Alternative Dispute Resolution (ADR) and Access to Justice: An Introduction

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Let me begin with an interesting quote from Stephen Leacock regarding the utility of university lectures. In 1922, Mr Leacock wrote "[m]ost people tire of a lecture in ten minutes; clever people can do it in five. Sensible people never go to lectures at all".[1]

[Laughter]

Of course, I do not agree with Mr Leacock's statement, but I do think that the real value of any lecture is determined by what the students do with the information that has been imparted to them.[2] The best law students will usually do further research on the subject matter, whereas the average law student will just rely on the notes taken during the lecture.

Very frequently, law courses have a textbook. Furthermore, our lectures are based on previous research, and you will always be able to find further information in books, law journals, and so on. So, if you want to be one of the top law students, I suggest you do your own research.[3]

Let's get started.

I have been asked to talk to you about the notion of Alternative Dispute Resolution (ADR), which is, perhaps, one of the most interesting subjects in the area of law and, without a doubt, a gigantic step forward in relation to the way in which disputes are currently being handled, not only, in England and Wales,[4] but also in several other common law countries.

In common law countries, there has been a change in the paradigm of the traditional justice system. I am referring, in particular, to the civil justice system. The shape of civil justice,[5] as Professor Hazel Genn would put it, is permeated by non-jurisdictional practices, to the extent that courts have become the primary sponsors of alternatives to the old-fashioned system.[6]

As a result, lawyers have been making use of a wide array of mechanisms that are more efficient in terms of time, cost and, more importantly, with respect to the overall performance concerning the parties and their degree of satisfaction with the functioning of these mechanisms.

What I intend to do this evening is to show you that we have moved into a new epoch where the role of lawyers is no longer limited to the execution of court-related activities.[7] Thus, the new generation of lawyers should be in a position to know and sufficiently understand the various forms of decision making,[8] and litigation, to be sure, is only one of them.

It can be argued that the role of lawyers has changed from that of a gladiator to that of a problem-solver.[9] Accordingly, it can be further argued that "the best lawyer" is not necessarily the one who wins most cases that go to trial, but rather the one who is able to provide the best legal advice, that is, the one that better satisfies the clients' interests. As we go through this lecture, I hope to be able to demonstrate the importance of this new approach.

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* This article has been adapted from an evening lecture given at the University of West London, on 8 March 2016.

[1] Stephen Leacock, cited by Kate Exley and Reg Dennick, *Giving a Lecture: From Presenting to Teaching*, 2nd edn (New York: Routledge, 2009) p.1.

[2] See, generally, Sarah French and Gregor Kennedy, "Reassessing the Value of University Lectures" (2016) *Issues and Ideas Paper* 1-15.

[3] For further guidance, see Steven Barkan, Barbara Bintliff and Mary Whisner, *Fundamentals of Legal Research*, 10th edn (Saint Paul: Foundation Press, 2015) pp.1-828.

[4] For an authoritative account of ADR within England and Wales, see Susan Blake, Julie Browne and Stuart Sime, *The Jackson ADR Handbook* (Oxford: Oxford University Press, 2013) pp.1-336.

[5] Hazel Genn, *Judging Civil Justice* (Cambridge: Cambridge University Press, 2009) p.5.

[6] Cf W. G. Hammond, "The Legal Profession - Its Past - Its Present - Its Duty" (1875) 9 *Western Jurist* 1-16.

[7] See, generally, Alan Rau, Edward Sherman and Scott Peppet, *Processes of Dispute Resolution: The Role of Lawyers*, 4th edn (New York: Foundation Press, 2006) 1-1166.

[8] See, generally, Simon Roberts and Michael Palmer, *Dispute Processes ADR and the Primary Forms of Decision-Making*, 2nd edn (Cambridge: Cambridge University Press, 2009) 1-408.

[9] Cf Susan P Sturm, "From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession" (1997) 4 *Duke Journal of Gender Law & Policy* 119-147. See also Carrie Menkel-Meadow, Lawyer as Problem Solver and Third-Party Neutral: Creativity and Nonpartisanship in Lawyering" (1999) 72 *Temple Law Review* 785-810.

The title of my lecture is "Alternative Dispute Resolution and Access to Justice". The topic is timely given that in the last three decades, especially, but not exclusively, in common law countries[10] (such as the US,[11] Canada,[12] England and Wales[13] and Australia,[14] to name just a few) we have seen a remarkable trend towards the utilisation of several different ADR mechanisms within the mainstream of the practice of law.

In England and Wales, for example, the use of ADR mechanisms has been methodically integrated into the civil justice system.[15] Active case management[16] practices allow the courts to encourage the parties utilise an alternative dispute resolution mechanism — where appropriate — and the parties are expected to positively respond to the courts' encouragement.[17]

Within the European Union, for instance, one of the initiatives aimed at ensuring the proper functioning of the internal market has been the development of alternatives to the court system. The idea was enshrined in the Lisbon Treaty, and culminated in a series of different outcomes that are currently visible within member states.[18]

Owing to the limited time available, I will only introduce the topic of ADR and access to justice. I will provide a brief overview of the renewed interest in the use of alternatives to litigation and contextualise this phenomenon within the scope of the relationship between jurisdictional and non-jurisdictional justice.

First, I'll be looking at the notion of ADR and some closely related concepts. Then, I'll be examining the relationship between ADR and access to justice. Finally, I'll touch upon the idea of practising law in the interest of justice. Perhaps we can leave any questions you may have until the end of the lecture.

Let's now look at the notion of ADR and some closely related concepts.

1. Alternative Dispute Resolution and Some Closely Related Concepts

The notion of ADR seems to have been introduced for the first time by Professor Frank Sander of Harvard Law School in a talk entitled "Varieties of Dispute Processing".[19] This talk was given at the 1976 Pound Conference,[20] which has been described as the starting point of the ADR movement.[21]

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[10] William Twining, "Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics" (1993) 56 *The Modern Law Review* 381. See also Pieter Sanders, "ADR in Common Law Countries" in Julio César Betancourt and Jason A. Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (Bloomington: AuthorHouse, 2014) pp.152-161; Ann Brady, "ADR in Developments within the European Union" in Julio César Betancourt and Jason A. Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (Bloomington: AuthorHouse, 2014) pp.229-252.

[11] Frank E. A. Sander, "Alternative Dispute Resolution in the United States: An Overview" in Julio César Betancourt and Jason A. Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (Bloomington: AuthorHouse, 2014) pp.1-15.

[12] Deborah Lynn Zutter, "Incorporating ADR in Canadian Civil Litigation" (2001) 13 *Bond Law Review* 1-18.

[13] Karl Mackie et al., *The ADR Practice Guide: Commercial Dispute Resolution* (London: Butterworths, 2000), 64 and the following.

[14] Tania Sourdin, "ADR in the Australian Court and Tribunal System" (2003) 6 *ADR Bulletin* 1-4.

[15] Loukas A. Mistelis, "ADR in England and Wales" (2001) 12 *American Review of International Arbitration* 167-222.

[16] As for the notion of active case management, see Lord Justice Jackson (ed), *Civil Procedure: The White Book*, vol 2 (London: Sweet & Maxwell, 2016) para 14-7.

[17] See Civil Procedure Rules, Part 1.4(2)(e), stating that "Active case management includes … (e) encouraging the parties to use an alternative dispute resolution(GL)procedure if the court considers that appropriate and facilitating the use of such procedure".

[18] See Julio César Betancourt, "Medios Alternativos de Resolución de Conflictos (ADR) en la Unión Europea y la Fenomenología de su Constitucionalización" (2012) 2 *Arbitraje Revista de Arbitraje Comercial y de Inversiones* 413-435.

[19] Frank E. A. Sander, "Varieties of Dispute Processing" (1976) 70 *Federal Rules Decisions: Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* 111-135.

[20] See Rex E. Lee, "The Profession Looks at Itself—The Pound Conference of 1976" (1981) 3 *Brigham Young University Law Review* 737-740. See also Wayne D. Brazil, "Court ADR 25 Years after Pound: Have We Found a Better Way?" (2002) 18 Ohio State Journal on Dispute Resolution 93-150.

[21] Jethro K. Lieberman and James F. Henry, "Lessons from the Alternative Dispute Resolution Movement" (1986) 53 *University of Chicago Law Review* 427, footnote 17. For an interesting account of the founders of the ADR movement, see Carrie Menkel-Meadow, "Mothers and Fathers of Invention: The Intellectual Founders of ADR" (2000) 16 *Ohio State Journal on Dispute Resolution* 1-37.

In the United States, the Pound Conference has also been described as the beginning of a serious attack on the traditional justice system.[22] Dissatisfaction with the American justice system was clearly not novel at all,[23] but this conference, and in particular, Professor Sander's talk, ended up generating a lot of debate about future policy on dispute processing.

At the Pound conference, Professor Sander spoke, among other things, about the spectrum of alternatives available and, very briefly, about the idea of a "Dispute Resolution Centre"[24] (later called multi-door courthouse),[25] an institution in which disputes would be finally settled or resolved through the most appropriate method(s).

In the 1980s, Professor Sander,[26] together with other scholars,[27] developed the concept of alternative methods of dispute resolution in more detail. During this decade, the initialism "ADR" began to be used in a more or less consistent fashion and, nowadays, it has become part of the legal terminology.[28]

ADR, in simple terms, refers to the idea of exploring and, where appropriate, utilising different means other than litigation, particularly, in those cases where litigation would not seem to be the best option. ADR mechanisms, therefore, are not intended to replace the traditional justice system, but to complement it by developing a more sophisticated *dispute management system*.[29]

This ground-breaking system obviously includes but is not limited to litigation, thereby enhancing the number of options available to the parties. The aim is, as Professor Sander would state it, to reserve the courts for the settlement of those cases that truly require a judicial decision, and to employ the most suitable mechanism(s) for either *settling* or *resolving* those cases in which a judicial decision is not indispensable.[30]

In most common law countries, this new justice system has been systematically put into practice through a series of civil justice reforms.[31] These reforms resulted in the establishment of both "court-referred" and "court-annexed" programmes whereby "litigants" are encouraged to either settle or resolve their disputes without actually having to "litigate" the matter.[32]

In some cases, participation in these programmes is "mandatory", whereas in some other cases participation is "voluntary".[33] The question of mandatory versus voluntary participation in ADR is in itself controversial, and neither approach has indisputably proved to be superior to the other.[34]

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[22] Laura Nader, "Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology" (1994) 9 *Ohio State Journal on Dispute Resolution* 5.

[23] See, for example, Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) 29 *Annual Report of the American Bar Association* 395-417.

[24] Frank E. A. Sander, "Varieties of Dispute Processing" (1976) 70 *Federal Rules Decisions: Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* 131.

[25] See Frank E. A. Sander, "The Multi-door Court House: Settling Dispute in the Year 2000" (1976) 3 *Barrister* 18 and the following. See also Frank Sander and Mariana Hernandez Crespo, "A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse" (2008) 5 *University of St. Thomas Law Journal* 665-674.

[26] See, generally, Frank E. A. Sander, "Alternative Methods of Dispute Resolution: An Overview" (1985) 37 *University of Florida Law Review* 1-18.

[27] Stephen B. Goldberg, Eric D. Green and Frank E. A. Sander, *Dispute Resolution* (Boston: Little Brown, 1985) 1-594

[28] Jonathan Law (ed), *A Dictionary of Law*, 8th edn (Oxford: Oxford University Press, 2015) p.34.

[29] Cf Frank E. A. Sander, "Alternative Methods of Dispute Resolution: An Overview" (1985) 37 *University of Florida Law Review* 1-2; David U. Strawn, *Dispute Management: How to End the Litigation Problem* (New York: iUniverse, 2004) 1-172.

[30] Frank E. A. Sander, "Varieties of Dispute Processing" (1976) 70 *Federal Rules Decisions: Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* 132.

[31] See, for example, Hazel Genn, "What is Civil Justice for - Reform, ADR, and Access to Justice" (2012) 24 *Yale Journal of Law & the Humanities* 397-418.

[32] Susan L. Keilitz, "Alternative Dispute Resolution in the Courts" in Steven Hays and Cole Blease Graham Jr (eds), *Handbook of Court Administration and Management* (New York: Marcel Dekker, 1993), p.384 and the following.

[33] Cf Marc Galanter, "The Vanishing Trial: An Examination of Trial and Related Matters in Federal and State Courts" (2004) 1 *Journal of Empirical Legal Studies* 1 459-570.

[34] See Lucy V. Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin" (1993) 1 *Journal of Dispute Resolution* 1-56. See also Arthur Marriott, "Mandatory ADR and Access to Justice" (2005) 71 *Arbitration* 310.

We don't have time to go into complexities, because this is just an introduction, but the truth of the matter is that participation in ADR is taking place. Interest in ADR is said to have grown over the years.[35] The rationale behind it is that ADR can facilitate access to justice which, according to Professor Sander, has always been one of the main objectives of the ADR movement.[36]

The idea is to engage the parties in mediation, arbitration, or any other non-jurisdictional mechanism that is suitable for them, so that the matter can be either "settled" or "resolved" in a more effective manner. This innovative line of thought has engendered some controversy,[37] but there are more supporters in favour of this proposition than there are detractors.

Throughout this lecture, I have deliberately distinguished between the terms *settlement* and *resolution*, the reason being that, strictly speaking, the concept of settlement — or dispute settlement — is related to the idea of third-party decision making, whereas the concept of resolution — or dispute resolution — has to do with the idea of joint decision making.[38]

Let me give you a couple of examples. Arbitration is a "dispute settlement mechanism" in which an impartial third party called "the arbitrator" puts an end to the dispute by way of an award. Mediation, on the other hand, is a "dispute resolution mechanism" in which a third party called "the mediator" attempts to help the parties to resolve their dispute by means of a negotiated agreement.

This distinction, of course, casts certain doubts on the adequacy of the term "Alternative Dispute Resolution", inasmuch as if we discriminate between the concepts of *settlement* and *resolution* it would also be necessary to separate the notion of "Alternative Dispute Settlement (ADS)" from the notion of "Alternative Dispute Resolution (ADR)".

Professor Carrie Menkel-Meadow, one of the most prominent scholars in the field of ADR, prefers to make use of the expression 'Appropriate Dispute Resolution',[39] in the sense that it embraces a diverse range of problem-solving mechanisms, including both *dispute settlement* and *dispute resolution* techniques.

Nevertheless, it can be said that the expression "Alternative Dispute Resolution" is the one that has gained widespread acceptance worldwide. The "globalization" of the alternative dispute resolution movement is beyond description,[40] and I believe that such an expression is not likely to be replaced in the foreseeable future.

When we talk about ADR mechanisms, however, it is important to remember that there are numerous types of dispute settlement and dispute resolution methods. Arbitration and mediation are probably the most commonly used forms of ADR,[41] but there is a plethora of dispute settlement and dispute resolution devices that can be as useful as arbitration and mediation.

These include, for example, conciliation, construction adjudication, dispute boards, early neutral evaluation, expert determination, mini-trial, negotiation, negotiated rulemaking, neutral expert fact-finding, ombudsman, private judging, summary jury trial, and so on, but it also encompasses tailor-made or systematically-designed dispute settlement and dispute resolution mechanisms.[42]

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[35] Steven Shavell, "Alternative Dispute Resolution: An Economic Analysis" (1995) 24 *Journal of Legal Studies* 1.

[36] Frank E. A. Sander, "Alternative Methods of Dispute Resolution: An Overview" (1985) 37 *University of Florida Law Review* 3.

[37] See, for example, Owen Fiss, "Against Settlement" (1984) 93 *The Yale Law Journal* 1073-1090. See also Austin Sarat, "Alternative Dispute Resolution: Wrong Solution, Wrong Problem" (1988) 37 *Proceedings of the Academy of Political Science* 162-173.

[38] Julio César Betancourt and Jason A. Crook (eds), *ADR, Arbitration, and Mediation: A Collection of Essays* (Bloomington: AuthorHouse, 2014) pp.xxii.

[39] Carrie Menkel-Meadow, "Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution" (2001) 28 *Fordham Urban Law Journal* 979-980.

[40] Cf James Richard Coben, "Intentional Conversations about the Globalization of ADR" (2006) 27 *Journal of Law & Policy* 217-227.

[41] Thomas J. Moyer, "Essay: ADR as an Alternative to Our Culture of Confrontation" (1995) 43 *Cleveland State Law Review* 15

[42] See Nancy H. Rogers and others, *Designing Systems and Processes for Managing Disputes* (New York: Aspen Publishers, 2013) pp.1-496.

It is clear that no single dispute settlement — or dispute resolution — mechanism can be seen as a panacea.[43] When selecting an ADR mechanism, we need to delve into several factors, such as the nature of the dispute, the relationship between the parties, the interests of the parties, the amount in dispute, costs, speed, etc.[44]

In 2010, the Chartered Institute of Arbitrators published a little manual in which the main ADR categories are concisely examined. This publication has been translated into several languages, so I suggest you have a quick look at it at some point, so that you can get an idea of how these mechanisms actually work.[45]

In a more recent publication, one of my colleagues and I shed some light on the notion of Online Dispute Resolution (ODR). It reviews a series of studies on the use of e-negotiation, e-mediation and e-arbitration. ODR is a captivating area of research and, if you are interested in this topic, I recommend that you read this publication.[46]

It can be said that the study of ADR mechanisms is as important as the study of litigation. Why is it important? Well, it is important because the law student who only focuses on litigation as a means of dispute settlement — without regard to other methods — can be deemed as "fully qualified" as the medical student who solely concentrates on the study of surgery as the only option for the treatment of a given disease.

As professor Sander would put it: "[h]ow would you feel about a doctor who suggested surgery without exploring other choices?"[47] Particularly when you know that there are various courses of treatment. This observation is, in a sense, analogous to that of a lawyer who advises his client to litigate the matter without considering other options.

2. The Relationship between ADR and Access to Justice

So let's now turn to the central theme of this lecture, which is the notion of ADR as a means of improving access to justice. The link between the use of alternatives to ligation and the notion of access to justice was first made by Professor Mauro Cappelletti (1927-2004) shortly before Professor Sander's talk was published.[48]

The ADR movement was conceived within the framework of the "access-to-justice project", which is perhaps one of the greatest legacies of Professor Cappelletti.[49] It was the largest research project ever carried out in this area, and the encouragement of alternatives to the court system was a landmark in the changing theoretical conception of access to justice.

Professor Cappelletti spoke of a "broader conception of access to justice",[50] which is not necessarily tantamount to the concept of access to court. The new "access-to-justice approach" called for the exploration of alternatives to the traditional justice system, and it also promoted "imaginative access to justice reforms".[51]

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[43] Cf Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 *Harvard Law Review* 668-684.

[44] Frank E. A. Sander, "Varieties of Dispute Processing" (1976) 70 *Federal Rules Decisions: Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* 118 and the following.

[45] See Julio César Betancourt (ed), *What is Alternative Dispute Resolution (ADR)?* (London: Chartered Institute of Arbitrators, 2010) pp.1-43.

[46] Julio César Betancourt and Elina Zlatanska, "Online Dispute Resolution (ODR): What is it, and is it the Way Forward?" (2013) 79 *Arbitration* 256-264.

[47] Frank E. A. Sander, "Professional Responsibility: Should there be a Duty to Advise of ADR Options?" (1990) 76 *ABA Journal* 50.

[48] See, generally, Mauro Cappelletti, "Access to Justice: Comparative General Report" (1976) 40 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 669-717.

[49] See Mauro Cappelletti, "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement" (1993) 56 *The Modern Law Review* 282-296

[50] Mauro Cappelletti, "Access to Justice: Comparative General Report" (1976) 40 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 704-710.

[51] Mauro Cappelletti, "Access to Justice: Comparative General Report" (1976) 40 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 716.

The sentiments of this broader conception of "access to justice" are, in the words of Professor Sackville, "capable of meaning different things to different people".[52] There is little room for discussion with regard to the meaning of the word "access", but the same cannot be said about the meaning of the word "justice".[53]

The concept of justice has been dissected for centuries,[54] and yet no consensus has been reached as to what it actually means. It would be preposterous to think that, in today's lecture, we will be able to put an end to this long-standing debate, but I will make an attempt to articulate my insights into the meaning of this provocative concept.

At the risk of oversimplifying, I will argue that "justice", *stricto sensu*, is nothing more than a protean concept relating to the maintenance and restoration of social order.[55] In this context, social order may be defined as the pattern of approved behaviour that is necessary to guarantee peaceful coexistence in any civilised society.

In addition, I will also argue that the expression "access to justice", *lato sensu*, is closely linked with the right — or the opportunity — to make use of one or more mechanisms suitable for maintaining and restoring social order in a given case. It should be noted that our vision of access to justice is not restricted to a one-way approach — I'll explain what I mean in a moment.

Access to justice, therefore, in the sense described here, does not equate with "access to court". I don't dispute that, in some cases, "access to court" gives you "access to justice", but if we see justice as an ideal — or as a destination — we will find that there are multiple avenues towards the attainment of justice.

From this point of view, the notion of ADR can be understood as part of a "superhighway" containing several different lanes whose final destination is justice. Thus, the question of how to get to justice can be seen, for the most part, as a matter of choice, and our role is precisely to help our clients to make an informed choice.[56]

For some reason, however, there has always been a tendency to confuse the concept of access to justice with the concept of access to court.[57] Let me explain this. Any dispute could be defined as a perceived violation of a normative expectation of behaviour. Traditionally, lawyers were trained to satisfy the parties' expectations by initiating court proceedings.

Consequently, litigation became a "default mechanism"[58] for imploring a final determination — or decision — concerning the purported violation of a given norm, but research shows that, in common law countries, the vast majority of cases that are taken to court are not disposed of by full litigation.[59] In a great number of them, the parties negotiate an agreement which, I would argue, gives them a sense of closure based upon the recognition that justice has been done.

It would be a mistake to think of negotiated agreements as something contrary to the idea of justice. These agreements are more likely to be voluntarily complied with than a judgment, and what's more these types of agreements are allowed by law, so they are, literally, as legitimate as — if not more legitimate than — a judgment.

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[52] Ronald Sackville, "Access to Justice: Assumptions and Reality Checks" (2002) *Access to Justice Roundtable: Proceedings of a Workshop* 19.

[53] As to the origin of the idea of justice, see Walter Kaufmann, "The Origin of Justice" (1969) 23 *The Review of Metaphysics* 209-239.

[54] See, for example, H. Spens (tr), *The Republic of Plato* (Glasgow: Printed by R. and A. Foulis, 1763) 1-430.

[55] See, for example, Eric Alfred Havelock, *The Greek Concept of Justice: From Its Shadow in Homer to Its Substance in Plato* (Cambridge, MA: Harvard University Press, 1978) 1-382.

[56] See Frank E. A. Sander and Stephen B. Goldberg, "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure" (1994) 10 *Negotiation Journal* 49-68.

[57] Cf Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart Publishing, 1999) 1.

[58] Cf New York County Lawyers' Association Ethics Institute, *The New York Rules of Professional Conduct*, vol. 1 (New York: Oxford University Press, 2011) p.xli.

[59] See Marc Galanter and Mia Cahill, "'Most Cases Settle': Judicial Promotion of Settlement and Regulation of Settlement" (1994) 46 *Stanford Law Review* 1339-1391. See also John G. Farrell, "Administrative Alternatives to Judicial Branch Congestion" (2007) 27 *Journal of the National Association of Administrative Law Judiciary* 3.

The use of negotiation as a means of bringing an end to court proceedings has been labelled by Professor Marc Galanter as "litigotiation".[60] Without deprecating the importance of litigation, Professor Galanter explains that in the United States, for example, lawyers spend more time negotiating than litigating, and the situation is more or less the same in some other common law countries. This suggests that the parties are not necessarily looking for a judgment, let alone that the parties unequivocally associate *justice* with *judgment*.

It is evident that disputes can be either settled or resolved without having to go to court, and our legal system enables us to do that. The myth that the parties want "to have their day in court" is based upon the mistaken assumption that litigation is the only way to tackle their problems but, in most instances, it simply sets the scene for an agreement to be reached.

Litigation is a time-consuming exercise that, in some cases, has devastating consequences for the parties, not only financially, but also emotionally and even physically.[61] Therefore, from the parties' perspective, litigation is far from exciting and, therefore, no sensible person would ever be looking forward to having a day in court.

I am not, in any way, calling into question the value of litigation. Before I became a full-time researcher, I was actually a litigator. I was also an Assistant Professor of Civil Litigation, and I passionately taught my students how to succeed in court. The very idea of bringing cases to court or the notion of settling disputes by means of litigation, therefore, is not necessarily anachronistic.

Litigators represent disputes as "cases",[62] and no doubt there are certain cases that are expected to be brought to court. These cases are supposed to be decided by the state in exercise of its "jurisdictional power"[63] but, in most situations, the parties can employ other mechanisms to either settle or resolve their disputes. I say "in most situations" because there are certain matters that, for public policy reasons, can neither be settled nor resolved out of court.[64]

In light of the above, one could make a distinction between *jurisdictional justice* and *non-jurisdictional justice*. In essence, both concepts are inextricably linked with the idea of maintaining or restoring social order. The former refers to the idea of administering justice through the use of litigation, whereas the latter concerns the pursuit of justice throughout different means other than litigation.

Social order is a reasonable aspiration, and our legal system has been designed to achieve such a goal.[65] The traditional justice system is a fundamental part of any civilised society, but the truth of the matter is that it cannot cope with the countless number of disputes that arise in our society. For this reason, we have to make sure that the civil justice system is used in an intelligent manner.

We cannot continue to assume that litigation is the only way.[66] The indiscriminate use of courts can be detrimental to the future of our traditional justice system. Judicial congestion, together with the vicissitudes of this undesirable phenomenon, may be the end result of an abhorrent predisposition to litigate, and we lawyers are "partly" to blame for this.

I say "partly" because the number of cases that can be lawfully taken to court within the ambit of the civil justice system,[67] as Professor Hazel Genn has pointed out, is practically infinite. Neither policy makers nor lawyers seem to have developed a systematic criterion as to what needs — or does not need — to be decided in court.

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[60] Marc Galanter, "Worlds of Deals: Using Negotiation to Teach about Legal Process" (1984) 34 *Negotiation and Legal Process* 268-276.

[61] Cf David Trubek and others, "The Costs of Ordinary Litigation" (1984) 72 *UCLA Law Review* 72-127. See also Warren E. Burger, "Isn't There a Better Way?" (1982) 68 *American Bar Association Journal* 275.

[62] Simon Roberts and Michael Palmer, *Dispute Processes ADR and the Primary Forms of Decision-Making* (Cambridge: Cambridge University Press, 2005) 79.

[63] As for the notion of jurisdictional power, see Julio César Betancourt, "Understanding the 'Authority' of International Tribunals: A Reply to Professor Jan Paulsson" (2013) 4 *Journal of International Dispute Settlement* 227-244.

[64] See Tony Marks and Julio Cesar Betancourt, "Rethinking Public Policy and Alternative Dispute Resolution: Negotiability, Mediability and Arbitrability" (2012) 78 *Arbitration* 24.

[65] Cf Lawrence Frank, "What is Social Order?" (1944) 2 *ETC: A Review of General Semantics* 29-37.

[66] Cf Carrie Menkel-Meadow, "When Litigation Is Not the Only Way: Consensus Building and Mediation As Public Interest Lawyering" (2002) 10 *Journal of Law & Policy* 37-61.

[67] Hazel Genn, "Understanding Civil Justice" (1997) 50 *Current Legal Problems* 160.

Strategic use of litigation (in particular) as well as dispute settlement and dispute resolution mechanisms (in general) presupposes a new mindset, but it also demands an additional set of skills.[68] ADR has become a new discipline. The literature is so vast that substantial effort would be needed to identify, survey and digest the most relevant information.

That's why I disagree with Mr Leacock's statement that sensible people never go to lectures at all, since without "the right guidance" it would be quite difficult to know where to start. I say "the right guidance", because there are hundreds of courses offered under the title of "Alternative Dispute Resolution", but what is actually taught in these courses is something rather different.

To conclude, let me now touch upon the idea of practising law in the interest of justice.

3. Practising Law in the Interest of Justice and some Concluding Remarks

Professor Menkel-Meadow has written extensively about the ways in which we might teach ADR, and I would like to think — after having read some of her publications[69] — that, when I teach ADR, I am doing the right thing, that is, to teach the new generation of lawyers to practise in the interest — or towards the achievement — of justice.

To practise in the interest of justice is to do 'with the possibilities of achieving justice … in a variety of different ways'.[70] To practise in the interest of justice is simply to appreciate that, in some cases, social order may be maintained and restored through coercive and non-coercive mechanisms. It is merely to recognise that there are different paths to justice.

I hope that my simile of the "superhighway" will give you an idea of what this new approach involves. Because this room is full of good law students, I also hope that, after this lecture, you will be doing further research into the many ways in which justice can be done. I further hope that, in the near future, you will all be practising law in the interest of justice.

I am convinced that the new generation of lawyers can be equipped to make better use of the civil justice system. I am also convinced that, sooner or later, lawyers will be able to provide their clients with more accurate information concerning litigation, ADR mechanisms, and the best access-to-justice route.

It has been a real pleasure to address you all this evening. Thank you very much for listening to me, and I look forward to answering any questions you may have.

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[68] See John Lande and Jean R. Sternlight, "The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students to Real World Lawyering" (2010) 25 *Ohio State Journal on Dispute Resolution* 251.

[69] For free access to some of Professor Menkel-Meadow's scholarly papers, visit her SSRN's webpage at <http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=98428> (last accessed 25 July 2016).

[70] Carrie Menkel-Meadow, "Peace and Justice: Notes on the Evolution and Purposes of Legal Processes" (2005) 94 *The Georgetown Law Journal* 554.