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ADR and the Rule of Law: Making the Connection

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Making the Connection

By Richard C. Reuben

On the face of it, the tension between alternative dispute resolution and the rule of law seems palpable.

The rule of law is, after all, about the supremacy of legal rules with respect to the ordering of human affairs, and providing standards for resolving the disputes that inevitably arise—quintessential public ordering. On the other hand, ADR is often thought of as “private ordering,” or the resolution of disputes through standards other than legal rules, such as through the satisfaction of interests, concerns, or preferences.

But when you take a closer look, the differences between them do not seem as sharp. Judicial and administrative dispute resolution programs are common throughout the state and federal governments. Increasingly, too, ADR processes such as study circles, town halls, and citizen juries are being used to facilitate community dialogue on a wide range of public problems, from neighborhood blight to national health care. Moreover, many of our most established ADR processes—arbitration, mediation, even negotiation—depend on the law to secure such crucial functions as enforcement, confidentiality, and legitimacy.

Plainly, then, ADR and the rule of law do not exist in mutually exclusive spheres. And yet, just as plainly there has been little explicit consideration of the relationship between the two—in particular, whether, and under what conditions, ADR might contribute to, or undermine, the rule of law, and vice versa.

This theme edition of Dispute Resolution Magazine seeks to bring this issue finally to the surface, and in this introduction I will address important definitional questions and try to articulate why it is important for practitioners, program managers, scholars, judges, and others involved in ADR to engage questions about the relationship between ADR and the rule of law.

Definitions, Distinctions

Like democracy and justice, the rule of law is an inherently amorphous concept that is capable of many different interpretations. As a result, rule of law experts often refer to thin and thick definitions of the rule of law.1

The thin definition tends to reflect the historical view of the rule of law as the supremacy of legal rules over the whims and preferences of particular individuals and institutions. Under this view, the rule of law provides a common set of standards to which all members of society must abide—from government to the private sector, from rich to poor, from elite to common. Significantly, the rule of law serves as a vital constraint on the power of government and government officials, prohibiting them from engaging in arbitrary, capricious, or even abusive actions.

This thin version of the rule of law is reflected in such aphorisms as Chief Justice Marshall’s famous declaration in Marbury v. Madison that ours is a “government of laws, and not of men,” and ensures the fulfillment of many important political and democratic values, including stability, equality, and, ultimately, individual freedom beyond the requirements of the rule of law.

The common commitment to abide by legal rules—by the people and by the government—is a common characteristic of democratic governance. However, it is important to remember that the rule of law and democracy are not the same thing. Democracy in this sense can be understood as describing the political means by which governing rules are enacted, while the rule of law refers to the supremacy of those rules, however enacted.

In the United States, for example, rules are often established by legislatures, pursuant to a process of representative democracy—democratic because we, the people, decide the rules we will live by, and representative because, as a general matter, we elect people as our representatives to draft and approve those rules rather than doing so ourselves directly. China, on the other hand, may not be a democracy because its rules are generally
promulgated through a process of one-party rule, but it still maintains a rule of law system in that all people, and the government, are expected to comply with the nation's constitution and other laws. This is sometimes pejoratively called "rule by law" rather than "rule of law." From this thin understanding, the definition of the rule of law can become progressively thicker by engraving onto it attributes that pertain to the rule of law. Law and order is a common example, as is judicial administration, and, at its thickest, human rights. The idea behind these thicker versions is that the rule of law is not merely procedural, but rather that it also embodies certain substantive ideals. When nations don't demonstrate these ideals in practice—for example, in assuring the protection of human rights—proponents of the thicker version of the rule of law may contend that the offending country isn't following the rule of law.

Given the wide range of interpretations that can be seen along this continuum of thickness, it is not surprising that rule of law can provide a canopy for a strange set of bedfellows. For example, political conservatives, even libertarians, can promote the rule of law as a necessary predicate for viable capitalist economic markets. At the same time, political liberals can use the rule of law as a vehicle to advance equality and human rights concerns. For this reason, the rule of law has been a hallmark of U.S. international policy since at least the 1990s, with its meaning and emphasis shifting with different administrations.

How Does ADR Fit in?

Although U.S. policy on the rule of law has at times focused on a thicker understanding of the term, development dollars have tended to follow the thinner definition. As result, funding by the World Bank, U.S. Aid to International Development, and others has most commonly been directed at establishing the traditional institutions of law. Building, repairing, and equipping courthouses has been a mainstay of this effort, as have been efforts to design legal systems, train judges and lawyers, and develop bar associations. Funding has also been used to further legal reform, especially the drafting of constitutions and codes of contract, property, and criminal law.

Interestingly, ADR has sometimes been included as a part of this development work. As here in the United States, ADR has been incorporated into court programs, for example, in India and the Dominican Republic. It has also been employed outside the courts to address community conflict. But also as here, much more can be done to institutionalize ADR as a part of the legal regimes of these developing nations. Though the domestic U.S. experience suggests that it makes sense to begin the institutionalization process within courthouses, it also points to the important potential of private sector ADR to address legal disputes earlier, before they even get to the courthouse doors. Similarly, the use of ADR methods for civic engagement of community problems can facilitate constructive community conflict resolution, mitigate related private conflict, and promote the social capital that is necessary for effective democratic rule.

Undermining the Rule of Law

Yet, even under a thinner definition of the rule of law, such progress arguably comes at a cost that harkens back to some of the more fundamental critiques that the modern ADR movement in the United States has endured. In his famous ADR critique, Against Settlement, for example, Owen Fiss expressed concerns in particular about power imbalances, authoritative consent, and the sometimes necessary continuing role of courts in the administration of law.

This Fissian view, at bottom, reflects traditional rule of law values, beginning with the assumption that public rules represent some kind of desirable democratic consensus on behavioral standards, and that the enforcement of those standards is necessary to order human affairs in a society in which people are inherently unequal. Under this view, ADR is simply and fundamentally incompatible with the rule of law because it denies the application of properly derived legal standards, resulting in outcomes that might be far removed from what society (acting through law) has determined would be appropriate under these circumstances. As a result, in this strong view, any increase in the use of ADR results in a decrease in the force or quality of the rule of law.

David Luban stresses a different aspect of the problem: the loss of judicial decisions interpreting public law to guide societal behavior as a result of ADR. The core of this argument is that ADR undermines the rule of law by depriving the public of opinions that will clarify and provide practical meaning of legislative acts that are often ambiguous.

Marc Galanter's empirical research on the "vanishing trial" certainly attests to the kind of paucity of judicial pronouncements that Luban and Fiss would see as necessary for a properly functioning rule of law regime. Indeed, it suggests that American dispute resolution—long a beacon for the rest of the world—may well be entering an ironic era in which the vast majority of legal disputes are resolved lawlessly, in direct contradiction to the rule of law.

Laura Nader, Ugo Mattei, and others press the point further and more bluntly, arguing that ADR promotes simply harmony and results in the subordination of legal rights, particularly those of society’s less powerful.

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Although their vague “interests” may be satisfied in ADR, it is often at the sacrifice of more concrete legal entitlements that may properly be secured through the adjudication of adversarial positions. In this way, ADR serves not only to frustrate the rule of law by denying its application, but, worse yet, it ultimately uses law to reinforce the very class and power disparities that so often give rise to conflict in the first place.

These critiques raise serious questions that have never been fully resolved by the modern domestic ADR movement, which has had the luxury of emerging against a backdrop of a strong rule of law. Simply breezing by these issues is much more troublesome in societies in which the rule of law has yet to take root, where there is affirmative distrust of the rule of law, and where graft, corruption, and violence are deeply embedded instead. In such situations, it seems rather quizzical to include ADR in programs that seek to cultivate and institutionalize the rule of law.

Promoting the Rule of Law

But in my view, the relationship between ADR and the rule of law is more paradox than enigma in that a closer look reveals a substantial capacity for ADR to promote the rule of law.

Some benefits are fairly obvious, and may be readily drawn from our own domestic experience. For example, ADR can serve the goals of judicial efficiency by properly diverting away from the bench cases that do not require judicial resolution, such as ones that involve small stakes or apply clearly defined law. By removing such cases from the docket, ADR serves the rule of law by allowing the courts to focus on those cases and issues that do require judicial attention, such as cases necessary to interpret constitutions or statutes or otherwise establish precedent to guide future behavior. Reasonable minds, of course, can differ on where to draw the line between cases that courts should and should not decide, but from a rule of law perspective it seems clear that ADR can perform this function.

ADR can also promote the rule of law by allowing for the resolution of disputes in a way that is more culturally appropriate to the community in which the dispute takes place. The South African diamond industry has long used arbitration to resolve its disputes, mediation-like processes are often used to resolve conflict in more collectivist cultures across the globe, and there is little reason to interfere with such practices by imposing the rule of law. This is addition by subtraction, in a sense, in that ADR can foster the rule of law by limiting its application to situations in which it is really necessary.

But there are other, more subtle (and arguably more substantial) ways that ADR can promote the rule of law, such as by fostering compliance with the rule of law and confidence in the rule of law as a viable alternative to graft, corruption, and violence.

Above all else, the rule of law requires a willingness to abide by the rules that have been cast. Moreover, it is crucial that this compliance be voluntary—something people are willing to do on their own—because compelled enforcement of all rules is, of course, impossible for any society as a practical matter.

The procedural justice literature tells us that there is a vital relationship between voluntary rule compliance and the process by which those rules are promulgated and enforced. In particular, the literature suggests that rule compliance is more a function of the process of rule creation and enforcement than it is based upon one’s substantive belief in the correctness of the rule. In addition, it tells us that our perception of that process is shaped by a number of factors, including voice (or participation), neutrality, equality, dignity, and trust. When we perceive such values to be fulfilled in the course of rule promulgation and administration, the research suggests, we are more likely to comply with the rule. When they are not, we are less likely to comply with the rule voluntarily.

This research has important implications for the relationship between ADR and the rule of law, both with respect to how laws are made—that is, the creation of the rule of law—and how disputes arising under those laws are resolved.

With respect to law-making, it tells us that the more rule-making processes incorporate procedural justice values, the more likely that those who are subject to the rule will be likely to comply with it voluntarily, thus reducing the costs of enforcing the law and increasing its legitimacy. We see just such results with negotiated rule-making, for example, where government agencies and interested parties come together to establish regulatory policies from the bottom up rather than a top-down process of rule-making by government fiat. Other civic engagement processes that provide for community participation and buy-in, such as town halls and study circles, see similar benefits in terms of compliance and legitimacy.

With respect to dispute resolution, the research suggests that procedural values should also be embedded in the processes by which disputes arising under the law are resolved. For the mainstream of the rule of law—traditional governmental adjudication—these procedural values may provide a concrete way to measure whether courts are acting in ways that promote or frustrate the rule of law. If courts eschew voice and dignity in the haste to process cases, for example, the research suggests the result is likely to be less compliance and legitimacy, to the likely detriment of the rule of law as a whole.

But as the dispute resolution field well knows, traditional governmental adjudication is only one form of dispute resolution, and the law rarely requires its employment. Despite the concerns raised by alternative processes, using alternative forms of dispute resolution that are permitted by law is not inherently inconsistent with the rule of law. To the contrary, when the law
permits or at least does not preclude the use of alternative means of resolving disputes, then its use can only be seen as compatible with the rule of law. Doing what the law permits is the essence of the very freedom that the rule of law in part strives to secure.

**How, Not Whether**

In my view, it is not the mere use of ADR that threatens the rule of law. Rather, the danger lies in how ADR is implemented because even nonlegal processes like ADR are still inextricably tied to the rule of law. Statutes and court and administrative rules in the United States, for example, authorize the use of mediation in judicial and administrative programs. Contract law permits the enforcement of mediated settlement agreements, and law helps to ensure the integrity of the process by providing rules to protect the confidentiality of mediation communications. Arbitration, too, relies on law to enforce agreements to arbitrate as well as final arbitral awards, and depends on courts to decide the many questions that arise under the law of arbitration.

Naturally, how these ADR processes are conducted will reflect on the rule of law that provides their critical support, much as the actions of a child reflect on the parent or the conduct of an employee reflects on her company. When a dispute resolution process is endorsed, authorized, or compelled by the rule of law; when it is facilitated by the rule of law; and, finally, when it is enforced by the rule of law, the capacity exists for the perception of the process to influence the perception of the rule of law that supports it. If the process is good, then its use will redound to the benefit of the rule of law both in perception and in practice, by expanding the number and nature of processes available to resolve disputes that will be supported by the rule of law. If the process is flawed, however, then its use will reflect negatively on the rule of law that supports it, as well as, of course, the process itself.

Again, procedural justice values remain instructive as a touchstone for balancing the tension between ADR and the rule of law. When an ADR process that is supported by the rule of law comports with those values, then it seems plausible to suggest that the process will reflect well on, or enhance, the rule of law by furthering the twin goals of compliance and legitimacy. On the other hand, ADR processes that do not honor procedural values are similarly likely to undermine the rule of law by subverting compliance and legitimacy.

**The Challenge Ahead**

It is one thing to suggest that, when guided by procedural justice values, ADR can strengthen the rule of law by providing more state-sanctioned dispute resolution processes that will relieve the courts of unnecessary cases, will provide the parties with more suitable and satisfying processes and outcomes, and will foster broader compliance with, and confidence in, the rule of law. It is quite another to make all of this happen in practice.

How to do that is the type of question arising out of this relationship that practitioners and scholars alike must address, and with some urgency considering development work is proceeding in real time. In this issue of Dispute Resolution Magazine, we approach the problem from several different perspectives. Michael Moffitt rounds out the readings by describing the relationship between ADR and the rule of law as a symbiotic one in which both need each other to thrive, while Wayne Brazil reminds us why it is more important than ever to grapple with the tension between rights and resolution. Bill Davis, Razili Dutta, and Sergio Zegarra of DPK Consulting give us a similar window into its use in rule-of-law programs sponsored by the U.S. Agency for International Development. James McGuire similarly writes about how mediation is being incorporated into the Chinese legal system. Israeli law professor Michal Alberstein describes how ADR has been used to help facilitate democratic transitions in previously authoritarian regimes, such as South Africa. And Former American Bar Association President Robert Grey describes how ADR has been included in some of the ABA’s rule-of-law initiatives on the ground in developing nations. Together, these articles engage many questions raised by the relationship between ADR and the rule of law—questions that compel even ADR professionals to think outside the box.

**Endnotes**

2. For a fuller discussion, see generally John W. Head, Feeling the Stones When Crossing the River, 7 Santa Clara J. Int'l L. 25 (2010).