G. Hanbury, *The Field of Modern Equity*, 45 Law Q. Rev. 196, 205 (1929) at 205 (Nottingham "stiffened and rationalized old ideas and turned them to permanent and practical use."). *See also* James O'Connor, *Thoughts about the Common Law*, 3 Cambridge L.J. 161, 164 (1928) (referring to the "crystallized conscience" of equity). Melvin M. Johnson, Jr., *The Spirit of Equity*, 16 B.U. L. Rev. 345, 346 (1936) (recognizing a maxim that "equity acts according to established rules") at 350 ("Equity became handcuffed by a rigorous body of rules and concepts.").

[50]Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 Nev. L.J. 289 (2002–2003) (urging that a proper system of justice should resolve societal as well as individual interests, seek societal harmony, and that both litigation and ADR can serve such goals); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 Tul. L. Rev. 1401 (2004) (examining tensions between using formal and informal systems to resolve employment discrimination complaints in the United States, Great Britain, and Australia). Jerold S. Auerbach, Justice Without Law? (1983) (examining informal and non-adversarial forms of justice throughout American history); Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 Penn St. L. Rev. 929, 957 (2004) (referring to adjudication and ADR as "war and diplomacy," respectively (citation omitted)); Robert F. Blomquist, *Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Alternative Dispute Resolution in America*, 34 Val. U. L. Rev. 343, 366 (2000) (discussing the relative efficiency and efficacy of ADR in contrast to "courtroom battles"); Kenneth R. Feinberg, *Resolving Mass Tort Claims: The*

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distinction of individual circumstances.[51] The established informal institutions[52] in a society (beliefs, norms and values) provide sources of motivation for and justification of more concrete institutions. The institutions promoting ADR as part of rule of law efforts have not done so simply to advance access to justice where courthouses are too costly, distant, or corrupt, but also to shape communities and encourage conciliation.

Albert Dicey[53] believed that a central principle of the rule of law was that both government and citizens should be subject to adjudication in the "ordinary courts." Does this view represent reality in modern days? According to John Lande[54] "most professionals in the legal system – including lawyers, judges, and legal scholars — place the courts in the center of the world of conflict resolution." Besides, Galanter,[55] assessing a "legal centralist" standpoint, favors "legal pluralism." Thus, a substitute standpoint is "legal pluralism," which recognizes that government courts are not the only or primary system of adjudication.[56] Of course, litigation serves important public purposes that should be protected and preserved. Professor Marc Galanter's work shows that even a fair litigation system can prove fruitless in elimi-

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Perspective of a Special Master, 53 Disp. Resol. J. 10, 12 (1998) (contrasting ADR with the typical "protracted litigation war of attrition"); Thomas R. McCoy, *The Sophisticated Consumer's Guide to Alternative Dispute Resolution Techniques: What You Should Expect (or Demand) From ADR Services*, 26 U. Mem. L. Rev. 975, 990 (1996) ("Mediation is not a spectator sport for the parties like litigation where lawyer-champions do battle on behalf of their parties . . . ."); Richard A. Williamson, *The Use of Experts Under the Amended Federal Rules of Civil Procedure, and in Alternative Dispute Resolution Forums*, PLI Order No. H4-5185 Mar.–Apr. 1994 at 414 ("Whereas litigation is war, Arbitration is a Skirmish, and Mediation, Early Neutral Evaluation and similar informal non-binding ADR process can be likened to Powwows that may lead to a lasting and satisfactory peace.").

[51]Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 Am. L. Rev. 729, 731 (1906) ("The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules. . . . Legal history shows an oscillation between wide judicial discretion on the one hand and strict confinement of the magistrate by minute and detailed rules upon the other hand.").

[52]Nee, Victor, The New Institutionalism in Economics and Sociology, In Neil Smelser & Richard Swedberg, Eds. The Handbook of Economic Sociology 2nd ed. Princeton: Princeton University Press. 2005

[53]Dicey, A.V, Introduction to the Study of the Law of the Constitution, London: Macmillian and Co., Limited. 1920.

[54]John Lande, Shifting The Focus From The Myth Of "The Vanishing Trial" To Complex Conflict Management Systems, Or I Learned *Almost* Everything I Need To Know About Conflict Resolution From Marc Galanter, Cardozo J. Of Conflict Resolution [Vol. 6:191 at 199.

[55]Marc Galanter, *The Portable Soc 2; or, What to Do Until the Doctrine Comes*, General Education In The Social Sciences: Centennial Reflections On The College Of The University Of Chicago, 246, 250-53 (J.J. MacAloon ed., 1992); Marc Galanter, *Justice in* Many Rooms: Courts, Private Ordering, and Indigenous Law, 19 J. Of Legal Pluralism, 1, 1-3 (1981). Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1391 (1994).

[56]Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. Of Legal Pluralism, 1, 1–3 (1981). Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 Stud. L., Pol'y & Soc'y 393, 395–97 (1992) (listing potential benefits of private courts).

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nating economic and social inequalities.[57] In addition, F. Sander argued that dispute resolution required a flexible panoply of processes to meet the needs of entire categories of cases and also the unique circumstances presented in particular cases.[58]

ADR performs a valuable role in the growth of the law and so, lacking the appliance of equity, law will be declining.[59] Moreover, ADR presents an alternative system for relief from the difficulty created by the substantive and procedural law of formal adjudication.[60] Furthermore, the ADR neutral arbitrator enjoys significant flexibility to reach a just result without making "bad law" in "hard cases."[61] Thus, ADR enhances "community involvement in the dispute resolution process" incorporating local values and norms into the decision-making calculus emphasizing concession, reunion, and fair-

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[57]Marc Galanter, Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95, 119–22 (1974). Simon Roberts, Order and Dispute: An Introduction to Legal Anthropology 26–27 (1979) ("[E]ven where judicial institutions are found they do not always enjoy the unchallenged pre-eminence in the business of dispute settlement which our courts claim and manage to exercise. Fighting and other forms of self-help, resort to supernatural agencies, the use of shaming and ridicule, or the unilateral withdrawal of essential forms of cooperation may all constitute equally approved and effective means of handling conflict.").

[58]Warren E. Burger, *Preface*, in The Pound Conference: Perspectives on Justice In The Future 5, 5 (A. Leo Levin & Russell R. Wheeler eds., 1979). Frank E.A. Sander, *Varieties of Dispute Processing*, *in* The Pound Conference: Perspectives on Justice In The Future, at 72–79 (outlining criteria for determining how particular disputes might best be resolved). Ralph Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 Law & Soc'y Rev. 247, 255 (1976) ("The [legal] system must be designed to encourage the non-legal resolution of disputes, and public participation in planning processes, as well as more traditional legal activity like litigation.").

[59]Percy J. Bordwell, *The Resurgence of Equity*, 1 U. Chi. L. Rev. 741, 747 (1934) ("In an indiscriminate 'fusing' or an indiscriminate borrowing, these principles are likely to be lost. They are likely to be lost even in the administration of equity itself by judges with only a legal point of view."). Boddie v. Connecticut, 401 U.S. 371, 374 (1970).

[60]Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 Law & Soc'y Rev. 701, 713–14 (1977) (finding only 3.7% voiced complaints studied reached any third party; only 16% of those brought to third parties were brought to a lawyer or court); Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 212 (2002/2003) (suggesting that the commonality of procedural reform movements include: "(1) obvious defects in the existing procedural systems; (2) agendas of the legal profession; (3) conservative ideology; and (4) liberal ideology"); Linda R. Singer, *A Pioneer's Perspective: Future Looks Bright, But Challenges Include Retaining Our Core Values*, Disp. Resol. Mag., Spring 2000, at 26–27 ("The [Pound] Conference coalesced the interests of those who focused on access and participation or voice with those who focused on costs and efficiency. Those interests have coexisted, somewhat uneasily, in the field ever since and have helped to shape the dispute resolution profession that has grown up as a result.").

[61]Northern Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").

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ness.[62] Litigation is a fight unto death with severe economic, psychological, and spiritual harm is done to parties, ADR compliments compromise embedded in moral and spiritual principles.[63] Hence, ADR broadens access to justice.[64]

Courts aid the social trust and consent that governments need to function well. The legitimacy of judges rests on the reasons that they provide for their actions and are answerable for the rationalization they give for their decisions.[65] The law has its own internal rationality engendering a full justification of all judicial decisions without judges resorting to their personal moral, religious, or political beliefs. Judges[66] apply the law automatically to reach the logical result without interpreting the rationale or policies informing the law. On the other hand, individual judges exercise huge discretion and much of the decision-making "action" within the courts occurs at a local level.[67] Moreover, Paul D. Carrington & Paul H. Haagen[68] argue that "our judges (or

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[62]Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); Carrie Menkel-Meadow, *And Now a Word about Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution*, 28 Fordham Urb. L.J. 1073 (2001). Stephen B. Goldberg Et Al., Dispute Resolution: Negotiation, Mediation, And Other Processes 6–9 (3d ed. 1999); at 8 ("To improve public satisfaction with the justice system; . . . To restore the influence of neighborhood and community values and the cohesiveness of communities.").

[63]Joseph Allegretti, *A Christian Perspective on Alternative Dispute Resolution*, 28 Fordham Urb. L.J. 997, 1001 (2001).

[64]Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It An Alternative?*, 70 N.D. L. REV. 269 (1994); William H. Simon, *Legal Informality and Redistributive Politics*, 19 Clearinghouse Rev. 384, 384–87 (1985); at, 384–87 (supporting ADR as a means of expanding access to justice for those unable to afford traditional litigation).

[65]Frank K. Upham, Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China, 2005 The Yale Law Journal [Vol. 114: 1675 at 1706 According to Frank K. Upham "courts are not only agents of the state but also sites for social, economic, and political conflict." Judges and courts mould basic behavior by the independent and authoritarian enforcement of centrally created and controlled rules.

[66]Unger, Roberto Mangabeira, "The Critical Legal Studies Movement," 1983Harvard Law Review, 96, 561-675. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (advocating that judges rely, to the extent possible, on general rules, rather than on totality of the circumstances analyses).

[67]Marc Galanter, *Case Congregations and Their Careers*, 24 Law & Soc'y Rev. 371, 371 (1990). This outstanding article catalogs a long list of causal factors affecting what Galanter calls a "case congregation," which he defines as "a set of cases arising from a specific event, product, or claim . . . that displays common features and that traces a discernable career over time." Richard Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 L. & Soc'y Rev. 91, 99-100 (1978).

[68]Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 331 ("[T]he Supreme Court has rewritten the law governing commercial and employment arbitration in the United States. So bold has the Court been that its work in this field could be said to exemplify the indeterminacy of American law, confirming the hypothesis of Critical Legal scholars that our judges (or at least our Justices) are uncontrolled by legal texts or precedents and free to decide cases according to their own political predilections.").

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at least our Justices) are uncontrolled by legal texts or precedents and free to decide cases according to their own political predilections" which shows that the judges' view is no panacea considering neutrality and fairness.

Courts[69] provide opportunities for the development of legal rules and precedents, facilitation and enforcement of private settlements. Through the process of judicial precedent, courts create and mould legal rights, co-existent with, and supplemental to, those created by statute.[70] According to *Richard M. Alderman*[71] "The use of arbitration to achieve substantive results different from what would be available in the courts not only circumvents our legal system, it also denies the courts the opportunity to review legal doctrine and make changes when appropriate. The validity of arbitration clauses is based on the premise that they are a voluntarily chosen alternative forum of dispute resolution. In the consumer context, arbitration is anything but voluntary and it is becoming the norm, not an alternative." Moreover, according to David Barnhizer[72] "Judicial opinions are grounded on outcome justification strategies that necessarily rely on the techniques of rhetoric and persuasion while knowing that not everyone will agree with the logic and assumptions. Judicial opinions appeal to conceptions of the rule of law as reasons enlightening their elaboration of doctrine. One of the primary characteristics of the strategy is to avoid leaving openings for those holding competing positions." While adjudication is far from perfect due to lack of access, it is comparatively appealing as compared to ADR "because it is self-limited, self-conscious, and relatively transparent, whereas the alternative forms of process attend too little to their own power as well as to the

[69]Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 Ohio St. J. On Disp. Resol. 241, 247-51 (1996).

[70]Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 Seattle Univ. L. R. 1 (2004) (discussing changes and trends in the development of the common law). Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, at 5 (1936).

As Justice Stone noted almost seventy years ago, the common law's,

> [D]istinguishing characteristics are its development of law by a system of judicial precedent, its use of the jury to decide issues of fact, and its all-pervading doctrine of supremacy of the law—that the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by courts.

[71]*Richard M. Alderman*, The Future of Consumer Law in the United States — Hello Arbitration, Bye-bye Courts, So-long Consumer Protection, University Of Houston Law Center, Public Law and Legal Theory Series 2007-W-02, at10.

[72]David Barnhizer, The "Delicately Constituted Fiction" of the Rule of Law, Research Paper 07-140 March 2007, at 16.

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effects of disputants' power and position on strategic interaction, opportunities, knowledge, and the legitimacy of outcomes."[73]

Courts[74] are not the only or primary system of adjudication. The dispute resolution field encompasses conflict resolution in countless institutions outside the courts as well.[75] Courts have encouraged parties to use different systems of dispute resolution and have enforced the decisions from those procedures.[76] By ordering ADR courts create and regulate a private ADR market. Government agencies and substantive legal rules motivate private organizations to acquire their own internal conflict management systems.[77]

The legal system and the ADR field have more and more overlapped in recent years so that they are entangled in many places. ADR offers assistance from adversities of formal litigation comparable to the old courts of

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[73]Judith Resnik, *Procedure's Projects*, 23 CIV. JUST. Q. 273, 276 (2004), Lela P. Love, *Images of Justice*, 1 Pepp. Disp. Resol. L.J. 29, 29–30 (2000) (emphasizing the public's interest in litigation given its openness, impartiality, and opportunity for appellate review); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 Geo. L.J. 2663 (1995) (advocating the value of settlement in dispute resolution, but acknowledging that the public's interest in litigation may sometimes outweigh that value).

[74]Sally Engle Merry, *Legal Pluralism*, 22 Law & Soc'y Rev. 869 (1988) Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 Law & Soc'y Rev. 525, 537, 542-43 (1980-81) (finding in study of claims of $1000 or more that lawyers were used in average of only 23 percent of disputes and cases were filed in court in average of only 11.2 percent of disputes, which varied by type of dispute). Marc S. Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 35 (1983). "Curiously those dispute institutions that flourish and enjoy relative autonomy tend to be omitted from discussions of ADR. Our social institutions are honeycombed by indigenous forums that elaborate and enforce complex codes of conduct - in hospitals, schools, condominiums, churches, the NCAA, and a multitude of other settings. Far more disputing is conducted within these indigenous forums than in all the freestanding and court-annexed institutions staffed by arbitrators, mediators and other ADR professionals. This profusion of indigenous law reminds us that the world of disputing includes much more than traditional adjudication and the new ADR institutions."

[75]Frank E. A. Sander, *Varieties of Dispute Processing*, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (The Pound Conference) (Apr. 7-9, 1976), reprinted in 70 F.R.D. 79, 111-14 (1976) (recommending that courts offer parties a range of dispute resolution procedures and help them choose among them in a "multi-door courthouse"). In the federal courts, the Alternative Dispute Resolution Act of 1998 mandates a weak version of a multi-door courthouse, requiring each federal district court to adopt local rules implementing its own ADR program. *See* 28 U.S.C. § 651(b) (2001).

[76]Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 Ohio St. J. On Disp. Resol. 715 (1999). Joan R. Tarpley, *ADR, Jurisprudence, and Myth*, 17 Ohio St. J. On Disp. Resol. 113, 114 (2001) (defining myths as "institutionalized customs, traditions, and mores that have become individually accepted as our own, which in turn form our personal core values and beliefs").

[77]U.S. Supreme Court decisions also encourage employers to provide internal complaint procedures as the availability of such procedures may be a defense to employees' suits. Burlington Industries v. Ellerth, 118 S.Ct. 2257, 2261 (1998); Faragher v. City of Boca Raton, 118 S.Ct. 2275, 2279 (1998). Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 Law & Soc'y Rev. 497 (1993).

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equity.[78] Professor Lisa Bingham argues that the growth in ADR use is related to a great expansion in the availability of information in disputes and reduction in confidence in a single, official mechanism for analyzing the information and determining the truth.[79] Much of the enthusiasm for development of the ADR field has been to offer dispute resolution options that avoid litigation shortcomings.[80] In addition, ADR portrays a system with procedural flexibility, a variety of remedial options and a focus on individualized justice.

ADR has expanded to become somewhat of a court of general civil jurisdiction and exists in virtually every segment of society. ADR now commands attention in all sectors of the economy.[81] The increasing incidence of

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[78]Thomas O. Main, *ADR: The New Equity*, 74 U. Cin. L. Rev. 329, at 329–330 (2005) (urging that just as the British system of equity sought to relieve problems and tensions created by the strict common-law approach, ADR today is a release for pressures created by our formal litigation system); Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 Cardozo J. Conflict Resol. 57, 58–59 (2004) ("Both equity and mediation offer a form of 'individualized justice' unavailable in the official legal system, and each allow room for mercy in an otherwise rigid, rule-bound justice system.").

[79]Lisa Blomgren Bingham, *When We Hold No Truths to be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. Disp. Resol. 131 (tracing roots of modern ADR to increasing epistemological complexity).

[80]Leonard L. Riskin Et Al., Dispute Resolution and Lawyers 286–307 (3d Ed.2005). Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 427 n.17 (1986), at 425–26 ("ADR has never had a unified theory to explain what it accomplishes and how it works. . . . It is easier to point to discrete practices than to discern the entire direction of the new movement."); Ralph Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 Law & Soc'y Rev. 247, 255 (1976) ("The [legal] system must be designed to encourage the nonlegal resolution of disputes, and public participation in planning processes, as well as more traditional legal activity like litigation."); William Twining, *Alternative to What?: Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics*, 56 Mod. L. Rev. 380, 380 (1993) (ADR movement was "largely pragmatic and political rather than theoretical or 'scientific.'"). Edwin B. Wainscott & Douglas W. Holly, *Zlaket Rules and Alternative Dispute Resolution*, 481 PLI/LIT. 631, 638 (1993) ("Unlike litigation, ADR does not restrict the parties to discreet legal claims or pre-existing legal remedies, and, therefore, a variety of creative remedies are available. The type of procedures that may be agreed upon are limited only by parties' and their counsels' imagination."); Kevin R. Casey, *Alternative Dispute Resolution and Patent Law*, 3 Fed. Cir. B.J. 1, 5 (1993) ("ADR hearings usually do not yield transcripts or written opinions in which trade secrets or other confidential information may be compromised (or in which 'dirty linen' of a loss is aired)."); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 538 (1986) ("[M]any defendants (and their attorneys) in products liability and antitrust cases . . . now seem intrigued by ADR as a means of protecting themselves from negative publicity and from outcomes they have disliked.").

[81]Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997) (noting that arbitration has "moved from the role of commercial court to that of a civil court of general jurisdiction"). Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and Death of Adjudication*, 58 U. Miami L. Rev. 173, 186 (2003) (suggesting that ADR has "creat[ed] a 'new' civil procedure"). Frank E.A. Sander, *The Future of ADR: The Earl F. Nelson Memorial Lecture*, 2000 J. Disp. Resol. 3, 4 ("Obviously, we didn't invent mediation, we didn't invent arbitration. But, by common agreement, it was in about 1975 that the current interest in ADR began. The first period, I think, was

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trans-national disputes has likewise fuelled the ADR boom.[82] Today, it is apparent that far more disputes in the United States are resolved through negotiation, mediation, and arbitration than through trial.[83]

Some societies do not share the viewpoint that increasing the role of formal law is the best way to create a just society.[84] Developing countries may not essentially want to adopt a formal rule of law system. For instance, in China, there is a system, culturally imbedded and without any form of codes or formal procedures, for the working out of some local disputes by local officials which could be seen as a form of ADR. Moreover, rule of law projects being undertaken in China are eroding native ADR techniques, in this manner unfavourably affecting access to dispute resolution for the poor.[85]

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about 1975 to 1982. I call it, 'Let a thousand flowers bloom.' There were many experiments . . . ."). Scott H. Blackman & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1716 (1998) (arguing that ADR is an effective means of resolving disputes that involve "shared rights" and for which an "either/or result in which one party walks away with all the rights at issue" is ill-suited).

[82]Yves Dezalay & Bryant G. Garth, Dealing In Virtue: International Commercial Arbitration And The Construction Of A Transnational Legal Order 33–62 (1996); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio St. J. on Disp. Resol. 211, 256 (1995) (citing Lauren K. Robel, *Private Justice and the Federal Bench*, 68 Ind. L. Rev. 891, 895–96 (1993) (the "privatization continuum"); Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 Stud. In. L. Pol. & Soc'y 393, 399–400 (charting the "dimensions of privatization").

[83]28 U.S.C. §§ 651–658, 652(a) (requiring each district court to have litigants in all civil cases consider using ADR, and to provide at least one ADR process to litigants); Jeffrey M. Senger, *Turning the Ship of State*, 2000 J. Disp. Resol. 79 (listing federal agencies utilizing various ADR processes, including the U.S. Postal Service, federal Justice Department, Equal Employment Opportunity Commission, and the Air Force).

[84]Lan Cao, *Introduction* to Symposium, *The "Rule of Law" in China*, 11 Wm. & Mary Bill Rts. J. 539, 542 (2003) (noting that the Chinese may have a very different attitude toward the rule of law than Americans do, and that "rule of law" translates into Chinese as "rule *by* law," which implies a more authoritarian approach); Pat K. Chew, *The Rule of Law: China's Skepticism and the Rule of People*, 20 Ohio St. J. On Disp. Resol. 43, 48–54 (2005) (discussing China's ongoing tension between the Western rule of law approach and the traditional Chinese preference for rule of people); Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored "Rule of Law" Reform Projects in the People's Republic of China*, 18 UCLA Pac. Basin L.J. 64, 89 (2000) (suggesting that rule of law projects being undertaken in China are eroding native ADR techniques, thereby adversely affecting access to dispute resolution for the poor); at 76 (discussing the Chinese government's resistance to the phrase "rule of law"); Benedict Sheehy, *Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes*, 26 Nw. J. Int'l L. & Bus. 225 (2006). Randall Peerenboom, China's Long March Toward Rule Of Law (2002) (presenting a more optimistic view on Chinese enthusiasm for the rule of law).

[85]Matthew C. Stephenson, A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored "Rule of Law" Reform Projects in the People's Republic of China, 18 UCLA Pac. Basin L.J. 64, 89 (2000). Laura Nader & Elisabetta Grande, Current Illusions and Delusions About Conflict Management—In Africa and Elsewhere, 27 Law & Soc. Inquiry 573, 591 (2002) ("U.S.- style alternative dispute resolution is being imposed on many unwilling recipients in foreign countries as a requirement for development aid . . . ") Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 Rutgers Camden L.J. 569, 641 (2004) (urging that ADR can play an important role in re-establishing social harmony, and focusing specifically on the example of Nigeria), (asserting

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VI
Maritime Arbitration

Courts[86] have favored arbitration over litigation and have been endorsing arbitration since the FAA passed which means that they consider arbitration to contribute to the rule of law. Congress, by the enactment of FAA, provided an approved alternative to litigation.[87] Levin asserts[88] that in recent years the private sector has begun to use binding arbitration as the favored method of dispute resolution and the payback appears to be that arbitration is a "quicker, less expensive and more private alternative to litigation." Arbitration and ADR have been gradually becoming more popular internationally.[89]

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that for some countries, development of the rule of law may not be the ultimate end, and that, instead, the ultimate end sought ought to be peaceful resolution of disputes); Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 Yale L.J. 1675, 1714 (2005) (reviewing Zhu Suli, Sending Law To The Countryside: Research On China's Basic-Level Judicial System (2000)), Frank K. Upham argues that "[t]he solution [to the tension], therefore, may be to institutionalize the dialectic that Zhu describes between formal and informal, modern and customary, center and periphery in a manner designed to make the norms created more accessible to the public while also being respectful of local practices". Richard L. Abel, *Introduction*, *in* 2 The Politics Of Informal Justice 1 (Richard L. Abel ed., 1982). Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 Ohio St. J. On Disp. Resol. 27, 91 (2002) ("The ultimate promise for dispute resolution is that it can harness and nurture the *will* to play together so that society is more than the sum total of disparate notes, but rather a cohesive—albeit sometimes discordant—tune."); Professor Abel explains that the informal justice that works well in pre-capitalist societies "cannot be recreated under Western capitalism". Pre-capitalist legal in-formalism is embedded in and dependent upon a social structure in which relationships are complex and unremitting, the supporters of one disputant are bound to the other by crosscutting bonds, there is little residential mobility, and status in the face-to-face community is greatly valued and without difficulty lost in the absence of privacy. Western capitalism not only lacks these virtues but also energetically rejects them. Informal legal institutions do not facilitate the preservation of relationships.

[86]Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 639 (1996).

[87]Volt Info. Sciences, Inc. v. Bd. of Trustees. of Leland Stanford Junior Univ., 489 U.S. 468 (1989) (emphasizing that the FAA generally ensures that arbitration agreements are enforced according to the terms agreed upon by the parties).

[88]Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 Am. Bus. L.J. 105 (1997), at 106.

[89]Marc Galanter, The Vanishing Trial: An Examination Of Trials And Related Matters In Federal And State Courts (2003). Richard Fullerton, *Searching for Balance in Conflict Management: the Contractor's Perspective*, 48 Disp. Resol. J Feb./Apr. 2005, at 48, 52. ("Over the last 20 years, arbitration has become used so widely in construction that many consider it the primary, rather than an alternative, method of dispute resolution.") John S. Murray, Alan Scott Rau, & Edward F. Sherman, ARBITRATION 292 (2d ed. 1996) (explaining that arbitration clauses in international commercial contracts are "almost universal"). Paul M. Secunda, *"Arasoi O Mizu Ni Nagusu" or "Let the Dispute Flow to Water": Pedagogical Methods for Teaching Arbitration Law in American and Japanese Law Schools*, 21 Ohio St. J. on Disp. Resol. 687, 697 (2006). "In recent years, the use of arbitration has taken on staggering proportions in the United States."

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It is generally supposed that arbitration is faster, cheaper, and more private than litigation.[90] The high cost of arbitration can be a considerable restraint that prohibits consumers, employees, and those with fewer resources from pursuing claims in arbitration.[91] It is argued that arbitration is no faster than litigation and according to one recent study, the average time to resolve an arbitration— the time from the date of filing the demand to the date of the award—is 16.5 months.[92] Courts and commentators alike have also noted the often-excessive costs of arbitration, which may deny access to those unable to pay.[93]

Arbitration precedent and stare decisis do not exist. Arbitrators can interpret the law, but the interpretation of one arbitrator is not binding upon

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[90]Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (noting "the simplicity, informality, and expedition of arbitration"); S. Judiciary Comm., Report To Accompany S. 1005: To Make Valid And Enforceable Certain Agreements For Arbitration, S. Rep. No. 68-536, at 3 (1924) (stating that arbitration may avoid "the delay and expense of litigation"); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negot. L. Rev. 171, 171 (2003) (arguing that "arbitration can be faster, cheaper and more private than litigation"); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, Disp. Resol. J., May–July 2003, at 9, 12 (discussing the cost savings of arbitration).

[91]Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 571 (N.Y. App. Div. 1998) (holding arbitration clause unconscionable where it required $4,000 filing fee, $2,000 of which was non-refundable, exceeding the value of the average computer that was the subject of the agreement); Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (holding that plaintiff failed to make a sufficient showing of the prohibitive costs of arbitration, but noting in dicta that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."). A party to an arbitration agreement may also challenge the agreement on grounds that it is unconscionable. *See* Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893–94 (9th Cir. 2002) (applying California state law on unconscionable contracts). Melissa B. Hutchens, *At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 Ala. L. Rev. 599, 606 (2002) (stating that the "Alabama Supreme Court has consistently rejected arguments to invalidate arbitration agreements on the basis of financial hardship").

[92]Robert B. Fitzpatrick, *The War in the Workplace Must End, But Arbitration Is Not the Answer*, *in* Advanced Empl. L. & Litig. 101, 105. Leslie A. Gordon, *Clause For Alarm: As Arbitration Costs Rise, In-House Counsel Turn to Mediation or a Combined Approach*, A.B.A. J., Nov. 2006, at 19 (noting that arbitration may not be faster than litigation given the "messy, complicated and expensive" process necessary to enforce arbitration clauses and the general absence of summary judgment as a tool for defendants). Lucy V. Katz, *Enforcing an ADR Clause—Are Good Intentions All You Have?*, 26 Am. Bus. L.J. 575, 581 (1988) (stating that "voluntary nature of alternatives has been eroded," and that it is problematic for ADR to take on formalistic characteristics of adjudication).

[93]The United States Supreme Court recently had an opportunity to rule on this point in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The court side-stepped the issues, however, noting that although "[i]t may well be that . . . large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights, ... [t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91. For examples of cases that have considered the effect of excessive costs, *see e.g.*, Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998); Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997); Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002); Armendariz v. Foundation Health Psychare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000).

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another. Consequently, arbitration lacks the ability to formulate policy, impose consistency, or change existing law. While private adjudications fail to produce rules or binding precedents,[94] the question to be answered is whether arbitration indirectly affects the shaping of the rule of law. Is adjudication the only method of elaborating public norms, providing accountability and does it constitute the only way that rule-of-law values can be achieved? On the one hand, adjudication elaborates public norms by developing binding precedents in a specific case, which will then apply in the future to comparable cases. On the other hand, ADR's power to produce responsible public norms stems from the relationship of individual and systemic conflict resolution.[95] Susan Sturm and Howard Gadlin[96] argue that "ADR can play a significant role in developing legitimate and effective solutions to common problems and, in the process, produce generalizable norms."

Does arbitration play a role in shaping the content of the rule of law? It is argued that ordinary citizens no longer had meaningful access to the courts.[97]

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[94]David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2622–23 (1995), Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 60 (2004) (stating that ADR procedures "occur out of public view and result in agreements that have no precedential value").

[95]Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 956 (2000) (arguing for a unified system of public justice in which trial, arbitration, mediation, evaluative techniques, and other forms of ADR all operate toward the single end of binding public civil dispute resolution).

[96]*Susan Sturm and Howard Gadlin,* Conflict Resolution and Systemic Change, *Journal Of Dispute Resolution* [Vol. 2007 No 1, 1, Columbia Law School, Public Law & Legal Theory Working Paper Group, Paper Number 07-147 at 3. Carrie Menkel- Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 Geo. L.J. 2663, 2664 n.9 (1995) at 2674, 2692.93 (discussing the potential for settlements to promote justice and elaborate norms). Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis. L. Rev. 1359 (discussing the possibility that ADR may incorporate racial and ethnic bias).

[97]Laura Nader, *Disputing Without the Force of Law*, 88 Yale L.J. 998, 1001 n.16 (1979) ("Our legal system has taken too literally the ancient maxim, 'de minimis non curat lex.'" Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 Harv. C.R.-C.L. L. Rev. 341, 360 (1990) ("Alternative dispute resolution is a response to criticisms of excessive litigation costs and systemic insensitivity."). Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 Ind. L.J. 591, 592 (2001) (calling the ADR movement an "effort to avoid the delay, expense, technicality, and acrimony of traditional judicial litigation"). Barbara A. Curran, The Legal Needs of The Public (1977); *Dispute Resolution*, 88 Yale L.J. 905, 906 (1979) (bemoaning "the persistent inaccessibility of judicial relief for poor and middle-class people"). Maurice Rosenberg, *Devising Procedures That Are Civil To Promote Justice That Is Civilized*, 69 Mich. L. Rev. 797, 801 (1971) (referring to "glutted calendars and mobbed courtrooms; the unconscionable delays, alternating with rush-rush-rush; the mistreatment of jurors and witnesses; the excessive expense; [and] the tarnished image of justice for millions of Americans"). Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 Tex. L. Rev. 285, 292 n.44 (2002) (claiming that the term "litigation explosion" first appeared in print in 1970 and attributing it to Justice Macklin Fleming of the California Court of Appeals); Arthur R.

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Economic barriers preclude many, if not most, parties in the United States from obtaining access to courts and so lack of access justifies the use of ADR as part of the rule of law.[98] For instance, under current American law, it seems unavoidable that consumer arbitration will ultimately replace litigation.[99]

According to Justice Douglas, arbitrators should be permitted to come to conclusions or take approaches different from courts and the common law.[100] The Court in *Warrior & Gulf*[101] indicated the role of the arbitrator in developing a distinct body of law that would govern the workplace. Courts in the United Steelworkers trilogy view judges' and arbitrators' roles as separate spheres or systems, with one but not both holding the right to adjudicate

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Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 985 (2003) ("The contemporary perception of a crisis in the judicial system first became prominent in the 1970s."); Gresham M. Sykes, *Cases, Courts and Congestion*, in Law In Culture And Society 327, 328 (Laura Nader ed., 1969) ("Part of the difficulty in getting rid of court congestion appears to be . . . [that] it is not simply an accidental defect of the law, but is rooted in some of the legal system's most cherished characteristics.").

[98]Deborah L. Rhode, Access To Justice 3 (2004) (explaining that while we boast of our support of access to justice, in reality, millions of Americans are denied real access); Robert Rubinson, *A Theory of Access to Justice*, 29 J. Legal Prof. 89, 100–02 (2005) (urging that, for the most part, the only persons or groups able to obtain access to the U.S. litigation system are commercial organizations, affluent individuals, and persons engaged in "values conflicts" of significant interest to attract pro bono or reduced-fee representation). Jerold S. Auerbach, Justice Without Law 4 (1983) ("In many and varied communities, over the entire sweep of American history, the rule of law was explicitly rejected in favor of alternative means for ordering human relations and for resolving the inevitable disputes that arose between individuals."); Robert Ellickson, Order Without Law: How Neighbors Settle Disputes 137–40 (1991) ("[L]egal instrumentalists have tended to under appreciate the role that nonlegal systems play in achieving social order").

[99]The Privatization Of Justice? Mandatory Arbitration And The State Courts—Report Of The 2003 Forum For State Appellate Court Judges (2006 Pound Civil Justice Institute) *See also, 2004 ABA Annual Meeting—Program Materials: Bench and Bar: The Vanishing Jury Trial*, available at http://www.abanet.org/abanet/litigation/mo/premium-lt/prog_materials/ 2004_abaannual/20.pdf "A private civil justice system is evolving, one that is relatively unconstrained by law and relatively uninformed by systematic empirical research." Using what is described as "Dispute Resolution Darwinism," the author concludes that, "We may already be witnessing the first mass extinction as large institutional organisms move in to occupy entire habitats in the civil justice ecosystem." Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. Miami L. Rev. 873 (2002).

[100]United Steelworkers of America v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

[101]*Warrior & Gulf*, 363 U.S. at 573-74. ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."), "The labor relations arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts". *Enterprise Wheel & Car Corp.*, 363 U.S. at 594-95. at 597. The Court did impose one possibility for review: that the arbitrator's award must "draw its essence from the contract." Only if "the arbitrator's words manifest an infidelity to this obligation" should the courts refuse enforcement.

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upon a particular question. Moreover, courts insist that arbitrators "follow the law."[102] Arbitration allows parties to use their own selected norms, which may be diverse from those chosen by the society at large. Contemporary decisions of arbitrators are thought to be informed by the arbitrator's "experience, knowledge of the customs of the trade and fair and good sense for *equitable* relief."[103] Edward Brunet[104] argues that "The weight of authority permits an arbitrator to 'do justice as he sees it' and fashion an award that embodies the individual justice required by a given set of facts." In addition, Geraldine Szott Moohr[105] argues that arbitration does not produce a uniform or consistent law but it does produce law. Does arbitration encompass any public action? Scholars argue that arbitration encompasses a state action attributing, on a smaller scale, state authority to arbitration panels as to courts.[106]

Lord Wilberforce[107] said that "I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration...regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive laws."

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[102]Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 232 (1987) ("[T]here is no reason to assume at the outset that arbitrators will not follow the law. . . .") (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 & n.19 (1985)); George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577 (7th Cir. 2001) ("[T]he arbitrator is bound to follow the law in the absence of a valid and legal agreement not to do so."); Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1459–60 (11th Cir. 1997) ("When a claim arises under specific laws . . . the arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so. As the Supreme Court has stated '[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'" (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991))). Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1946 (1996) (noting that the Supreme Court's view that arbitration does not alter substantive rights "is in keeping with the courts' expectation that arbitrators will follow applicable legal rulings . . . .").

[103]1 Gabriel M. Wilner, Domke On Commercial Arbitration § 25.01, at 391 (rev. ed. 1995).

[104]Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992).

[105]Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev. 395 (1999).

[106]Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate*, 26 Pace L. Rev. 73, 110 (2005) (concluding that the "close relationship between the SEC and the SROs creates state action when the SROs mandate that their employees participate in arbitration as a condition of their employment"); Richard C. Reuben, *Public Justice: Toward A State Action Theory of Alternative Dispute Resolution*, 85 Cal. L. Rev. 577, 615- 19 (1997) (arguing that public and private entanglement in enforcing arbitration agreements gives rise to state action); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1, 40-47 (1997) (arguing that state action exists at least to the extent courts are relying on a preference for arbitration over litigation to interpret validity and scope of arbitration agreements). Paul R. Verkeuil, *Privatizing Due Process*, 57 Admin. L. Rev. 963, 983-86 (2005) (noting that, even with limited state action, societal institutions have developed many alternatives to the Due Process Clause, including in ADR processes).

[107]Hansard HL (Series 5) Volume 568 Col. 778 18 January 1996.

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Moreover, according to Eric D. Dunlap[108] "The laudatory goals of the FAA will be achieved only to the extent that courts ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest. If we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less." Thus, there is support for arbitration being a totally independent dispute mechanism and not merely auxiliary to courts. Arbitration and courts should become two independent and autonomous systems of dispute within a legal sovereign resembling the legal function of law and equity that had existed for years contributing to the development of the rule of law. Arbitration must keep its individuality and not to be formalised in a way mimicking litigation and inevitably to have the fate of equity.[109]

The Supreme Court[110] of Canada held that the grant of exclusive jurisdiction to arbitrators is to be interpreted exceptionally liberally and nearly all workplace disputes must be determined at arbitration and cannot be litigated in the courts,[111] including constitutional issues which may arise in particular if the employer is part of government. Moreover, in *Douglas College*[112] the Canadian Supreme Court held that labor arbitrators must not only interpret statutes and apply the common law, but also decide constitutional issues and award certain constitutional remedies.

Canadian law considers the arbitrator as an integrated part of the general legal system.[113] Lord Justice Denning[114] said that "[t]here is not one law for arbitrators and another for the court, but one law for all." Furthermore,

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[108]Eric D. Dunlap, Setting aside arbitration awards and the manifest disregard of the law standard, 2006 Florida Bar Journal July/August 51, p 52.

[109]G Zekos, International Commercial & Marine Arbitration, 2008 Routledge & Cavendish forthcoming.

[110]Weber v. Ontario Hydro, [1995] 2 S.C.R. 929, ¶ 54 (Can.). *See also* St. Anne Nackawic Pulp & Paper Ltd. v. Canadian Paperworkers Union Local 219, [1986] 1 S.C.R. 704 (Can.); Regina Police Ass'n v. Regina (City) Board of Police Comm'r, [2000] 1 S.C.R. 260 (Can.).

[111]Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. Rev. 81, 85 (1992) ("The weight of authority permits an arbitrator to 'do justice as he sees it' and fashion an award that embodies the individual justice required by a given set of facts.")

[112]*Douglas College*, [1990] 3 S.C.R. at 570.

[113]David A. Wright, Foreign To The Competence Of Courts" Versus "One Law For All": Labor Arbitrators' Powers And Judicial Review In The United States And Canada, Comp. Labor Law & Pol'y Journal [Vol. 23:967, at 1005 "Canadian law's willingness to allow arbitrators to determine issues up to and including constitutional claims has stemmed from the view that they are public decision-makers, part of the general legal system."

[114]Taylor (David) and Son, Ltd. v. Barnett, [1953] 1 All E.R 843 (C.A.), *cited in Douglas College*, 3 S.C.R. at 597 and *Weber*, 2 S.C.R. at 958.

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David A. Wright[115] argues that "Canadian arbitrators do have an important role as public officials in interpreting and enforcing public policies and public rights. Canadian arbitrators frequently interpret human rights codes and other statutes and are increasingly adjudicating constitutional issues. The view of Lord Denning that there should be "one law for all" has contributed to the view of arbitrators as part of the general legal system."

Arbitrators and arbitration boards are considered to be similar to other administrative decision-makers, such as human rights tribunals,[116] that are seen as "undeserving" of deference because they perform functions similar to those of the courts. David A. Wright[117] argues that "American law may benefit from incorporating some of these aspects of the Canadian approach, which allow for the benefits of the informal and relatively quick decision-making and fact finding that arbitration provides, without the need to have review of the arbitrator's conclusions on such issues of public policy which are completely prohibited."

Like arbitration, Equity did not claim to override the law[118]. According to Leonard J. Emmerglick[119] "Law and equity cannot be blended or homogenized because they are [fundamental] antitheses" and so "Each [system] has a function to perform that requires some freedom to act upon the other." Does this view apply to the relation between courts and arbitration nowadays? In *Scherk v. Alberto-Culver Co.*[120] the court held that it is a "parochial concept that all disputes must be resolved under our laws and in our courts" equating dispute resolution in courts with dispute resolution in arbitral tribunals. Furthermore, it stressed the need for reliance upon norms contributing to a wanted rational decision.[121] Accurate adjudication results comprise a

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[115]David A. Wright, Foreign To The Competence Of Courts" Versus "One Law For All": Labor Arbitrators' Powers And Judicial Review In The United States And Canada, Comp. Labor Law & Pol'y Journal [Vol. 23:967, at 998, at 1004 "Canadian law demonstrates that a nuanced approach is possible, giving the arbitrator a broad role to determine nearly all workplace disputes in unionized environments, including determining when a matter is arbitrable and adjudicating human rights claims. The arbitrator acts as a decision-maker of first instance in the workplace. Most significantly, this means that arbitrations are not delayed with trips to court to determine arbitrability."

[116]David Mullan, Recent Developments in Administrative Law—The Apparent Triumph of Deference!, 12 C.J.A.L.P. 191 (1999).

[117]David A. Wright, Foreign To The Competence Of Courts" Versus "One Law For All": Labor Arbitrators' Powers And Judicial Review In The United States And Canada, Comp. Labor Law & Pol'y Journal Vol. 23:967, at 1005.

[118]Anton Hermann Chroust, *The "Common Good" and the Problem of "Equity" in the Philosophy of Law of St. Thomas Aquinas*, 18 Notre Dame L. Rev. 114, 117 (1942–1943)

[119]Leonard J. Emmerglick, *A Century of the New Equity*, 23 Tex. L. Rev. 244, 246 (1945) at 248.

[120]*Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) at 519. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

[121]Lon L. Fuller, Collective Bargaining and the Arbitrator, 1963 Wisc. L. Rev. 3, 29 (asserting that the "procedural limitations that surround the adjudicative function are designed to insure as rational a decision as possible"). Ronald Dworkin, A Matter of Principle 72-74 (1985).

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positive litigation value resulting in a "good result efficacy"[122] which does not mean that arbitration has to mimic and follow the litigation road because accurate results can be achieved by arbitrators' interpretation of facts via written law or customary law.

Arbitration now rivals court adjudication as the preferred means of resolving civil disputes based on expert knowledge[123] in the adjudication of the dispute.[124] Furthermore, arbitration continues to thrive in specialized industries permitting determinations based on field-specific norms that often are not understood or applied in public courts.[125] There is no basis to deem

[122]Robert Summers, Evaluating and Improving Legal Processes—A Plea for "Process Values," 60 Cornell L. Rev. 1, 1-3 (1974). Geoffrey Hazard, Rising Above Principle, 135 U. Pa. L. Rev. 153, 167-171 (1986). William W. Park, The 2002 Freshfields Lecture—Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion, 19 Arb. Int'l 279, 293 (2003).

[123]John Berryhill, Public Interest Considerations in Private Resolution of Patent Disputes, *available at* http://www.johnberryhill.com/patdis.html (claiming that it is unreasonable to expect judges and juries to properly evaluate the technical subject matter in patent suits and that savings in time and cost may be achieved by appointing an expert arbitrator). Steven J. Elleman, Note & Comment, Problems in Patent Litigation: Mandatory Mediation May Provide Settlements and Solutions, 12 Ohio St. J. On Disp. Resol. 759, 771 (1997) ("[A]rbitration of patent disputes under 35 U.S.C. Section 294 has not been utilized as much as expected by its drafters.").

[124]Kamaratos v. Palias, 821 A.2d 531, 535 (N.J. App. Div. 2003) (stating that although there is a "strong judicial approval for the technique of arbitration, . . . New Jersey is equally committed, on the other hand, to assuring that a party does not unwittingly lose the 'time honored right to sue'" (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 773 A.2d 665, 670 (N.J. 2001); G. Richard Shell, Res Judicata and Collateral Estoppel Effects of Commercial Arbitration, 35 UCLA L. Rev. 623, 626-27 (1988) ("Arbitration is rapidly overtaking court adjudication as the most popular forum for the trial of civil disputes."). John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 137 (3d Cir. 1998) ("[A]rbitration most often arises in areas where courts are at a significant experiential disadvantage and arbitrators, who understand the 'language and workings of the shop,' may best serve the interest of the parties."; Edward F. Sherman, The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process, 15 Rev. Litig. 503, 503 (1996) ("Alternative dispute resolution (ADR) grew to prominence as an alternative to litigation.").

[125]Richard H. McLaren, The Court of Arbitration for Sport: An Independent Arena for World Sports Disputes, 35 Val. U. L. Rev. 379, 381 (2001). at 380–81 (highlighting the CAS arbitrators' application of widely accepted principles that may some day be recognized as the "*lex sportiva*"). Camille A. Laturno, International Arbitration of the Creative: A Look at the World Intellectual Property Organization's New Arbitration Rules, 9 Transnat'l. Law 357, 369–71 (1996) (discussing the evolution of arbitration in intellectual property disputes and emphasizing that arbitration is particularly appropriate for resolution of such disputes because they involve specialized and technical issues); Christine Lepera, What the Business Lawyer Needs To Know About ADR: New Areas in ADR, 13 PLI/NY 709, 711–14, 719 (1998) (describing increased use of arbitration to resolve disputes involving intellectual property rights, online technology, and entertainment issues). Judd Epstein, The Use of Comparative Law in Commercial International Arbitration and Commercial Mediation, 75 Tul. L. Rev. 871, 915–16 (2001) (discussing *lex mercatoria*); Kazuaki Sono, The Rise of Anational Contract Law in the Age of Globalization, 75 Tul. L. Rev. 1185, 1185–86 (2001) (discussing the rise of delocalized contract law in international commercial arbitration). *But see* Christopher R. Drahozal, Contracting Out of National Law: An Empirical Look at the New Law Merchant, 80 Notre Dame L. Rev. 523, 524–26, 551 (2005) (explaining understandings of *lex mercatoria* but finding empirical evidence of limited use of such transnational commercial law in international commercial arbitration).

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arbitration process faulty relative to formal process.[126] Arbitration is simply an alternative method of law enforcement. According to H. Krause[127] "litigants could compromise on process, but that the arbitrator still had to apply the law." Hence, Arbitration and in general ADR perform a valuable role in the growth of the law and so lacking the appliance of equity, law will be declining.[128]

VII
CONCLUSION

The rule of law encompasses all the morals, and values incorporated in norms created and adopted by people living in a society. Taking into account the low rate of adaptability of formal law, the mobility of society causing alteration into the norms is better served by informal dispute systems applying the newly adopted norms. Thus, the rule of law has to adapt its pace of adaptability and mobility according to the rhythm endorsed by the society which the rule of law is supposed to govern. Globalisation and cyberspace/electronic technology are two factors injecting mobility and changeability into societies' life as expressed by new norms incorporating new values and morals which means that the rule of law has to keep pace with this mobility. The interaction of societies causes changes in society's life which have to be endorsed by the rule of law and so the existence of formal and informal dispute systems is fundamental for the existence of the rule of law because as it is analysed above both systems of dispute resolution contribute into the shaping of its content.

Both litigation and arbitration serve societal harmony.[129] The view of Percy J. Bordwell,[130] that "The equity of today becomes the right of tomorrow" is directly applicable in the relation of norms established by ADR-arbitration and formal law. Litigation and arbitration can go hand in hand and so a Society can rely not only on law but also on norms. As the system of equi-

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[126]Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[127]Hermann Krause, Die Geschichtliche Entwicklung Des Schiedstrichtswesens In Deutschland 89 (1930).

[128]Percy J. Bordwell, *The Resurgence of Equity*, 1 U. Chi. L. Rev. 741, 747 (1934) ("In an indiscriminate 'fusing' or an indiscriminate borrowing, these principles are likely to be lost. They are likely to be lost even in the administration of equity itself by judges with only a legal point of view."). Boddie v. Connecticut, 401 U.S. 371, 374 (1970).

[129]Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 Nev. L.J. 289 (2002–2003), Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 Tul. L. Rev. 1401 (2004) (examining tensions between using formal and informal systems to resolve employment discrimination complaints in the United States, Great Britain, and Australia).

[130]Percy J. Bordwell, *The Resurgence of Equity*, 1 U. Chi. L. Rev. 741, 747 (1934) at 750.

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ty sought to alleviate problems and tensions created by the strict common-law approach, arbitration nowadays is a relief for pressures created by formal litigation systems[131] attributing immensely but currently indirectly to the development of the rule of law. The establishment of arbitration as an autonomous, independent and co-equal[132] (to courts) dispute resolution mechanism in a single jurisdiction sovereign will bring a direct impact of arbitration upon the progressive formation of the rule of law.

[131]Thomas O. Main, *ADR: The New Equity*, 74 U. Cin. L. Rev. 329, 329–30 (2005), Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 Cardozo J. Conflict Resol. 57, 58–59 (2004) ("Both equity and mediation offer a form of 'individualized justice' unavailable in the official legal system, and each allows room for mercy in an otherwise rigid, rule-bound justice system.").

[132]G Zekos, International Commercial & Marine Arbitration, 2008 Routledge & Cavendish forthcoming.

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