

Transplanting an ADR-Centric Model of Dispute Resolution From the Anglo-American Legal System to the Civil Law System: Challenges, Limitations, and Proposals

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Abstract

The ADR movement, as we know it today, developed from the United States in the 1960s and 1970s and expanded first in countries that share the same Anglo-American legal tradition, mainly England, Canada, Australia, and New Zealand. Today, the ADR model developed by this movement has been embraced worldwide by both Common Law and Civil law countries. The success of this model in Civil Law countries remains, however, a challenge. Comparing the development of ADR in countries of the Anglo-American legal tradition and those of civil law tradition, this article identifies and studies four sources of these challenges: (1) lack of overall assessment of the civil law system to identify which problems could be addressed by legal and procedural reforms and which ones could be solved by the introduction of ADR, (2) introducing ADR in isolation rather than approaching it as one of the solutions in a broader, coherent and complementary reforms of the entire legal system, (3) transplanting ADR mechanisms without reshaping and adapting them to fit specific legal and procedural problems of the country; and (4) failure to identify and strengthen elements of the civil law system that can support ADR mechanisms. It also proposes some solutions to address these challenges and build effective ADR mechanisms in civil law countries.

I. INTRODUCTION

Alternative Dispute Resolution (ADR), as a procedure for settling disputes by means other than judicial determination, was known and practiced in many communities worldwide as far back as 1800 BC.¹ However, its entry and recognition in the mainstream justice system started in the 1960s and 1970s when the American legal profession recognized it as valuable and recommended its broad practice.² Following this endorsement, ADR evolved mainly to refer to arbitration, court-annexed arbitration, mediation, med-arb, mini-trials, early neutral evaluation, judicial settlement conferences, negotiation, and summary jury trials.³

The growth and acceptance of ADR in justice systems outside the United States followed a noticeable pattern: the first wave of countries to incorporate ADR mechanisms was made of countries sharing a similar Anglo-American system as the United States, with Canada, Australia, New Zealand, and the United Kingdom taking the lead.⁴ The second wave includes civil law tradition countries with a solid rule of law culture.⁵ These countries, especially those in Europe, were introduced to ADR by academia⁶ and institutions like

¹ JEROME T. BARRETT WITH JOSEPH P. BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT* xxv (2004).

² See Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 FLA. L. REV. 1, 1 (1985); see also Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93 (2002); see also Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 424 (1986).

³ See generally SUSAN BLAKE, JULIE BROWNE & STUART SIME, *A PRACTICAL APPROACH TO ALTERNATIVE DISPUTE RESOLUTION* (5th ed. 2018); see also JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* (4th ed. 2013).

⁴ See generally WORLD BANK GRP., *ALTERNATIVE DISPUTE RESOLUTION GUIDELINES* (2011).

⁵ The use of civil law legal tradition or common law legal tradition should be understood in general terms. The author acknowledges that although countries may be categorized in these broader legal traditions, it is hard to find a country that is purely common law or purely civil law as most have evolved to incorporate some elements from the other system, and vice versa.

⁶ See Nadja Alexander, *What's Law Got to Do with It: Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, 13 BOND L. REV. 1, 7 (2001).

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the European Union.⁷ The third and last wave of the ADR movement comprises transitional countries of either civil or common law legal systems. This last wave found its force from economic and development programs funded by the World Bank and other development organizations and agencies.⁸

Today, the American ADR model's worldwide acceptance in both civil and common law legal systems has transformed the debate from whether to embrace these mechanisms to how these systems can be more effectively incorporated into the mainstream justice system.⁹ The growth of ADR around the world has, however, also revealed that some legal systems are more fertile for ADR than others. While ADR had a soft landing and is today on a smooth ride in the first wave ADR countries,¹⁰ it experienced a hard fall and is still on

⁷ See Christian Duve, *European ADR: Commission's "Green Paper" Promotes Discussion, Harmonization*, 9 DISP. RESOL. MAG. 10, 10 (2003). With regard to steps taken by the EU and on certain aspects of mediation in civil and commercial matters, see Council Directive (EC) 2008/52, 2008 O.J. (L 136) 3. On alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, see Council Directive (EU) 2013/11, 2013 O.J. (L 165) 63. On online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, see Council Regulation (EU) 524/2013, 2013 O.J. (L 165) 1.

⁸ See generally James Michel, *Alternative Dispute Resolution and the Rule of Law in International Development Cooperation*, (World Bank, Working Paper No. 62096, 2011), <http://documents1.worldbank.org/curated/en/480671468340288039/pdf/620960WP0J0D01200public00BOX358362B.pdf>; see also Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law – Lessons From Abroad*, 56 DEPAUL L. REV. 569, 573–74 (2007); see also Cynthia Alkon, *Lost in Translation: Can Exporting ADR Harm Rule of Law Development?*, 2011 J. DISP. RESOL. 165, 166 (2011); see also SCOTT BROWN ET AL., *ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS' GUIDE* (1998); see also LUKASZ ROZDEICZER & ALEJANDRO ALVAREZ DE LA CAMPA, *ALTERNATIVE DISPUTE RESOLUTION MANUAL: IMPLEMENTING COMMERCIAL MEDIATION* (2006).

⁹ See W. Gottwald, *Mediation in den USA-ein Wegwiser*, in *MEDIATION IN DER ANWALTSPRAXIS* 221–22 (M.Henssler & Ludwig Koch eds., 2000).

¹⁰ *Infra*. Part III.

a bumpy road in the second¹¹ and third¹² wave ADR countries. The particularity and magnitude of ADR challenges in countries of the civil law tradition have even brought some to conclude that the latter are not well suited to the use of ADR.¹³

This paper examines the development, challenges, and hopes of ADR in civil law tradition countries. Although structured in four chapters, it is divided in two key parts. The first part analyzes critical factors that contributed to making ADR successful in the United States and in the first wave ADR countries. Second, it assesses how lessons from these countries can help in the ongoing efforts to develop effective and efficient ADR mechanisms in civil law countries.

II. ADR AND THE BROADER REFORM OF THE ANGLO-AMERICAN LEGAL SYSTEM

A. *THE POUND CONFERENCE AND THE REVOLUTION OF THE AMERICAN LAW*

In 2016–2017 the International Mediation Institute launched and conducted in different countries a series of conferences under the umbrella name of “Global Pound Conference.”¹⁴ For some ADR community members,

¹¹ See Tatjana Zoroska Kamilovska, *Privatization of Civil Justice: Is It Undermining or Promoting the Rule of Law?*, 2020 ACCESS TO JUST. EUR. 34, 38 (2020) (“It should not be neglected that in many countries, there is a great cultural and economic resistance to the promotion and use of ADR. Indeed, many countries so far are facing the failure to make ADR familiar to the public and culturally normal.”). For analysis of the following countries that use civil law legal systems—Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, and Switzerland—see REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS (Felix Steffek & Hannes Unberath eds., 2013). For analysis on the state of mediation in Benin, Brazil, Lebanon, Luxemburg, Kazakhstan, Mexico, Portugal, Russia, Slovenia, and Ukraine, see NEW DEVELOPMENTS IN CIVIL AND COMMERCIAL MEDIATION: GLOBAL COMPARATIVE PERSPECTIVES (Carlos Esplugues & Louis Marquis eds., 2015).

¹² See generally Don Peters, *It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers’ Resistance to Mediating Commercial Disputes*, 9 RICH. J. GLOBAL L. & BUS. 381 (2010); see also Alexander, *supra* note 6.

¹³ See generally Alain Lempereur, *Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education*, 3 HARV. NEGOT. L. REV. 151 (1998).

¹⁴ For more on this Global Pound Conference Series, see GLOBAL POUND - INTERNATIONAL MEDIATION INSTITUTE, <https://imimediation.org/research/gpc/> (last visited Mar. 29, 2021).

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this may have been their first formal introduction to Pound. For most, however, especially in the United States' legal community, Pound was already a household name. Two impactful conferences had already been named after him: the 1906 and the 1976 Pound Conferences.

Although some books on the history of ADR barely mention the first "Pound Conference" of 1906,¹⁵ those most familiar with it credit it to be the "Big Bang" moment of the ADR movement as we know it today.¹⁶ This Conference was not about ADR. It was rather a meeting about law and the legal profession; an ordinary 29th Annual Convention of the American Bar Association (ABA) held in St. Paul, Minnesota, on August 29th, 1906, for lawyers, judges, and legal scholars, with no ADR on its agenda. What made it extraordinary was the keynote address entitled "The Cause of Popular Dissatisfaction with the Administration of Justice," delivered that day by a young dean of the University of Nebraska Law School named Roscoe Pound.¹⁷ Pound's 1906 assessment categorized four critical causes of popular dissatisfaction with the American administration of justice.

The first category included causes for dissatisfaction common to all legal systems. Under this heading, he listed (1) the necessarily mechanical operation of rules, and hence of laws; (2) the inevitable difference in rate of progress between law and public opinion; (3) the general popular assumption that the administration of justice is an easy task, to which anyone is competent; and (4) popular impatience of restraint.¹⁸

The second category listed the causes of dissatisfaction peculiar to the Anglo-American legal system. Here, he included (1) the conflict between the individualistic spirit of the common-law and the collective spirit of the present age; (2) the common law doctrine of contentious procedure, which turns litigation into a game; (3) political jealousy, due to the strain put upon the common law legal system by the doctrine of supremacy of law; (4) the lack of general ideas or legal philosophy, so characteristic of Anglo-American legal law, which gives people petty tinkering where comprehensive reform is needed; and (5) defects of forms due to the circumstance that the bulk of common law legal system is still case law.¹⁹

¹⁵ See BARRETT WITH BARRETT, *supra* note 1. This author mentions only the 1976 Pound Conference and makes no mention of the 1906 Conference.

¹⁶ See Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677, 679 (2017).

¹⁷ See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 742 (1906).

¹⁸ See *id.* at 731.

¹⁹ See *id.* at 736.

The third category highlights the causes of dissatisfaction specific to the American judicial organization and procedure. Here, Pound argued that the system of courts in America is archaic in three respects: (1) in its multiplicity of courts; (2) in preserving concurrent jurisdictions; and (3) in the waste of judicial power that it involved.²⁰

The fourth and last category of causes focused on the environment of American judicial administration. In this section, Pound discussed: (1) popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved; (2) the strain put upon law in that it has today to do the work of morals also; (3) the effect of transition to a period of legislation; (4) the putting of American courts into politics; (5) the making of the legal profession into a trade, which has superseded the relation of attorney and client by that of employer and employee; and (6) public ignorance of the real working of courts due to ignorant and sensational reports in the press.²¹

Some have considered the 1906 Pound address as “the most influential paper ever written by an American legal scholar.”²² Others have observed that Pound’s address “struck the spark that kindled the white flame of high endeavor” and radiated “the spirit of resolute progress in the administration of justice.”²³ In explaining the impact of Pound’s assessment, Jay Tidmarsh argued that Pound’s 1906 speech during the twenty-ninth American Bar Association convention,

commenced the most thoroughly successful revolution in American law. The success of the revolution has been so complete that it swept clean lawyers’ collective memory of what it had replaced, obliterated a system that had taken centuries to construct, killed off an entire vocabulary, and inverted the way in which every lawyer—every person, really—thinks about the law.²⁴

²⁰ *See id.* at 742.

²¹ *See id.* at 747–48.

²² WARREN BURGER ET AL., *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE*, PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 7 (A. Leo Levin & Russel R. Wheeler eds., 1979).

²³ John H. Wigmore, *Roscoe Pound’s St. Paul Address of 1906*, 20 J. AM. JUD. SOC’Y 176, 176 (1937).

²⁴ Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 513 (2006).

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Immediately after this conference, attendees shared a mutual conviction to act on issues highlighted by Pound.²⁵ Pound himself spearheaded most reforms. Starting with criminal law reform, Pound founded the American Institute of Criminal Law and Criminology (AICLC) in 1909.²⁶ This institute had an objective “To further the scientific study of crime, criminal law, and procedure, to formulate and promote measures for solving the problems connected therewith, and coordinate the effort of individuals and organizations interested in the administration of certain and speedy justice.”²⁷ Also, under Pound’s influence, the American Judicature Society was created in 1913, with the mission to coordinate efforts to assist the legal profession in expressing itself effectively in anticipated changes in courts and procedure.²⁸ In 1929, President Hebert Hoover appointed Pound to the National Commission on Law Observance and Enforcement. This Commission conducted the first comprehensive national studies of crime and law enforcement in U.S. history. This Commission addressed issues related to the American criminal justice system, including the causes of crime, police and procedure, and the importance of probation and parole.²⁹ Other vital institutions created under Pound’s influence include, for example, the American Law Institute (ALI), formed in 1923 to promote the clarification and simplification of the United States Common law and its adaptation to changing social needs; and the American Judicature Society, which was created in 1913 to protect the integrity of the American justice system.³⁰

Despite the significant progress with procedural reforms, some causes remained, however hard to address. Most causes in this category were related to the nature of the common law legal system itself and its application in the United States. They include what Pound had called “popular lack of interest in justice, which makes jury service a bore and the vindication of right and law

²⁵ See Barry Friedman, *Popular Dissatisfaction With the Administration of Justice: A Retrospective (and Look Ahead)*, 82 IND. L.J. 1193, 1209 (2007).

²⁶ Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1951 (1995).

²⁷ American Institute of Criminal Law and Criminology, 25 J. CRIM. L. & CRIMINOLOGY 4 (1934).

²⁸ Herbert Harley, *American Judicature Society: An Interpretation*, 62 U. PA. L. REV. 340, 340 (1914).

²⁹ See generally JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY: HERBERT HOOVER’S INITIATIVES 77–102* (1993) (discussing at length the issues in the American criminal justice system that were addressed by the National Commission on Law Observance and Enforcement).

³⁰ See Friedman, *supra* note 25, at 1209–10.

secondary to the trouble and expense involved”³¹ and most importantly, those Pound had articulated in the following statement:

A no less potent source of irritation lies in our American exaggerations of the common law contentious procedure. . . . [I]n America, we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interests of justice. The idea that procedure must, of necessity, be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to “get error into the record” rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations “to affect credit,” which have made the witness stand “the slaughterhouse of reputations.” It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function, which impairs the administration of justice. [...] It grants new trials because by inability to procure a bill of exceptions, a party has lost the chance to play another inning in the game of justice. It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. The inquiry is not, what do substantive law and justice require? Instead, the inquiry is, have the rules of the game been carried out strictly?³²

To address the above-mentioned causes of dissatisfaction would have required a significant change in the American adversarial system. Yet, the American legal community seemed not happy or even ready to tinker with this cherished system at the foundation of the common law tradition. As Chief Justice Warren E. Burger put it, “When Pound challenged the exaggerated

³¹ Pound, *supra* note 17, at 747.

³² Pound, *supra* note 17, at 738–39.

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contentiousness of the adversary system, the aggressive spirit of some American lawyers—the contentiousness that Pound said was perverting the adversary idea into a sporting contest—asserted itself in attacks on Pound.”³³ Many in the American justice system found Pound’s prognosis as a rebellious call against the legal establishment, “a disparagement of the judiciary and the bar[,] and an attack upon the entire remedial jurisprudence of America.”³⁴ The opponents of Pound’s adversarial system’s reform based their opposition on pragmatic and straightforward reasons. These reasons were articulated by Professor David Luban as follows:

[F]irst, the adversarial system, despite its imperfections, irrationalities, loopholes, and perversities, seems to do as good a job as any at finding truth and protecting legal rights. . . . Second, some adjudicatory system is necessary. Third, it’s the way we have always done things. These things constitute a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have.³⁵

Sticking to an untamed adversarial system implied, however, also accepting its consequences: it was a source of the delay, high costs, contentious court proceedings, and limited parties’ control in the justice outcome; sources of popular dissatisfaction Pound had identified. Americans had to live with the adversarial imperative, which Geoffrey L. Davie had defined as

³³ Warren E. Burger, *Agenda for 2000 A.D.—The Need for Systematic Anticipation*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 23, 31 (Leo Levin & Russell R. Wheeler eds., 1979).

³⁴ See William T. Gossett, Bernard G. Segal & Chesterfield Smith, *Foreword*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 7, 7–9 (Leo Levin & Russell R. Wheeler eds., 1979) (“In 1906, the ABA was essentially a gentlemen’s club of very prosperous lawyers. . . . The Association’s activities were largely convivial or addressed to matters of concern only to lawyers. Indeed, the Association’s voice, when heard at all on questions of broader social movement, was far more expressed against than in favor of legal innovation and law reform”) (“the criticism most often leveled at the ABA was that it was too narrowly vocational in its concerns, unduly preoccupied with protection of the privileges and special interests of lawyers”) (explaining that Pound’s argument received a “chilly reception” from the ABA because it was a threat to the establishment).

³⁵ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 92 (1988).

the compulsion which litigants and especially their lawyers have to see the other side as the enemy who must be defeated; the ‘no stone unturned mentality’ is a compulsion to take every step which could conceivably advance the prospects of victory or reduce the risk of defeat. Both, in turn, increase the labour intensiveness and consequently the cost and delay of dispute resolution and, especially as between parties of unequal means, render it unfair.³⁶

There was, therefore, a need for a creative solution that, instead of opposing the adversarial system, could cohabit with and build on it, while also addressing its unwanted consequences. This solution came in 1976 with the Second Pound Conference.

On April 7th, 1976, Warren E. Burger, then Chief Justice of the United States Supreme Court, opened the “National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice” in Minnesota, in the same room Pound made his famous speech, seventy years earlier. In his remarks, Chief Justice Warren E. Burger acknowledged that “if Pound was correct in his analysis that excessive contentiousness impeded fair administration of justice in 1906, I doubt that anyone could prove it less so today.”³⁷ Reiterating the 1906 Pound frustration, Chief Justice Warren E. Burger highlighted the consequences of an untamed adversarial system. He lamented that there is

a widespread feeling that the legal profession and judges are overly tolerant of lawyers who exploit the inherently contentious aspects of the adversarial system to their own private advantage at public expense. The willingness of some of the participants to elevate procedural maneuvering above the search for truth, as Pound said, sends out “the whole community a false notion of the purpose and end of the law.”³⁸

Stressing the purpose of the 1976 Pound Conference, Chief Justice Warren E. Burger highlighted the need for finding “the most satisfactory, the speediest and the least expensive means of meeting the legitimate needs of the

³⁶ Geoffrey L. Davies, *Fairness in a Predominantly Adversarial System*, in BEYOND THE ADVERSARIAL SYSTEM 102, 111 (Helen Stacey & Michael Lavarch eds., 1999).

³⁷ Burger, *supra* note 33, at 30–31.

³⁸ Burger, *supra* note 33, at 30–31; *see also* Lawrence E. Walsh, *The Business of the Courts*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 51, 56–60 (Leo Levin & Russell R. Wheeler eds., 1979).

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people in resolving disputes.”³⁹ He further invited participants to be open-minded “to consideration of means and forums that have not been tried before.” He contributed to this call by proposing that they explore options for minor cases to be handled by non-lawyers, the use of arbitration process, and dealing with such family problems as marriage, child custody, and adoption “outside the formality and potentially traumatic atmosphere of courts.”⁴⁰

The most “out of the box” creative response to Chief Justice Warren E. Burger’s call for innovative solutions came from Frank Sander, then Professor of Law at Harvard University. His paper entitled *Variety of Dispute Processing*, presented at the 1976 Pound Conference, is “widely credited for kicking off the modern ADR movement.”⁴¹ In his presentation, Sander chastised lawyers and law teachers for being “too single-minded when it comes to dispute resolution.”⁴² Sander proposed other forms of adjudication, such as arbitration and administrative process, as alternatives to courtroom litigations. He proposed a scale of dispute resolution based on external involvement. On a decreasing external involvement from adjudication, he proposed mediation, conciliation, negotiation, and avoidance.⁴³ Sander did not just advocate for incorporating ADR in the formal justice system; he also highlighted their positive potentials with regard to the relationship between disputants,⁴⁴ cost-effectiveness,⁴⁵ and speed.⁴⁶

As discussed in the next chapter, the post-second Pound Conference period invested in proving to the American legal community that Sander’s ADR solutions could address Pound’s concerns. But, before examining the development of ADR in the American formal justice system, let us first explore how other countries in the Anglo-American legal tradition followed a Pound-like assessment to justify their introduction of ADR mechanisms.

B. ADR AND LEGAL ASSESSMENT AND REFORMS IN OTHER

³⁹ Burger, *supra* note 33, at 32.

⁴⁰ Burger, *supra* note 33, at 34.

⁴¹ LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION & LAWYERS*, 26 (5th ed. 2014).

⁴² Frank E. A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65, 67 (Leo Levin & Russell R. Wheeler eds., 1979).

⁴³ *See id.* at 69.

⁴⁴ *Id.* at 74–77 (explaining how settlements reached through negotiation and mediation allow participation, address the root of the dispute, and have “therapeutic effect on the long-term relationship” between parties).

⁴⁵ *Id.* at 78 (“until better data become available one can probably proceed safely on the assumption that costs rise as procedural formalities increase.”).

⁴⁶ *Id.* at 79 (speculating that arbitration may be faster than litigation, but also calling for further studies).

COUNTRIES OF ANGLO-AMERICAN LEGAL TRADITION

Although Pound's 1906 address was about causes of popular dissatisfaction with the administration of justice in the United States, two of the four categories of these causes were not unique to the United States. One is related to causes "inherent to all legal systems," and the other includes "causes peculiar to the Anglo-American legal system." If Pound is correct, this would mean that all countries under the common law system share, to some degree, these two causes.

This section will not examine the above-mentioned causes in all common law countries. It will only focus on England, Canada, Australia, and New Zealand; more specifically, how these countries followed the same approach as the United States in assessing and reforming their respective justice systems before introducing ADR mechanisms

In England, ADR became mainstream in the country's civil justice following the Lord Harry Woolf's Report.⁴⁷ In 1994, the Lord Chancellor appointed Lord Harry Woolf to review the procedures in the civil courts of England and Wales and to recommend solutions that could improve access to justice, reduce the cost of litigation, reduce the complexity of the rules, modernize terminology, and remove unnecessary distinctions of practice and procedure.⁴⁸ Lord Woolf concluded that the "key problems facing civil justice today are cost, delay, and complexity. These three are interrelated and stem from the uncontrolled nature of the litigation process."⁴⁹ Lord Wolf stressed that there is a connection between these problems and the adversarial system and warned that:

without effective judicial control [], the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise, and fairness may have only low priority.⁵⁰

To address these problems, Lord Woolf recommended the adoption of better case management mechanisms, better division of judicial and administrative responsibility, a more practical approach to judiciary deployment, a new structure of courts, the need to use information technology

⁴⁷ See HARRY WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995).

⁴⁸ *Id.* at Introduction.

⁴⁹ *Id.* at 7.

⁵⁰ *Id.*

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as case management tool, new approach on how to deal with small claims, reducing the strong focus on litigants in person, redefining elements in pleadings and statement of cases, and new rules related to discovery, witness statements and experts procedures.⁵¹ In addition to these legal reforms, he recommended using ADR processes “particularly those in the United States, Australia, and Canada.”⁵²

In Australia, although ADR practice may be traced as far back as the 1980s, mainly with the adoption of the 1983 Community Justice Act,⁵³ it was in the 1990s that it was broadened and solidified in the formal justice system.⁵⁴ Australian law critics had long been concerned that legal proceedings were “excessively adversarial and that this produces undue delay, cost, and unfairness in litigation.”⁵⁵ To address this issue, in 1995, the Federal Attorney-General requested the Australian Law Reform Commission (ALRC) to review Australia’s federal adversarial system of litigation and make recommendations on ways to reform and improve it.⁵⁶

In its review, the Commission collaborated with and received inputs from different working groups, including government, academia, courts, litigants, and businesses.⁵⁷ In its conclusion, the Commission avoided changes that would require a non-adversarial federal civil litigation. It instead sought to maintain the adversarial system but give judges a much more active role in managing litigations. One of the thrusts of its final report was the recognition “that civil justice system operates more effectively and efficiently when judges

⁵¹ *Id.* at 223–33.

⁵² *Id.* at 227–28.

⁵³ See Wendy Faulkes & Robyn Claremont, *Community Mediation: Myth and Reality*, 8 AUSTL. DISP. RESOL. J. 177, 177–80 (1997); see also Alexander, *supra* note 6, at 6.

⁵⁴ See generally Tom Altobelli, *Mediation in the Nineties: The Promise of the Past*, 4 MACARTHUR L. REV. 103 (2000) (reviewing the growth of ADR in the 1990s in Australia).

⁵⁵ Austl. L. Reform Comm’n, *Rethinking the Federal Civil Litigation System*, ALRC IP 20, 6 (1998), <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/lawreform/ALRCIP/1998/20.html>.

⁵⁶ See Austl. L. Reform Comm’n, *Review of the Adversarial System of Litigation*, 1–5 (1999), <https://www.alrc.gov.au/wp-content/uploads/2019/08/DP62.pdf> (the details of these 1995 terms of reference for this review were amended in 1997).

⁵⁷ See Lucille M. Ponte, *Reassessing the Australian Adversarial System: An Overview of Issues in Court Reform and Federal ADR Practice in the Land Down Under*, 27 SYRACUSE J. INT’L & COM. 335, 338–39 (2000) (explaining that these working groups produced papers that were subject to discussion and review by both the public and experts, and then the recommendations generated from this process were in turn subject to further public comments).

take a more active role in managing litigation before them.”⁵⁸ In addition to these and other judicial organization and procedural changes, the Commission proposed adopting and adapting ADR mechanisms in the Australian civil justice system. In extolling the benefits of ADR, the Commission emphasized those that address the dissatisfaction with the adversarial approach. For example, the Commission found that ADR (1) is “a less intimidating process in which the parties have control over the decision and can explore a range of options;” and (2) provides an “opportunity for disputants to express their interests without fear that their legal rights will be compromised, or their relationships jeopardized by the process of dispute resolution.”⁵⁹ The Commission also highlighted ADR’s benefits in enhancing parties’ access and participation in resolving disputes and reducing costs and delays in court and tribunal proceedings.⁶⁰ While cautioning against using ADR as a panacea for all ills of litigation, the Commission highly recommended broader use of ADR in the Australian civil justice system.⁶¹

Like Australia, Canada also had a history of promoting the settlement or resolution of disputes outside the court system. However, the integration of ADR into civil litigation procedures was only formalized in the 1990s following the report of the Canadian Bar Association.⁶² Concerned with the problem of excessive costs and delays associated with trial-based litigation,⁶³ the Canadian Bar Association (CBA) created in 1995 the System of Civil Justice Task Force with the mandate “to inquire into the state of the civil justice system in Canada and to develop strategies and mechanisms to assist in the continued modernization of the system.”⁶⁴ In its report, the CBA lamented the Canadian legal community’s resistance to moving away from its traditional adversarial system and warned about the consequences of such a resistance. As the CBA put it:

⁵⁸ Austl. L. Reform Comm’n, *Managing Justice: A Review of the Federal Civil Justice System*, 219 ALRC REP. 89, 219 (2000), <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC89.pdf> [hereinafter *Managing Justice*].

⁵⁹ Austl. L. Reform Comm’n, *ADR: Its Role in Federal Dispute Resolution* ALRC IP 25, ¶ 2.9 (1998), <http://www.austlii.edu.au/au/other/lawreform/ALRCIP/1998/25.html>.

⁶⁰ *Id.* at ¶ 2.51.

⁶¹ *Managing Justice*, *supra* note 58, at 426–31.

⁶² Barbara Billingsley & Masood Ahmed, *Evolution, Revolution and Culture Shift: A Critical Analysis of Compulsory ADR in England and Canada*, 45 COMM. L. WORLD REV. 186, 191 (2016).

⁶³ *Id.* at 186.

⁶⁴ CAN. BAR ASS’N, SYSTEMS OF CIVIL JUSTICE: TASK FORCE REPORT iii (1996).

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While the adversarial approach is central to the civil justice system and should remain a key feature in the future, a preoccupation with gaining advantage through an adversarial approach too often has the result of displacing substantive communication, common sense, and a problem-solving orientation, all of which assist in resolving disputes.⁶⁵

The CBA also acknowledged that despite multiple efforts to make the Canadian civil justice system relatively cost-effective and speedy, there remained issues of costs, delays, and access.⁶⁶ The CBA concluded that alleviating these problems while maintaining the adversarial system required a new vision of a multi-option civil justice system. The enhanced civil justice system envisaged by the CBA Task Force required a fundamental reorientation, away from the traditional adversarial approach and toward dispute resolution, and an increased emphasis on a more generalized dispute resolution system.⁶⁷

Like in Australia and Canada, New Zealand had long practiced some ADR forms, though it was limited in some communities and regulated by scattered laws.⁶⁸ However, its formal entrance and general application in the New Zealand legal system became prominent in the 1990s due to studies and reports advocating its use to solve civil justice litigants' problems. Some of these studies include a courts discussion paper entitled "Courts Referral to Alternative Dispute Resolution: A Proposal to Extend the Use of Alternative Dispute Resolution," which was published in 1997;⁶⁹ The Law Commission Report of 2004 entitled "Delivering Justice for All: A Vision for New Zealand Courts and Tribunal;"⁷⁰ and the report entitled "Alternative Dispute Resolution: General Civil Cases," which was commissioned by the Ministry of Justice in 2004.⁷¹ All of these documents associated the problem of costs, delay, complexity, and feeling of a detached justice with the adversarial

⁶⁵ *Id.* at 18.

⁶⁶ *Id.* at 11.

⁶⁷ *Id.* at 6.

⁶⁸ For more details on the history of ADR in New Zealand, see Grant Hamilton Morris, *Towards a History of Mediation in New Zealand's Legal System*, 24 *AUSTRAL. DISP. RESOL. J.* 17, 83, 86–101 (2014).

⁶⁹ N.Z. L. Soc'y, Response to Discussion Paper *Referral to Alternative Dispute Resolution* in Department for Courts *Submissions to Courts Consultative Committee on Court Referral to Alternative Dispute Resolution* (January 1997).

⁷⁰ See generally N.Z. L. Reform Comm'n, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, NZLC R85 (March 2004) [hereinafter *Delivering Justice for All*].

⁷¹ K. Saville-Smith & R. Fraser, *Alternative Dispute Resolution: General Civil Cases*, CTR. FOR RSCH. EVALUATION & SOC.ASSESSMENT (2004).

system.⁷² Still, while most of these studies recommended a wide use of ADR in New Zealand's civil justice, some warned that ADR could also be a source of delays and high costs if not well-formulated and -applied.⁷³

The above analysis of the introduction of ADR in New Zealand, Australia, Canada, and England leads to three important conclusions. First, a thorough assessment of each country's civil justice preceded and informed the introduction of ADR. Second, just like Pound conferences, these analyses concluded that there is a relationship between the adversarial system and the problems related to delay, costs, uncertainty, and the injustice resulting from deciding cases upon points of practice that affect parties in civil justice. Third, and as detailed in the next section, in those countries, ADR was introduced as part of broader civil justice reforms that also touched judicial organization and procedure laws.

III. ADR MECHANISMS CRAFTED TO ADDRESS SPECIFIC IDENTIFIED PROBLEMS OF COMMON LAW SYSTEM

ADR is often defined in opposition to formal justice or adjudication.⁷⁴ However, the fact that the ADR movement started in the United States and developed first in countries of the Anglo-American legal system seems to have narrowed its focus on "adversarial" justice or adjudication. This is illustrated in the emphasis of ADR as a "form of non-adversarial justice;" an approach that places ADR in the same family as other non-adversarial systems, including civil law systems.⁷⁵

This chapter analyzes how the focus on ADR as a form of non-adversarial justice in opposition to the Anglo-American legal system as an adversarial system, has not only contributed to defining ADR as we know it today but has also shaped its development in the broader legal reform seeking to be more cost and time effective. To address this question, this chapter will

⁷² See *Delivering Justice for All*, *supra* note 70, at 6 (arguing "our consultations and in submissions, people frequently expressed the belief that delay and disadvantage could be swept away if we moved from an adversarial system"); see also Saville-Smith & Fraser, *supra* note 71, at 27 n.8 (arguing "disputants often find these difficult to articulate clearly but in sum they reflect a discomfort with the perceived formality of the court and fears that they might not represent themselves well within what they see as an adversarial environment").

⁷³ See *Delivering Justice for All*, *supra* note 70, at 86 (explaining that "the Law Commission's work has highlighted some serious concerns about the way the mediation market is developing in New Zealand. Costs seem to be spiraling to levels that are beyond the reach of many people").

⁷⁴ See MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE 87–89 (2009).

⁷⁵ *Id.* at 88.

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examine the development and the shape ADR took as the consequence of the first- and second-Pound Conferences in the United States, the 1995 Woolf's Report in England and Wales, the 1996 Canadian Bar Association Report, and the 1998 and 2000 Australian Law Reform Reports.

A. *ADR IN THE UNITED STATES*

In the United States, the impact of civil procedure reforms undertaken since the First Pound Conference had done little to reduce costs and backlogs in the civil justice system.⁷⁶ For Chief Justice Warren E. Burger, the source of this failure had to do with the American legal community's refusal to reform its adversarial system. In his 1984 annual report to the midyear meeting of ABA, he warned American lawyers that

We Americans are competitive people, and that spirit has brought us to near greatness. But that competitive spirit gives rise to conflicts and tensions.

Our distant forebears moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trial will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood.

Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.⁷⁷

⁷⁶ See Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 889–90 (1991) (“In the half-century since adoption of the Federal Rules of Civil Procedure, the caseload of the federal district courts has increased significantly. The total number of cases filed in the federal courts grew from 33,591 in 1938 to 217,879 in 1990. The total number of weighted civil filings increased from 207 per judgeship in 1955 to 448 per judgeship in 1990. The median length of time from issue to trial increased from 9.1 months in 1955 to 14 months in 1990. Over ten percent of all pending cases are more than three years old. The delays and costs associated with federal civil litigation have fostered cynicism about American justice among members of the bar and the lay public alike”).

⁷⁷ Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984).

This warning and call for action by Chief Justice Warren E. Burger was yet another and probably the last attempt to persuade the American legal community on the need to reform the adversarial system. In the post second Pound Conference, the debate on reforming the adversarial system to address challenges of costs and delay in the administration of American justice was fading away. A growing priority was rather shifting toward finding how ADR could be used as a tool to address these challenges. More effort was therefore invested in following up and implementing solutions generated during the Second Pound Conference. The Task Force created to this end, initiated the debate between ADR and its potential to reduce costs and delay in civil justice.

It was urged at Saint Paul that alternative methods of dealing with disputes, if properly developed and made widely available in a realistic fashion, offered great promise of meeting the needs of claimants and, in the process, providing relief to the courts so that they might be available for litigants with claims which only courts can adjudicate.⁷⁸

Moving beyond debates, this Taskforce proposed setting up Neighborhood Justice Centers to offer various services that include “mediation and other facilities.”⁷⁹ At the same time, the government, courts, and members of the legal profession started warming up to the potentials of ADR and experimenting with ADR mechanisms that better address the issues of cost and delay.

In 1985, the United States Attorney General issued an order recognizing ADR as an alternative to full-scale litigation of disputes involving the government, and as an effective tool to reduce the time and expense of civil litigation.⁸⁰ In 1990 Congress adopted the Civil Justice Reform Act (CJRA). This Act required each federal district court to develop a case

⁷⁸ See A. Leo Levin, Russell R. Wheeler & Roscoe Pound, *New Mechanisms for Delivery of Justice*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 295, 306 (Leo Levin & Russell R. Wheeler eds., 1976).

⁷⁹ *Id.* at 306–07.

⁸⁰ For more details, see letter from Frank W. Hunger, Assistant Attorney General, Civil Division, to Honorable Thomasina Rogers, Chair, Administrative Conference of the United States (Nov. 15, 1994), <https://www.justice.gov/olp/evaluation-civil-division-adr-program> (detailing the Department of Justice’s efforts to implement the administrative Dispute Resolution Act and Negotiated Rulemaking Act of 1990).

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management plan to reduce costs and delay and incorporate ADR.⁸¹ It avoided defining ADR or advocating for any specific ADR mechanism. The choice was left to courts to experiment and develop mechanisms that work for them. The government offered only monetary incentives to support them.⁸² Because judges could easily see the value of enhancing case-management efficiency, they prioritized ADR mechanisms that helped them achieve this goal.⁸³

The evaluation of judicial case management under CJRA conducted in 1996 almost, however, crushed the hope in ADR as a preferred tool in case management and fairness. This evaluation found a negligible impact of ADR on reducing litigation's cost and delay.⁸⁴ It rather found that better management of proceedings shows better results.⁸⁵ Following this evaluation, more investment was directed in improving and assigning ADR mechanisms based on where, when, and under which conditions they can assist case management. Program effectiveness measured such factors as case settlement rates, trial rates, case processing time to disposition, and agreement-making rates became research priority to prove the effectiveness of ADR.⁸⁶ Still, the lack of a definitive answer to these questions led some researchers to nuance

⁸¹ See generally JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996).

⁸² DONNA STIENSTRA, ADR IN THE FEDERAL DISTRICT COURTS: AN INITIAL REPORT (2011); see also LEONARD L. RISKIN ET AL., *supra* note 41, at 497.

⁸³ Dorothy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. DISP. RESOL. 545, 547–48 (2002).

⁸⁴ See KAKALIK ET AL., *supra* note 81. The evaluation commissioned by the Civil Justice Reform Act in 1996 found little impact of ADR on reducing delay and costs of litigation was not significant. *Id.* at xxx–xxxi. More specifically, it was found that early mandatory arbitration referral did not significantly affect time to disposition, lawyer work hours, or lawyer satisfaction. *Id.* Furthermore, the evaluation provided no strong statistical evidence that the mediation or neutral evaluation programs significantly affected time to disposition, litigation costs, or attorney views of fairness or satisfaction with case management. *Id.*

⁸⁵ . The evaluation found that (1) early judicial management, (2) setting the trial schedule early, (3) reducing time to discover cutoff, and (4) having litigants at or available on the telephone for settlement conferences showed consistent statistically significant effects on time to disposition. James S. Kakalik et al., *Just, Speedy, Inexpensive? An Evaluation of Judicial Case Management under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 44 (1997). With regard to costs (Lawyer work hours), the evaluation found lawyer work hours appear to be driven predominantly by factors other than judicial case management policy and that only judicial management of discovery was significantly associated with reduced lawyer work hours. *Id.* With regard to attorney satisfaction and views on fairness, the evaluation found that although a higher degree of case management is associated with higher lawyer satisfaction, there were no consistent statistically significant effects of case management on attorney views of fairness. *Id.*

⁸⁶ See Noce, *supra* note 83, at 548.

how ADR methods are assessed. They argued that, instead of asking whether ADR saves courts and litigants time and money, which assumes that all ADR programs are the same, the question should be under which circumstances ADR could save time and money.⁸⁷

Following the CJR evaluation, ADR methods that help produce agreements that settle cases became priorities for courts. This preference was motivated by the fact that these methods save money and time for courts. Mediation ranked higher in this category, followed by early neutral evaluation, then mini-trials and summary jury trials.⁸⁸ Even in the same category of ADR methods, the higher the impact on saving money and time, the more preferred they were with courts. For example, although mediation ranked higher among ADR methods, the number of districts that authorized the judge to order mediation without party consent was four times higher than those that authorized the form of mediation where consent of all parties is needed.⁸⁹

The focus on case management should not, however, be understood to mean that other benefits such as preserving parties' relationships and facilitating access to justice are insignificant as ADR benefits. It rather means that, as Della Noce observed, "while the goals of many court-annexed programs were expressed in terms of a broad array of social value, the reality was that the justice system's goal of case management efficiency often prevailed over the most more 'humanistic goals embraced by the broader alternative dispute resolution movement' when conflicts arose, and prioritization was required."⁹⁰

After the CJRA sunset, Congress passed the 1998 ADR Act that went beyond encouraging ADR use.⁹¹ This Act mandated federal trial courts to make ADR programs available to litigants. In declaring the policy behind this Act, Congress stressed its conviction that (1) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, mini-trials,

⁸⁷ Jennifer Shack, *Mediation Can Bring Gains, but Under What Conditions?* 9 DISP. RESOL. MAG. 1, 1 (2003).

⁸⁸ See STIENSTRA, *supra* note 82 (showing the number of District Courts in which each type of ADR procedures is authorized as follows: mediation (63%), settlement conference (38.9%), Early Neutral Evaluation (24.5%), Summary Jury trial (11.7%); *see also* Frank Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 10–29 (2006) (showing that Mediation, ENA, mini trial, and summary jury trial rank high on speed and cost).

⁸⁹ STIENSTRA, *supra* note 82, at 500.

⁹⁰ *See* Noce, *supra* note 83, at 550.

⁹¹ Alternative Dispute Resolution Act of 1998, Pub. L. No. 105–315, 112 Stat. 2993 Pub. L. 105–315 (Oct. 30, 1998), <https://www.adr.gov/adrguide/ADRAof1998-US-Statutes-at-Large.pdf> (last visited July 12, 2021).

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and voluntary arbitration, may have the potential to reduce the large backlog of cases; and that (2) alternative dispute resolution, when supported by the bench and bar and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.⁹²

By the end of the 1990s, most states had replicated what the federal government was doing, creating state offices charged with promoting ADR use.⁹³ Also, the ABA created its section of dispute resolution, with a mission “to provide its members and the public with creative leadership in the dispute resolution field by fostering diversity, developing and offering educational programs, technical assistance and publications that promote problem solving and encourage excellence in the provision of dispute resolution services.”⁹⁴ Simultaneously, law schools started incorporating ADR in their curriculum, and American corporations started adopting it as their preferred dispute resolution tool.⁹⁵

B. IN ENGLAND, CANADA, AUSTRALIA, AND NEW ZEALAND

Some American litigants prefer adjudication because it is adversarial, while others prefer ADR because it is not adversarial. The wider the gap between them, the better they can coexist, with one acting as alternative to the other.⁹⁶ Unlike the U.S., however, where the choice was understood to be between softening its adversarial litigation or developing ADR as a non-adversarial alternative, other countries using the Anglo-American system—namely England, Canada, Australia, and New Zealand—took a different

⁹² See *id.*, at § 2.

⁹³ See BARRETT WITH BARRETT, *supra* note 1, at 239.

⁹⁴ BARRETT WITH BARRETT, *supra* note 1, at 219.

⁹⁵ See generally AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992); see also John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247 (2010).

⁹⁶ See generally Kwok Leung, *Some Determinants of Reactions to Procedural Models for Conflict Resolution: A Cross-National Study*, 53 J. PERS. & SOC. PSYCHOL. 898 (1987) (arguing that as Americans continued to warm up to ADR, they still preferred the adversarial system to any other form including inquisitorial. This study found that Americans favored mediation and adversary adjudication equally and strongly preferred both to inquisitorial adjudication.).

path.⁹⁷ These countries opted for softening their adversarial justice, making ADR an alternative for those still feeling threatened by even the softer adversarial litigation, and an opportunity for the state to broaden its civil justice options⁹⁸ as an access-to-justice tool.⁹⁹ In these countries, ADR was also understood beyond its case management benefits.¹⁰⁰

In Australia, instead of being just an alternative to adversarial adjudication, ADR was redefined and repackaged to broadly “mean assisted or appropriate dispute resolution.”¹⁰¹ Unlike the American priority focusing on ADR methods that help produce an agreement that settles the case, the Australian matrix of dispute-resolution processes was broadened, based on each process’s approach and goals. This matrix includes facilitative, advisory, determinative, transformative, and blended processes.¹⁰²

⁹⁷ See, e.g., Burger, *supra* note 33, at 31 (praising England for its recent softening of its adversarial system); see also Suzanne Burn, *The Civil Justice Reforms in England and Wales: Will Lord Woolf Succeed Where Others Have Failed?*, 17 WINDSOR Y.B. ACCESS JUST. 221 (1999) (discussing the impact of the Lord Woolf report).

⁹⁸ See, e.g., John Doyle, *Diminished Responsibility? The Changing Role of the State*, 2 FLINDERS J. L. REFORM 31, 33 (1997) (arguing that instead of calling ADR “alternative” it should be called additional dispute resolution).

⁹⁹ See CHRISTINE PARKER, JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE 31–38 (1999).

¹⁰⁰ Austl. L. Reform Comm’n, *Rethinking the Federal Civil Litigation System*, in 20 AUSTRALIAN L. REFORM COMM’N ISSUE PAPERS 5.1, 5.7–5.8 (1998) (commenting on managerial judging and the adversarial system in Australia) (“The Australian civil litigation system is increasingly a blend of adversarial and non-adversarial elements [and] . . . the trend towards more active intervention by judges in the conduct of litigation is reflected in the development of case management systems, in rules of court that mandate new forms of judicial intervention and by a greater willingness of judges to intervene in particular cases in the interests of court efficiency. This trend is in response to many factors. These factors include financial constraints on the courts and litigants, community and judicial concern about court delays, the growing complexity and volume of civil litigation and better information technology within courts. A stronger management culture may be developing among judges and judicial administrators as it is in other areas of public administration.”); see also *State of Queensland v. JL Holdings Pty Ltd.* (1997) 189 CLR 146, 154 (Austl.) (“Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of the court is the attainment of justice, and no principle of case management can be allowed to supplant that aim.”).

¹⁰¹ NAT’L ALT. DISP. RESOL. ADVISORY COUNCIL, DISPUTE RESOLUTION TERMS 4 (2003), https://www.adrac.org.au/_files/ugd/34f2d0_fc316a9a1bf0418eaa7211406ca292e2.pdf.

¹⁰² See *id.* at 6; see also Mary Anne Noone & Lola Akin Ojelabi, *Alternative Dispute Resolution and Access to Justice in Australia*, 16 INT’L J. OF L. IN CONTEXT 108 (2020).

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Canada, like Australia, did not approach ADR as an alternative to adversarial justice. It placed trials and ADR methods on one continuum process that parties can progressively follow in search of a satisfactory resolution to their dispute. The CBA Task Force articulated this approach in the following terms:

“[We] considered and rejected the proposition that access to the courts should be limited by developing criteria to determine which types of disputes should have access and which should be diverted to alternatives. In our view, a preferable approach is to provide a broad array of options for dispute resolution within the court system. Under this approach, trials become an appropriate last step if and when it can be demonstrated that available alternatives have been exhausted. We refer to this as ‘multi-option civil justice.’”¹⁰³

As illustrated above, countries of the first ADR wave softened the confrontational, adversarial procedure and introduced ADR not as alternatives but as additional dispute resolution methods. This resulted in developing new ADR approaches and adapting those imported from the U.S. to fit the local realities. ADR methods were selected and developed not as a principle, but rather on the basis of what works, where, and how.

For example, Australia’s dispute resolution menu includes today, in addition to litigation, seven processes. “These are mediation, shuttle telephone negotiation, informal dispute resolution, informal telephone dispute resolution, investigation, conciliation, and arbitration.”¹⁰⁴ Of these seven methods, conciliation is the most-used process,¹⁰⁵ followed by informal ADR.¹⁰⁶ This is unlike in the U.S., where mediation is considered the most-used ADR method.

Canadian provinces developed and adapted ADR methods based on their needs and priorities. For example, as Zutter highlighted,¹⁰⁷ in Ontario, Rule 24.1 requires that mediation occur within 90 days following the filing of the first statement of defense in any non-family civil action brought in the

¹⁰³ CAN. BAR ASS’N, SYSTEMS OF CIVIL JUSTICE TASK FORCE REPORT 26 (1996).

¹⁰⁴ Lola Akin Ojelabi & Mary Anne Noone, *ADR Processes: Connections Between Purpose, Values, Ethics and Justice*, 35 L. CONTEXT: A SOCIO-LEGAL J. 5, 11 (2017).

¹⁰⁵ To better understand conciliation and its use in Australia, see Elizabeth Evatt, *Conciliation in Australian Law*, 11 SYDNEY L. REV. 1 (1986).

¹⁰⁶ See Ojelabi & Noone, *supra* note 104, at 11.

¹⁰⁷ See generally Deborah Lynn Zutter, *Incorporating ADR in Canadian Civil Litigation*, 13 BOND L. REV. 1 (2001).

Superior Court, General Division. One in five cases in Toronto are placed on the mandatory mediation list. Alberta has developed a Judicial Dispute Resolution (JDR) approach, which includes some form of a settlement conference, where the parties, their legal counsel, and a judge meet before trial to consider settlement and (often) receive the judge's nonbinding opinion about the merits of the case. British Columbia introduced the "Notice to Mediate" under which "rather than a court encouraging or mandating participation in mediation, a party who is presumably intimately familiar with the dispute and who has assessed the timing and appropriateness of mediation, compels the participation of the other parties in mediation."¹⁰⁸ British Columbia also introduced Facilitated Planning Meetings which, to shorten the time required to make effective decisions for children, allows "separate orientation meetings for parents and social workers; a support person for social workers; and the delineation and assignment of the administrative aspects of mediation to a full-time administrator."¹⁰⁹

IV. ADR AS AN ALTERNATIVE WHOSE SUCCESS DEPENDS ON PRECEDENTS AND ADVERSARIAL JUSTICE

It is often assumed that an ADR settlement and a court judgment are each a product of specific and distinct norms and processes.¹¹⁰ ADR settlement is reached following ad hoc privately negotiated norms understood as "free process centered on the transmutation of underlying bargaining strength into [an] agreement by the exercise of power, horse-trading, threat, and bluff."¹¹¹ On the other hand, a court judgment is the product of an adjudication that follows public legal norms understood as a "norm-bound process centered on the establishment of facts and the determination and application of principles, rules, and precedents."¹¹² The characterization of ADR settlement as a relatively norm-free process seems, however, more theoretical than empirical. As Theodore Eisenberg has correctly observed, in practice, dispute-negotiation consists mainly of the "invocation, elaboration, and distinction of principles, rules, and precedents."¹¹³ This invocation is what Michael Barkun has labeled as "systemic demands" that the mediator or one of the parties

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *Id.* at 17.

¹¹⁰ See Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, J. DISP. RESOL. 81, 92 (2002).

¹¹¹ Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638 (1976).

¹¹² *Id.*

¹¹³ *Id.* at 639.

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articulates, and suddenly, the negotiation changes “from dyadic to triadic without the actual, physical presence of the third person.”¹¹⁴

In practice, the interaction and interdependence between settlement and adjudication norms are common. Leonard Riskin has tried to present this relationship on a four-level continuum process. The first level addresses litigation issues with the primary goal of settling the matter in dispute through an agreement that approximates the result that a trial would produce. At this point, discussions center on “the strengths and weaknesses of each side’s case and on how the judge or jury would likely determine the relevant issues of fact and law.”¹¹⁵ The second level focuses on business interests, understood as those issues that a court would probably not reach.¹¹⁶ These include, for example, the interests and needs for two businesses to continue doing business, make profits, and maintain a good reputation. At the third level, parties deal with personal, professional, and relational issues.¹¹⁷ At the fourth and final level, negotiators address community interests.¹¹⁸

Whether one looks at ADR negotiation as a continuum process that starts with addressing litigation issues; or as a standalone process on the opposite side of litigation; in practice, an ADR settlement is shaped or shaded by the law (and the dispute resolution process) under which it is bargained. This is what Mnookin and Kornhauser have called “bargaining in the shadow of the law.”¹¹⁹ Such a bargain implies that each party assesses first the strength and weakness of her case and that of the opposite side, then uses the conclusion of this evaluation to predict the outcome the law will impose if no agreement is reached. This conclusion that needs to be continuously reassessed and improved as negotiations go on could also be defined as Best Alternative to a Negotiated Agreement (BATNA).¹²⁰ It is the standard that any proposed agreement should be measured against.¹²¹ For the involved parties, the

¹¹⁴ Michael Barkun, *Conflict Resolution Through Implicit Mediation*, 8 J. CONFLICT RESOL. 121, 126 (1964).

¹¹⁵ Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 19 (1996). Rule 16.4 name of article italicized; journal name small caps; Was a different font size than the other footnotes

¹¹⁶ *Id.* at 19–20.

¹¹⁷ *Id.* at 20–21.

¹¹⁸ *Id.* at 21–22.

¹¹⁹ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

¹²⁰ ROGER FISHER & WILLIAM URY, *GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN* 99–108 (Bruce Pattion ed., 2011).

¹²¹ *Id.* at 102.

settlement's attractiveness will depend not only on whether it is beneficial and less detrimental to them but also on whether these benefits or losses are better than the alternative: namely a judicial decision.¹²²

As most disputes are formulated in terms of disagreement about the nature and extent of legal rights and obligations, assessing the strength and weakness of a case should be a familiar exercise for most lawyers.¹²³ All the lawyer needs is to evaluate the facts underlying these rights and obligations in the light of the available legal materials applicable to these facts.¹²⁴ From this comparison and analysis, the lawyer performs the most important and distinctive part of her profession: predicting the outcome of her case (or in other words the court decision). As Holmes has put it by, "[f]ar the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise and to generalize them into a thoroughly connected system."¹²⁵ The lawyer's assessment does not only allow to predict the court outcome but also the law. "The prophecies of that the courts will do in fact, and nothing more pretentious, are what I mean by law,"¹²⁶ says Holmes.

Whether one agrees or not with Justice Holmes about his realist theory of law,¹²⁷ assessing and predicting what courts will do in a given case remains one of the challenges lawyers struggle with in their everyday practice,¹²⁸ and wish there were better tools to assist in making their prophecies more

¹²² Robert J. Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 80 (1985).

¹²³ See *id.* at 66.

¹²⁴ See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 656 (1995).

¹²⁵ Oliver Wendall Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 991 (1897).

¹²⁶ *Id.* at 994.

¹²⁷ See Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L. Q. 703, 713 (1992) (arguing that Holmes was a realist). On the critics of Holmes, see LON FULLER, *THE LAW IN QUEST OF ITSELF* 117 (1940), (criticizing Holmes's incoherence). See also Harry P. Glassman, *Predicting What the Law Court Will Do in Fact*, 30 ME. L. REV. 3, 8 (1978) (arguing that when we read Law Court opinions, we should more readily accept what the Court says and not employ a form of psychoanalysis to predict what the courts will do in fact); Jerome Frank, *What Courts Do in Fact - Part Two*, 26 ILL. L. REV. 761, 781 (1931-1932), (criticizing Holmes but also acknowledging his impact on American legal system. He is "indeed the greatest of lawyers' lawyers.").

¹²⁸ Harry P. Glassman, *Predicting What the Law Court Will Do in Fact*, 30 ME. L. REV. 3, 3 (1978), ("Legal philosophers and professors of jurisprudence may justifiably quarrel with Holmes' definition of law, but that definition continues to be useful to the practicing attorney engaged in the everyday business of counseling clients and advising them concerning the legality of anticipated activities.")

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accurate.¹²⁹ Some legal systems are, however, better tooled than others to assist lawyers in this exercise.¹³⁰ For example, on average, U.S. lawyers rate themselves in the eightieth percentile or higher on their ability to predict litigation outcomes.¹³¹ Where does this confidence come from? The answer may stem from two tools the Anglo-American legal system makes available to its lawyers: (1) precedents as an anticipation of the outcome, and the (2) legal reasoning from precedents.

The predictive role of precedent is well articulated in its definition. According to Black's Law Dictionary, a precedent is a "decided case that furnishes a basis for determining later cases involving similar facts or issues."¹³² More specifically, Roscoe Pound defines it as the application of the "judicial experience of the past to the judicial questions of the present."¹³³ The detailed rules, interpretation, and guidance contained in a precedent allow a trial court to predict how a case is likely to be decided in the appeals and for lawyers to advise their clients based on this prediction.

Cominker has identified four critical predictive pieces of data, that though not a crystal ball, suggest how a higher court is likely to decide a case before it. Two of those are about precedents: the first predictor is dispositional rules endorsed by individual judges in prior written opinions deciding cases; the second type of predictive data consists of dicta contained in various Justices' opinions.¹³⁴ Carminker argues that the lower courts' faithfulness to precedents is so strong that "when an inferior court faces a perceived conflict between the apparent command of a constitutional provision and a legal rule prescribed by a superior court precedent, the precedent takes precedence."¹³⁵

In assessing the alternative to a negotiated agreement, the prediction by parties in an ADR process is informed by precedents and the legal reasoning stemming from it. To illustrate this, Schauer has given the following example:

¹²⁹ See ASHLEY, K. D., *ARTIFICIAL INTELLIGENCE AND LEGAL ANALYTICS: NEW TOOLS FOR LAW PRACTICE IN THE DIGITAL AGE* (2017).

¹³⁰ See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

¹³¹ Richard Birke, *Settlement Psychology: When Decision-Making Processes Fail*, 18 ALT. TO HIGH COST LITIG. 212, 214 (2000).

¹³² *Precedent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹³³ ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 182 (Beacon Press ed., 1921).

¹³⁴ Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decision-making*, 73 TEX. L. REV. 1, 17–18 (1994). Other types of data concerns mainly the supreme court. They include declarations of legal position and informal information concerning a particular judge or justice's general ideological commitments or proclivities. *Id.* at 18.

¹³⁵ *Id.* at 25.

Suppose we were to ask someone to predict a future judicial decision under the "best interests of the child" standard. My suspicion is that the predictor would first ask about the features of the dispute whose resolution she is being asked to predict. She would want to know the characteristics of the parents, the characteristics of the child, and related matters. But when it came down to prediction, she would predict on the basis of these characteristics by knowing which of these characteristics were likely important in this court, based on an analysis of past decisions by this court.¹³⁶

The prediction process, which consists of identifying a feature likely to be relevant in the future based on its having been relevant in the past, results in identifying regularity, tendency, and rule applicable in the present case.¹³⁷ ADR parties involved in this process treat their "settlement as the anticipation of the outcome of a trial and assume[] that the terms of [their] settlement are simply a product of [their] prediction[] of that outcome."¹³⁸ This is why, often, settlement tends to occur late in the life of a case and often after all discovery is complete and after mediators disclose their views about the merits or value of a case.¹³⁹

Knowing the rule and dicta of a relevant precedent is not, however, enough. The legal reasoning that compares and contrasts facts and issues from this precedent with those of the present dispute make the prediction more relevant. This reasoning-from-precedent is at the center of the common law decision-making process.¹⁴⁰ This reasoning, also described by Edward Levi as "reasoning by example," follows a three-step process: first, the similarity is seen between cases; next, the rule of law inherent in the first case is announced; then, the rule of law is made applicable to the second case.¹⁴¹ "Behind this logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."¹⁴²

¹³⁶ Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 787 (1998).

¹³⁷ *Id.*

¹³⁸ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984).

¹³⁹ See Bobbi McAdoo et al., *Institutionalization: What do Empirical Studies Tell Us About Court Mediation?*, DISP. RESOL. MAG. 8, 9 (2003).

¹⁴⁰ MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 50 (1991).

¹⁴¹ See EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2 (2013).

¹⁴² Holmes, *supra* note 125, at 998.

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Justice Oliver Wendel Holmes has articulated the importance of legal reasoning in common law, its central role in legal training and practice of law, and its reflection in court's decision, in these terms:

The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind.¹⁴³

This is also confirmed by Christopher Columbus Langdell, who was dean of Harvard Law School between 1870 and 1895.¹⁴⁴ Dean Langdell who is also credited for introducing Socratic Method in law schools, believed that legal education should focus on the internal logic of the law and that statutory law was unworthy of study in a law classroom.¹⁴⁵ Although since Langdell both civil law and common law systems may have move closer, the approach of learning in law school is still reflecting the old methodological difference between them. While the survival of a first-year law student in civil law system depends on how much she can memorize abstract legal provisions and principles “in a fairly mechanical and uncritical way,”¹⁴⁶ a similar student’s survival in a common law legal system depends on her critical skills in “analyzing judicial decisions in order to identify the narrow holding of a judgment which is entitled to the application of stare decisis as a precedent, while at the same time learning to distinguish it from other cases.”¹⁴⁷ The legal

¹⁴³ Holmes, *supra* note 125, at 998.

¹⁴⁴ *Deans of Harvard Law School*, HARV. L. SCH., <https://hls.harvard.edu/about/history/hls-deans/> (last visited April 9, 2022).

¹⁴⁵ See LISA G. LERMAN ET AL., *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 43 (5th ed. 2020).

¹⁴⁶ JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 63 (3rd ed. 2007) (arguing that concepts and definitions developed by scholars are taught in a “fairly mechanical, uncritical way” and that “the generally authoritarian and uncritical nature of the process of legal education . . . tend to produce the attitude that definitions or concepts and classes express scientific truth.”); see also Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 429 (1967) (“In civil law countries, the student starts his study with codes and textbooks. He learns about Justinian codifications and their influence on his present-day legal system. He is taught general principles and how to think in abstractions.”).

¹⁴⁷ Dainow, *supra* note 146 (emphasis omitted); see also MERRYMAN & PEREZ-PERDOMO, *supra* note 146, at 66 (arguing that legal education in common law focuses on creating problem solvers rather than theoreticians).

reasoning involved in this exercise, though may not lead to a “clear light of legal certainty,”¹⁴⁸ could allow to better predict how a judge will decide a case involving same facts and issues. As one empirical study has demonstrated, “predictions of case outcomes based on the data in case-based legal reasoning models are not only possible but can be of high quality, at least relative to the data in the model.”¹⁴⁹

The connection of the above-mentioned tools to the common law system, especially its adversarial procedure, creates interdependence and complementarity between court adjudication and ADR settlements that uniquely contribute to promoting ADR in common law countries. On the one hand, the adversarial system allows courts to create better precedents.¹⁵⁰ On the other hand, the reasoning from these precedents allows parties in a dispute to assess and predict what courts will do in fact. This prediction informs their choice between adjudication and settlement based on which one offers a better outcome. By negotiating a settlement, parties opt for an alternative to an adversarial court adjudication but also benefit from a product (precedents) and process (reasoning-from-precedent) of this same adversarial system. In the end, the justice system benefits as a whole.

V. ADR CHALLENGES IN CIVIL LAW SYSTEMS AND HOW TO ADDRESS THEM

The previous chapters have explained how the success of ADR in common law countries is connected to four key factors: (1) it was not introduced in a vacuum; rather, it was preceded by an overall assessment of the civil justice system in each country. (2) It was identified as one of the solutions in a broader reform of the entire justice system. (3) Although it is presented as an alternative to court's adjudication in general, its origins in the

¹⁴⁸ Valerie A. Sanchez, *Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England & Today*, 11 OHIO ST. J. DISP. RESOL. 1, 26 (1996) (describing how in Anglo-Saxon England often “lawsuits did not end with winner-take-all judgments. Many ended, instead, with settlement agreements.” These settlements were achieved through a “bargaining in the clear light of legal certainty because the parties negotiated with full knowledge of what the legal outcome would be if they failed to come to terms.”).

¹⁴⁹ Stefanie Bruninghaus & Kevin D. Ashley, *Predicting Outcomes of Case-based Legal Arguments*, LEARNING RSCH. & DEV. CTR., INTELLIGENT SYS. PROGRAM, SCH. OF L., UNIV. OF PITTSBURGH (June 2003), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.85.9499&rep=rep1&type=pdf>.

¹⁵⁰ The adversarial process allows a rule produced in an opinion to be a product of debates between involved parties. This participation and debate in rule making allows judges and parties involved to be persuaded about its relevance and soundness and thus to accept it moving forward.

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Anglo-American legal system defined its benefits and design with the adversarial systems and other causes of dissatisfaction of the Anglo-American legal system, in mind. (4) The success of ADR relies on the prophecies of what the court will decide based on precedents and procedural justice, the two key elements specific to the Anglo-American legal system.

Building on the above four key factors, this chapter analyses and proposes solutions for the four different challenges faced today by countries in civil law countries in their effort to develop ADR in their legal system: (1) lack of overall assessment of the civil justice before introducing ADR, (2) introducing ADR in isolation rather than approaching it as one of the solutions in a broader, coherent and complementary reforms of the entire legal system, (3) transplanting ADR mechanisms without reshaping and adapting them to fit specific legal and procedural problems of the country; (4) failure to identify and strengthen elements of the civil law system that could support ADR mechanisms.

A. *THE NEED FOR A POUND-LIKE ASSESSMENT OF THE CIVIL LAW SYSTEM*

As Pound has explained, any justice system assessment has to examine at least four of its key layers: (1) the layer common to all legal systems; (2) the layer related to its legal family system- common law, civil law, etc.- (3) the country's judicial organization and procedure; and (4) the environment of the country's judicial administration. As illustrated earlier, such an exercise was conducted in the U.S. by Pound in 1906; in England and Wales by Lord Harry Woolf in 1996; in Canada, by the Canadian Bar Association (CBA) in 1996; in Australia by the Australian Law Reform Commission in 1999; and in New Zealand, by the New Zealand Law Commission in 2004, among others. These assessments recommended broader legal reforms that included introducing, crafting, and adapting ADR methods, to address the identified loopholes and concerns.

No such comprehensive assessment has so far been conducted either in upstream countries of the civil law system, such as France¹⁵¹ and Germany or in those downstream of this system, such as those former Spanish and French colonies. Had such a thorough assessment been conducted, it would have revealed at least two factors that may be contributing to making ADR a challenge in those countries: the fact that in civil law system countries, (1) the state is not only the umpire but also an active player in the administration of justice; and (2) the cost and delay in the administration of justice are more a product of the inquisitorial approach of the system and thus unlikely to be addressed by introducing ADR.

1. *THE STATE AS THE UMPIRE AND ACTIVE PLAYER IN JUSTICE*

One of the key accusations of Pound on the Anglo-American legal system, and which served as the foundation for introducing ADR, has been that it creates only an arena where “parties should fight out their own game in their own way without judicial interference.”¹⁵² In the civil law system, however, this is not the case. The state not only provides the arena, sets the rules of the game, and enforces the rules. It also plays an active role as the justice-giver.

The civil law philosophy that focuses on perception of, and criteria to determine, substantive fairness of the outcome¹⁵³ is different from that of common law system that is concerned with the fairness of the procedure or

¹⁵¹ Review of civil procedures and legal aid such as those conducted in France under the 1997 *Commission de Reforme de l'Acces au droit et a la Justice* headed by Paul Boucher, and the 2000 Coulon Report entitled *Reflexions et Propositions sur la Procedure Civile* may be equivalent, using Pound terminology, assessing the causes of discontent with the country's judicial organization and procedure but not with the causes of discontent with the civil law system as a justice system. See generally Jean-Marie Coulon, *Reflexions et Propositions sur la Procedure Civile*, RAPPORT AU GARDE DES SCEAUX, MINISTER DE LA JUSTICE 59 (1957), <https://www.vie-publique.fr/sites/default/files/rapport/pdf/974024100.pdf>. Yet, these piecemeal assessments sometimes point a finger to the civil law problems without mentioning it (“En revanche, elle (Conciliation) se heurte souvent aux cultures professionnelles des magistrats et des avocats, ainsi qu'à la psychologie des parties, assurées de leur bon droit”) (“In contrast, [conciliation] is often confronted with professional habits of magistrates and lawyers, as well as the psychology of parties, confident in their granted rights.”) (explaining that these reports showing that even lawyers, judges and parties from civil law system often resist ADR because it challenges their old practices). *Id.*

¹⁵² Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738 (1906).

¹⁵³ See MORTON DEUTSCH, *Justice and Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION 41 (2000); see generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

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processes used to arrive at the outcomes.¹⁵⁴ The civil law system's non-adversarial approach requires the judge to be more active in conducting an investigation, assisting parties to clarify the issues and pleadings, and in questioning witnesses. But in the common law, procedural fairness leaves to involved parties the control of investigation and proceedings. In common law systems, procedural justice is said "to be the line in the sand circumscribing the judicial role and entrenching facets of the adversarial model."¹⁵⁵ The civil law system's strong focus on distributive justice and non-adversarial process makes it attractive for parties involved in a dispute, and positions ADR more as a competitor than an alternative.

The origins and development of the civil law system seem to have created a legal environment that is less enabling for ADR. The English common law that developed because aristocrats and merchants wanted to limit the role of the state's ability to interfere in markets, freedom of contract, and individual property rights. The civil law system, in contrast, developed because the French Revolution, and then Napoleon, wanted state intervention in distributive justice.¹⁵⁶ In civil law systems, distributive justice is not achieved with the sole goal of resolving a dispute on a specific issue, but as part of a broader scheme of enforcing State policies.¹⁵⁷ Laws in civil law systems "oblige[] the State to set societal values of what is right, what's wrong and what is just."¹⁵⁸

The civil law system's strong focus on distributive over procedural justice invites a stronger state involvement. It limits the role of private actors, including parties in the dispute, to control the dispute resolution process. State

¹⁵⁴ See Jill Howieson, *Perceptions of Procedural Justice and Legitimacy in Local Court Mediation*, 9 MURDOCH UNIV. ELEC. J. OF L., 3 (2002); see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 63–65 (1988); see also Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003).

¹⁵⁵ J. THIBAUT & L. WALKER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 115 (1988).

¹⁵⁶ See generally Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001); see also Rafael La Porta et al., *The Economics Consequences of Legal Origins*, 46 J. OF ECON. LITERATURE 285 (2008).

¹⁵⁷ See MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 87–88 (1986) ("Two ways of conceiving the office of government . . . generate[s] two contrasting ideas about the objective of the legal process. According to one, the process serves to resolve conflict; according to the other, it serves to enforce state policy.") *Id.* at 88; ("The more fully a stare realizes its activist potential, the narrower the sphere in which the administration of justice can be understood as dispute resolution, and the more the legal process is pruned of procedural forms inspired by the key image of a party-controlled contest.") *Id.* at 87.

¹⁵⁸ Alexander, *supra* note 6, at 20.

intervention results in an inquisitorial procedure where “both the decision that resolves the dispute and the process of investigation that precede the decision are under the control of the third party,”¹⁵⁹ namely the judge or an administrative state official. Dispute resolution is seen as the state’s responsibility, conducted by one of its officials, and who must act not out of her discretion but as the mere mouth of the law (*Bouches de la Loi*).¹⁶⁰ Judges and the civil society have a minimal role in impacting the social legal order, which is the primary if not the exclusive domain of the legislative.¹⁶¹ The legislative branch views itself as the primary pillar in setting the social legal order and sets the rules governing the judiciary, making sure that it maintains this monopoly.¹⁶² In such an environment, the introduction of ADR is perceived as privatization of justice—as the State’s abdication of its primary mission to offer justice.¹⁶³

¹⁵⁹ LIND & TYLER, *supra* note 154, at 17.

¹⁶⁰ Le juge est le serviteur de la loi. (The judge is the mouth of the law.) Irmgard Griss, *How Judges Think: Judicial Reasoning in Tort Cases from a Comparative Perspective*, 4 JETL 247 (2013); Pierre Mayer, *Le Juge et la Loi Etrangere*, 1 SWISS. REV. INT’L & EUR. L. 485 (1991).

¹⁶¹ See Lempereur, *supra* note 13, at 161 (“To maintain the centralized authority, the center developed a system that prevented the periphery from impacting legislation. The center accomplished this exclusion of the periphery through its control of the courts and politics. By assigning judges a very limited role in which they were to be mere mouthpieces, the legal system made a conscious choice to grant the legislature the power to change or reform France”).

¹⁶² See Peter G. Mayr & Kristin Nemeth, *Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR*, in REGULATING DISPUTES RESOLUTION, ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 65, 66–67 (Felix Steffek & Hannes Unberath eds., 2013).

¹⁶³ “Judges are merely the operators of a machine designed by scientists and built by legislators... judges are referred to as ‘operators of the law’”. In deciding a case, the judge extracts the relevant facts from the raw problem, characterizes the legal question that these facts present, finds the appropriate legislative provision, and applies it to the problem. Unless the legal science and the legislator have failed in their functions, the task of the judge is a simple one: there is only one correct solution, and there is no room for the exercise of judicial discretion. If the judge has difficulty finding the applicable provision or interpreting and applying that provision to the fact situation, then one of the following people must be at fault: the judge, who does not know how to follow clear instructions; the legislator, who failed to draft clearly stated and clearly applicable legislation; or the legal scholar who has either failed to perceive and correct defects in the legal science or has failed to instruct the legislator and judge properly on how to draft and apply statutes. No other explanation is permissible. If everyone did his job right, the judge would have no difficulty in finding, interpreting, and apply the applicable law.” MERRYMAN & PERZPERDOMO, *supra* note 146, at 81.

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Citizens in civil law countries not only see ADR with the same suspicion they attach to privatization in general,¹⁶⁴ but they also fear that private actors involved in dispute resolution would recourse to non-law standards, such as underlying interests and preferences of parties¹⁶⁵ instead of using rules established by the state. This creates a twin challenge for the civil law system seeking to introduce and develop ADR:¹⁶⁶ The increasing role of the state as the justice-giver and the corresponding dependence and expectation of citizens on the state to play this role. This approach engenders apathy and passiveness among citizens who perceive the resolution of their dispute as the State's and the State institution's business.

In addition to the above substantive justice concerns, there are also those related to procedural justice in civil law systems. The first concern in this category is the role and perception of codes. Since the time of Napoleon, codes of law and procedure have been designed to control dispute resolution in all circumstances.¹⁶⁷ The problem is not that there are codes. After all, codes exist also in common law systems. The problem is the old belief that codes are comprehensive, and thus the primary, if not exclusive, source for all answers to citizens' legal disputes. The civil law system is embedded in a strong belief that a human mind (a legislator) can predict how humans will behave and act in the future and legislate a single, complete, coherent, and logical system of law (codes) to govern all legal future relationships.¹⁶⁸ Unfortunately, this illusion has remained unchallenged and continues to handicap the development of law by means other than legislation. In such an environment, it becomes difficult to settle disputes using rules from customs, negotiations, court precedents, and private contracts.

Common law legal scholars in ADR agree that cases in which the plaintiff seeks an interpretation or declaration of law by the court are not suited for ADR.¹⁶⁹ A close analysis of the judiciary's role in civil law systems indicates that almost every case practically requires the judge to declare or interpret the applicable law. Under this system, the judge is required to state

¹⁶⁴ La Porta et al., *supra* note 156, at 286.

¹⁶⁵ See Tatjana Zoroska Kamilovska, *Privatization of Civil Justice: Is it Undermining or Promoting the Rule of Law*, 2020 ACCESS TO JUST. E. EUR. 34, 44 (2020).

¹⁶⁶ Laurent Cohen Tanugi, *deux cultures juridiques; in le droit sans l'Etat, Paris*, in VOLKMAR GESSNER ET AL., EUROPEAN LEGAL CULTURES 269–70 (1996).

¹⁶⁷ See Rafael La Porta et al., *supra* note 156, at 304.

¹⁶⁸ See also Edward D. Re, *Stare Decisis and the Judicial Process*, 22 CATH. LAW 38, 38–39 (1976) (explaining how stare decisis creates both flexibility and consistence).

¹⁶⁹ See LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 23 (1987) (noting that the ADR literature recognizes that some types of cases are not suited to resolution outside the courtroom, including in particular cases in which the plaintiff seeks a declaration of law by the court).

the legislative provision upon which the decision is based and interpret it not with the intent to develop a general rule or standard. Instead, she works on making the facts at hand fit within the abstract context defined by the legislature. This approach is articulated by Max Weber in the following terms:

Present-day legal science, at least in those forms which have achieved the highest measure of methodological and logical rationality, i.e. those which have been produced through the legal science of the Pandectists' Civil Law, proceeds from the following five postulates: first, that every concrete legal decision be the 'application' of an abstract legal proposition to a concrete 'fact situation', second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually or virtually constitute a 'gapless' system of legal proposition, or must, at least, be treated as if it were such a gapless system; fourth, that whatever cannot be 'construed' rationally in legal terms is also legally irrelevant, and fifth, that every social action of human beings must always be visualized as either an 'application' or 'execution' of legal proposition, or as an 'infringement' thereof, since the 'gapless' of the legal system must result in a gapless 'legal ordering' of all social conducts.¹⁷⁰

Though Weber's observation may have evolved and adapted in some countries, it remains predominant in most civil law countries. It determines how law is taught, how lawyers think, and how judges approach dispute resolution.¹⁷¹ A legal system based on general and abstract rules, designed to encompass a wide range of factual situations,¹⁷² applied almost exclusively through deductive reasoning,¹⁷³ is more likely to be of the exclusive domain

¹⁷⁰ MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* 657 (Guenther Roth & Claus Wittich, eds. 1978).

¹⁷¹ Alain Lempereur, *Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education*, 3 HARV. NEGOT. L. REV. 151, 163–164 (1998) (“[I]n a country where legislation and codification are superior sources of legal authority, legal education primarily focuses upon these sources. . .law schools teach deduction as the normal mode of legal thinking... cases with real parties and experiences from everyday practices are considered inessential in legal teaching.”).

¹⁷² Tanugi, *supra* note 166, at 271.

¹⁷³ Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain and the USA*, 24 AM. J. COMPAR. L. 43, 45 (1976).

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of legal experts, not laypeople.¹⁷⁴ It is not surprising that such an environment would not enable ADR, which requires creativity, the use of various legal reasoning starting from facts at hand rather than abstract rules, and empowering laypeople to participate in dispute resolution.

The above limitations are just illustrative examples and evidence that the civil law system needs a thorough assessment, not only for its overdue needed general reform but also to help identify how, where, and when alternatives such as those of ADR would fit in this reform.

2. PROBLEMS OF COSTS, DELAYS, AND ACCESS AS SYSTEMIC PROBLEMS IN CIVIL LAW SYSTEM

Addressing the issue of cost, delay, and procedural justice, Pound argued in 1906 that ‘uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice... have created a deep-seated desire to keep out of court...’.¹⁷⁵ This reality was reiterated by Chief Justice Warren E. Burger in his 1976 keynote address, when he lamented how litigants “with the longest purse” make it costly and time consuming on the small litigant to manipulate the system to their advantage.¹⁷⁶

Some may argue that Pound's observation is not unique to the common law system. Every administration of justice involves procedural challenges, and some may require more resources in time and cost than others. A comparison between the civil law and common law systems shows, however, that these costs and delays weigh heavier on parties involved in the latter system than the former. As the Australian Law Commission has stressed, some in common law countries not only view “the costs, delay or unfairness in the system, attributable to the adversarial character of the system”¹⁷⁷ but also believe that “these problems could be cured by transplanting or borrowing from the civil code systems.”¹⁷⁸

¹⁷⁴ See EVA STEINER, *FRENCH LAW, A COMPARATIVE APPROACH* 276 (2nd ed. 2018) (“The notion of public service with its concomitant emphasis on public law partly accounts for the fact that French procedural law favours, in a long-established tradition, professional judges rather than lay personnel and the use of inquisitorial ... in the application of the process of justice.”).

¹⁷⁵ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 742 (1906).

¹⁷⁶ Burger, *supra* note 33, at 32.

¹⁷⁷ See *Discussion Paper 62: Review of the Federal Civil Justice System*, AUSTL. L. REFORM COMM’N DISCUSSION PAPERS ¶ 2.22 (1999), <http://www.austlii.edu.au/au/other/lawreform/ALRCDP/1999/62.html>.

¹⁷⁸ *Id.*

To deal with problems of cost, delay, and procedural hurdles, Australia opted for combining a limited adversarial reform and broadening the use of ADR. This choice was made after considering and rejecting the option of borrowing from the Civil Law System.¹⁷⁹ After all costs, delays, and procedural problems are not unique to countries using the Common Law system. The civil law system also has some structural and procedural requirements that make its justice costly and time-consuming. The only difference is that these problems of cost and delay are systemic to the inquisitorial nature of civil law system.¹⁸⁰ Unlike the adversarial system that places a heavier burden of cost and sources of delays on litigants, the inquisitorial nature and philosophy of the civil law system place this burden and risk on the government. As discussed later, these factors impact the litigants' cost analysis as they explore ADR or litigation option.

Examples of how the Civil Law system affects costs and delay are, in addition or related to its inquisitorial nature, illustrated by some of the following characteristics of its procedural law, just to name a few:

- The principle of collegiality. This principle requires civil and criminal cases to be heard by a panel of three judges, both at the trial and appeals levels. In most civil law countries, there is still a strong reliance on judges deciding on a bench.¹⁸¹ Though this may help reduce the bias of one judge in a system where justice is more distributive than procedural—as French say, *juge unique, juge inique*¹⁸²—it reduces the number of cases a court can hear and thus contributes to a backlog and delay in delivering justice. This is also costly to the taxpayers.
- The principle of a double degree of jurisdiction and, in some cases, a double level of appeals.¹⁸³ This and the fact that the

¹⁷⁹ “Such debate assumes that borrowing from different political and cultural systems will work in similar ways in our legal system, that such change can be engineered and that it will improve the system. The Commission does not advocate change to implement a non-adversarial federal civil litigation system; we do advocate change to judicial and administrative processes and informal dispute resolution schemes.” *Id.* at ¶ 2.32.

¹⁸⁰ Unlike the accusatorial system that puts the burden on parties and thus pushes them to invest money and time to prove their case (discoveries, witnesses, evidence, etc.), in the inquisitorial system, the cost of justice is often carried by the State because the court goes beyond the evidence and facts presented by parties, to actively seek additional facts and evidence to support its judgments.

¹⁸¹ See, e.g., Art. L 212-1 & Art. L 313-1 of the French Code d’Organisation Judiciaire.

¹⁸² Translated as “single judge, unfair judge.”

¹⁸³ See Nina Nichols Pugh, *The Structure and Role of Courts of Appeal in Civil Law Systems*, 35 LA. L. REV. (SPECIAL ISSUE) 1163, 1174–1173 (1975).

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right of appeal includes the right to reconsideration of factual and legal issues are the critical sources of backlog and costs in most higher courts in civil law countries. In most countries, the appeal is understood more as a right than an opportunity to correct errors by the lower court. Every case is therefore appealed not because of concerns about errors by the lower court, but because the losing party is simply unhappy with the distributive outcome of the ruling. Given that all appeals are considered de novo, the appeals court is often called to reexamine facts, review evidence, and reinterpret the applicable law. Thus, the appeals court performs the role of a trial court and appeals court at the same time; this extends the time each case is heard and increases the costs on both the government and the involved parties. Often a case that started in the court of first degree arrives at the Supreme Court unrecognizable because of new facts, new issues, and new arguments incorporated along the way.

- The rules of evidence are often not fixed, where fixed they are not rigorously followed, and where followed there is often no pre-hearing to determine which evidence will be admissible and which will not be.¹⁸⁴ This allows attorneys and judges to constantly get away with unpreparedness which in turn affects delay and cost. As one author has argued, civil law cases take longer mainly because matters that would ordinarily be concentrated into a single event in a common-law jurisdiction become a series of isolated hearings that involve exchanges of written communication between counsel and the judge, introduction of evidence, testimony, procedural motions and rulings on each.¹⁸⁵ Each phase requires sometimes that the hearing on the substance be adjourned, making a case last longer than it should.
- The above concern of lack of preparedness is also encouraged by the fact that pleading in civil law is very general. Issues are not defined before hearing but rather as the proceeding goes on.¹⁸⁶ Often judges and attorneys come to a hearing

¹⁸⁴ See Robert L. Henry, *Procedure in Civil Law Jurisdictions - A Comparative Study*, 2 LA. L. REV. 401, 406 (1940).

¹⁸⁵ MERRYMAN & PEREZ-PERDOMO, *supra* note 146, at 113.

¹⁸⁶ MERRYMAN & PEREZ-PERDOMO, *supra* note 146, at 114.

unprepared about which facts are relevant, material, and essential, and which factual or legal issues they want the judges to rule on.

- Another factor contributing to delays and costs is the absence of "stare decisis" or binding precedents in the civil law system. Under this system, lower court judges are tasked with interpreting in every case the applicable law even when the facts and issues in that case are similar to those a higher court may have ruled upon or may have extensively interpreted the applicable law. This happens even at the appeals level, where judges are not required or have no interest in being bound by higher courts' decisions or those in the same court. Contradictory rulings by same courts or courts in the same jurisdiction on same facts and issues are common in civil law countries.

Some civil law countries have justified the introduction of ADR on the need for access to justice. However, it is doubtful whether this solution is better than or should substitute the need for reforming the system itself. As some authors have observed, a close comparison between the civil law and common law systems shows that where human and financial capacity are available, clients of the civil law system do not suffer the same level of inability to access justice as their counterparts in the Anglo-American system.¹⁸⁷ It is not, therefore, sure that, although ADR may contribute to broadening access to justice in the civil law system, it can also be attractive to litigants than a better functioning civil law system. A party in a dispute in the civil law system may prefer litigation over ADR mainly because of its state-sanctioned inquisitorial and distributive justice focus. As one study has concluded, "disputants actually prefer processes in which they surrender decision control (e.g., trial and arbitration) if they perceive that these processes provide more opportunity for voice and more dignified treatment than the available consensual processes."¹⁸⁸ Add to this the opportunity for parties to shift some procedural costs on the government, then the choice between a good

¹⁸⁷ Alexander, *supra* note 6, at 24; *see also* Peter G. Mayr & Kristin Nemeth, *Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR*, in *REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS* 65, 66 (Felix Steffek & Hannes Unberath eds., 2013).

¹⁸⁸ Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. UNIV. L.Q. 787, 825 (2001).

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functioning inquisitorial system and a good functioning accusatorial system or ADR, becomes clearer.

The above benefits may contribute to making parties find bearable the cost and delay involved in the civil law litigation and even chose it over ADR. After all, ADR is not free from expenses and delay. Although there is no study comparing the cost of litigation in both civil and common law systems and determining how these costs are distributed between the government and parties involved, it is fair to assume that parties in the inquisitorial system do not carry as a heavy share of the cost of justice as their counterparts using the accusatorial and adversarial system.

The above examples, though not exhaustive, illustrate that in arguing for ADR benefits in terms of cost, time, complexity, and access to justice, countries in civil law systems need to examine first which problems are self-inflicted by the structure of the system itself. Only after this assessment can they decide which ones of those problems could be addressed by reform and which ones that could be addressed by alternatives or additional forms of dispute resolution. Until this evaluation is completed, introducing ADR with the assumption that it will take care of these issues on both the government and litigants sides, sounds more speculative and risks hurting both court litigation and ADR settlement approaches.

B. *DESIGNING ADR MECHANISMS THAT TAKE INTO CONSIDERATION PROBLEMS SPECIFIC TO THE CIVIL LAW SYSTEM*

The challenge to the introduction and success of ADR in the civil law system is not only related to the failure of assessing this system and identify where key legal reforms are needed. Other challenges are specific to the introduction, design, and functioning of ADR mechanisms as so far promoted in civil law countries. More specifically, they are related to (1) the justification behind the introduction of ADR; (2) the method of selecting which ADR mechanisms to prioritize; and (3) the centralized and top-down approach followed in introducing them.

First, there is the issue of justification for introducing the formulation of ADR mechanisms in civil law systems. In the absence of a thorough assessment of causes of dissatisfaction with civil law systems or their individual specific judicial administration, these countries have opted to focus on ADR benefits as identified by countries of Anglo-American legal

tradition.¹⁸⁹ The benefits often touted include but are not limited to: (1) reducing courts' caseloads and expenses; (2) cutting parties' time and expenses; (3) facilitating access to justice; (4) preserving parties' relationships; and (5) providing more "effective" dispute resolution.¹⁹⁰ What these countries fail to verify is, however, (1) whether there is correlation or causation between ADR and these benefits; and whether (2) conclusions showing this relationship are country- or legal system-specific or could be universally applicable.

While studies on the benefits of ADR in Anglo-American legal systems have found some benefits in some ADR methods,¹⁹¹ others have concluded the opposite.¹⁹² Somewhere between these two opposing views are

¹⁸⁹ See *Commission Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*, at 7, COM (2002) 196 final (Apr. 19, 2002) [hereinafter *Green Paper*] (“ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought before courts is increasing, the proceedings are becoming lengthier and the costs incurred by such proceedings are increasing. And the quantity, complexity and technical obscurity of the legislation also help to make access to justice more difficult.”); ALBERT FIADJOE, *ALTERNATIVE DISPUTE RESOLUTION: A DEVELOPING WORLD PERSPECTIVE 1* (2004) (In one of the earliest books on ADR in Developing countries, Fiadjoe says, “ADR is becoming the preferred choice of the resolution of conflict and disagreement, and the reasons are not hard to find.” Then with no effort to illustrate how these reasons are self-evident also in developing countries, he states, “[litigation] is a costly, lengthy, public exhibition of differences, leading to a great deal of ill-will between litigants. In contrast, ADR processes are usually faster, less expensive, less time-consuming and more conclusive than litigation.”); World Bank Grp. [WBG], *Alternative Dispute Resolution Center Manual: A Guide for Practitioners on Establishing and Managing ADR Centers*, 5 (June 2011); U.N. Off. on Drugs and Crimes, *Training Manual on Alternative Dispute Resolution and Restorative Justice*, 19 (Oct. 2007), [https://www.un.org/ruleoflaw/files/publications_adr\[1\].pdf](https://www.un.org/ruleoflaw/files/publications_adr[1].pdf).

¹⁹⁰ See Frank E.A. Sander, *Alternative Alt. Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 3 (1985); see also LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION & LAWYERS* 8 (5th ed. 2014); see also Welsh, *supra* note 188.

¹⁹¹ See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research.*, 17 OHIO ST. J. ON DISP. RESOL. 641, 695 (2002); Stevens H. Clarke & Elizabeth Ellen Gordon, *Public Sponsorship of Private Settling: Court-ordered Civil Case Mediation*, 19 JUST. SYS. J. 311, 324 (1997).

¹⁹² See generally JAMES S. KAKALIK ET AL., *AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* (1996); JAMES S. KAKALIK ET AL., *AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT* xxxii (1996); Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2176 (1993) (arguing that mandatory court-connected arbitration “will tend to systematically disadvantage poorer and more risk-averse litigants”); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 908 (1991) (arguing that the statistics about these benefits simply do not support the claims).

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those who have argued that more rigorous empirical scrutiny is needed,¹⁹³ while others have found that the determination of these benefits depends on how the question is formulated.¹⁹⁴ Absent a large number and solid empirical studies on ADR benefits in civil law systems in general or individual countries applying this system,¹⁹⁵ it is impossible to know their relevance. This does not, however, mean that ADR mechanisms have no benefits in civil law systems. It rather means that, instead of simply selling ADR as one of those ideas whose time has come¹⁹⁶ and whose benefits are universal and self-evident, there is a need to conduct empirical studies that are country and legal system-specific to verify those benefits.

More is still needed to understand why litigants in the civil law system would choose ADR over courts. Focusing on ADR benefits is not enough. As one empirical study has suggested, “the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement.”¹⁹⁷ Little is known about these determinants in civil law countries.

The second issue in this category is related to the design and selection of which ADR mechanisms found their way in civil law systems countries. In most countries, the introduction of ADR has been justified by its success in the US, Canada, and other countries of the first wave in the ADR movement.¹⁹⁸ Having been first, these countries have had the advantage of defining ADR,

¹⁹³ See Kim Dayton, *supra* note 192, at 894 (arguing that “claims concerning the success of ADR have not been subjected to close empirical scrutiny”); Frank E.A. Sander, *supra* note 190, at 15 (“ADRM specialists have essentially no sophisticated data concerning the relative time and cost of alternative dispute settlement mechanisms such as arbitration and mediation”).

¹⁹⁴ See Shack, *supra* note 87.

¹⁹⁵ See, e.g., Green Paper, *supra* note 189, at ¶ 25 (acknowledging the lack of such studies and listing some limited studies conducted in Denmark, Italy, Austria and Portugal); see also Piet Taelman & Stefaan Voet, *Mediation in Belgium: A Long and Winding Road*, in 6 NEW DEVELOPMENTS IN CIVIL AND COMMERCIAL MEDIATION: GLOBAL COMPARATIVE PERSPECTIVES 89, 109 (Carlos Esplugues & Louis Marquis eds., 2015) (EU studies on the implementation of its regulation discussing how some authors see mediation a waste of money and time).

¹⁹⁶ See BARRETT WITH BARRETT, *supra* note 1, at 239 (describing the development of ADR in as those ideas that fit in Victor Hugo quotes: “nothing is so powerful as an idea whose time has come.” He says that some have tried to explain the development of ADR in the world as one of those irresistible ideas”).

¹⁹⁷ George L. Priest & Benjamin Klein, *The Selection of Disputes. for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984).

¹⁹⁸ See Green Paper, *supra* note 189; see also 2000 Coulon Report, *supra* note 151, at 53.

developing its contents, and choosing the methodology to assess its success. Consequently, as one French author has put it, ADR mechanisms flourishing around the world carry with them “a fashionably progressive, American connotation.”¹⁹⁹ This in itself should not be a problem. After all, there is nothing wrong with borrowing from a system that has proven to work. However, as civil law countries introduce ADR mechanism championed in the United States, they need to know that even countries like Canada, Australia, U.K., and New Zealand in the same Anglo-American legal system as the United States, had to recalibrate and redefine these methods before plugging them in their national legal systems.

As explained earlier, before the development of modern legal systems such as common law and civil law as we know them today, most societies depended on ADR-like methods of conflict resolution. As the modern formal judicial justice systems grew, these ADR-like methods died a natural death, and those that survived were sidelined. This was the case, for example, of the ADR method of conciliation and arbitration in France.²⁰⁰ If this is true, then, maybe before importing other ADR methods, countries like France needed to reexamine, first how to revive, adapt and incorporate those mechanisms that co-existed in the past with their civil law systems. This also applies, and even more significantly, to developing countries either of civil or common law traditions. These countries witnessed their functioning non-adversarial, reconciliatory, and community-based justice systems be uprooted by colonial imposed formal court system that today is now calling for ADR rescue. Before importing new ADR mechanisms, these countries may be better off learning from the Canadian, New Zealand, and Australian experiences on how to revive, adapt and develop non-adversarial mechanisms, including indigenous justice mechanisms.²⁰¹ Reviving, adapting, and broadening systems like *Gacaca* and *abunzi* in Rwanda;²⁰² *Shalish* in Bangladesh, *Barangay* in the Philippines, *chefe du suco* and *adat* in Timor-Leste;²⁰³ or those cases identified

¹⁹⁹ Emmanuel Gaillard & Jenny Edelstein, *Mediation in France*, 55 DISP. RESOL. J. 74, 74 (2001).

²⁰⁰ *Id.* at 74–5.

²⁰¹ See 2006–2007 NAT’L ALT. DISP. RESOL. ADVISORY COUNCIL ANN. REP. 23 (arguing that western definition of ADR processes such as ‘mediation’ do not necessarily match Australian Indigenous conceptions); see also MICHAEL KING ET. AL., NON-ADVERSARIAL JUSTICE (2009) (regarding different non-adversarial justice mechanisms developed in these countries).

²⁰² See JEAN-MARIE KAMATALI, INTRODUCTION TO RWANDAN LAW 35–71 (2020).

²⁰³ For more details on these methods see United States Agency for Int’l Dev, *Non-State Justice System Programming: A Practitioners’ Guide* (June 2019), <https://www.usaid.gov/sites/default/files/documents/1866/Guide-to-NSJS-Jun-19.pdf>.

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by Philip Gulliver in Arusha Tanzania,²⁰⁴ may, therefore, help promote homegrown and acceptable solutions than or before considering importing new ADR mechanisms.

The third issue affecting ADR in the civil law system is related to the top-down, centralized approach involved in its introduction. As explained earlier, before their packaging under the generic term of ADR, the contents and approaches for arbitration, court-annexed arbitration, mediation, med-arb, mini-trial, early neutral evaluation, judicial settlement conferences, negotiation, and other ADR mechanism as known today, developed through decentralized pilot methods and experiments.²⁰⁵ Also, ADR skills, techniques, and evaluations associated with each ADR mechanism were not developed in the abstract, generic, and universal terms. They carried with them the local realities and specific issues they sought to address.

Civil law systems have followed a different approach in introducing ADR in general or some of its specific mechanisms. Instead of following a participatory, bottom-up, and pilot-based approach, as did most countries of Anglo-American tradition; most countries of the civil law traditions opted for an easy but unsustainable approach. They not only started from the assumption that what succeeded in America and other Anglo-American legal systems will be successful there, but they also imposed it in a top-down, centralized approach. This is mainly illustrated in how ADR was introduced in European countries and in developing countries of civil law systems.

In 2008, the European Union directive required its members to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes.²⁰⁶ This directive, that highlighted the benefits of ADR without showing the sources its conclusion, was based on a Green Paper that praises the American and Canadian long and rich experience of ADRs in various forms.²⁰⁷ As one author has put it, this was unusual because the “widespread admiration within the European Union (E.U.) for the broad variety of American Alternative Dispute Resolution (ADR) practice”²⁰⁸ as reflected in this Green Paper, broke with the European policymakers’ suspicion about American policies.²⁰⁹ The same Green Paper, while highlighting the existence of minimal and scattered efforts to promote ADR in

²⁰⁴ See Philip Gulliver, *Case Studies of Law in Non-Western Societies*, in *LAW IN CULTURE AND SOCIETY* 11, 18 (L. Nader ed. 1969).

²⁰⁵ See generally STEPHEN GOLDBERG ET. AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (Richard A. Epstein et. al., 2d ed. 1992).

²⁰⁶ See Council Directive (EC) 2008/52, 2008 O.J. (L 136) 6.

²⁰⁷ See Green Paper, *supra* note 189, at ¶ 22.

²⁰⁸ Duve, *supra* note 7, at 10.

²⁰⁹ Duve, *supra* note 7, at 10.

the E.U. countries, acknowledged that the Member States do not have detailed framework regulations on ADRs.²¹⁰

The majority of countries of the European Union, which are unanimously of civil law tradition,²¹¹ have been struggling to enforce the above E.U. directive. Some of the challenges in implementing this directive include, for example, the fact that countries that had already started developing their own mediation programs had to revise them to fit in the E.U. directive definition and framework;²¹² the fact that its insistence on incorporating due process requirement of adjudicatory proceedings could undermine parties' right of self-determination;²¹³ and the fact that confidentiality requirement, a key element in ADR, may be a challenge in those countries where, unlike in the common law system, there is no concept of confidentiality privilege.²¹⁴

Outside the European Union, the top-down, centralized, and often elitist approach to adopting ADR has often been influenced by developing agencies and other international organizations such as USAID, U.N., and World Bank.²¹⁵ ADR missionaries played a significant role too.²¹⁶ The result has been a rush by these countries to embrace ADR as patches to their

²¹⁰ Green Paper, *supra* note 189, at ¶ 25.

²¹¹ Although the level at which they follow civil law varies, since Brexit, these countries almost unanimously apply civil law system. *See The Common Law and Civil Traditions*, BERKELEY L., <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf> (last visited April 9, 2022).

²¹² *See* Taelman & Voet, *supra* note 195, at 94–95 (discussing debates in Belgium about updating the 2005 mediation act in Belgium to fit the EU directive). 4

²¹³ Duve, *supra* note 7, at 10–11.

²¹⁴ Duve, *supra* note 7, at 10–11.

²¹⁵ *See* Michel, *supra* note 8.

²¹⁶ *See* Michael Palmer, *ADR Missionaries*, 12 DISP. RESOL. MAG., Spring 2006, at 13; *see also* Jacques Werner, *ADR: Will European Brains Be Set on Fire?*, 10 J. INT'L ARB. 45 (1993).

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dysfunctional justice system²¹⁷ or as a parallel system geared to benefit business and investors.²¹⁸

C. STRENGTHEN ELEMENTS OF THE CIVIL LAW SYSTEM THAT CAN SUPPORT ADR MECHANISMS

As said earlier, the adversarial system enables parties in a dispute to debate in the determination of a justice outcome, but also to contribute in the development and formulation of the rule(s) underlying this outcome. These rules help resolve the dispute at hand as well as future disputes with similar facts and issues. They serve as precedents for courts but also enlighten parties as they prophecy what courts will decide in fact. As such, they help parties choose which route to take between the court or ADR. If parties choose ADR, these prophecies provide the shadow of law under which they negotiate. In other words, parties that choose ADR to avoid the adversarial nature of the trial still use and benefit from precedents developed through the adversarial process. This creates an interdependent relationship between ADR and the adversarial system: one feeding and contributing to the success of the other.

Compared to common law, however, the shadow the law offers to disputants negotiating their dispute settlement in the civil law system is shallow and less helpful. It is much harder for parties and their representatives in the civil law system to know the law understood in the meaning of Holmes as "the prophecies of what the court will do in fact, and nothing more pretentious." The reason for this shallowness and unpredictability are several.

First, there is the issue of legislation. While statutes and code provisions in common law are drafted with specific factual or legal issues they intend to address, civil law statutes are formulated in the form of general and abstract principles to cover an infinite number of legal situations.²¹⁹ Civil law systems have remained a prisoner of Rousseau's definition of law as a top-

²¹⁷ See also Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons From Abroad*, 56 DEPAUL L. REV. 569 (2007); Cynthia Alkon, *Lost in Translation: Can Exporting ADR Harm Rule of Law Development*, 2011 J. DISP. RESOL. 165 (2011); Anthony P. Greco, *ADR and a Smile: Neocolonialism and the West's Newest Export in Africa*, 10 PEPP. DISP. RESOL. L.J. 649, 657 (2010).

²¹⁸ See, e.g., Greco, *supra* note 217, at 657 ("The use of ADR mechanisms still serves the same purpose within the context of globalization that commercial law reforms do—that as a familiar form to many Westernized nations it can attract foreign investors, which will lead to economic growth and general greater social welfare for the societies in which it is being implemented. As there is often a shortage of institutions and professionals to administer justice in Third World nations and developing economies, ADR has also been championed as having the ability to decongest these court systems, alleviating the case load pressure and allowing greater access to justice as a whole.").

²¹⁹ EVA STEINER, *FRENCH LAW: A COMPARATIVE APPROACH* 1–16 (2nd ed. 2018).

down rule that does not consider its subjects as individuals and their actions as particulars.²²⁰ Such legislation leaves a weak shadow of the law that cannot help parties predict what the court would decide if the facts in their disputes are to be brought to its hearing. Legislation or statutes create general rules that need to be interpreted by courts based on the facts at hand. The rules developed by courts through this interpretation remain, however, "inefficient".²²¹ As parties tend to prefer settling out-of-court when confronted with an "efficient" rule, and to recourse to litigation when confronted with an "inefficient" rule²²², backlog cases seem inevitable in civil law system.

The second challenge for parties in the civil law system seeking to settle their dispute in the shadow of the law, which is connected to the first, is the lack of precedents. Precedents offer numerous benefits to parties and the entire justice system that include fostering stability, the development of a consistent and coherent body of law, preserving continuity, respect for the past, spare judge the task of reexamining rules of law with each succeeding case, and affording the law a desirable measure of predictability.²²³ Its relevance in ADR results, however, more in its capacity to assure equality of treatment for litigants similarly situated.²²⁴ As Justice Barrett has put it, "precedent is the strongest predictor of what a court would do if faced with the same question again."²²⁵ Parties can use precedents to assess their case and decide whether to opt for an ADR or court process. In case they opt for the former, parties can use precedent to leverage their negotiations and bargain. Precedents also serve as the weight to put on the other side of the scale to

²²⁰ See JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL: LIVRE II*, 76–78 (Flammarion et Cie 2001) ("Mais qu'est-ce donc enfin qu'une loi ? [...]. Quand je dis que l'objet des lois est toujours général, j'entends que la loi considère les sujets en corps et les actions comme abstraites, jamais un homme comme individu ni une action particulière.") ("But then what is really law? [. . .]. When I say that the object of the law is general, I mean that law takes its subjects as a whole and its actions as abstracts, it does not take a person individually or an action particularly.")

²²¹ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (Little, Brown and Co., 1973) (arguing that rational decision-making, which maximizes the efficient use of resources, is the stated objective of economic analysis of legal problems). *But see* Donald H. J. Hermann, *Review of "Economic Analysis of Law," By Richard A. Posner*, 1974 WASH. UNIV. L. REV. 354 (1974) (discussing how common law system decision-making facilitates over time the efficient allocation of resources). *See also* George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

²²² Rubin, *supra* note 221.

²²³ *See Re, supra* note 168, at 39.

²²⁴ *Re, supra* note 168, at 39.

²²⁵ Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1074 (2003).

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assess whether the deal from the settlement is better than what the court could have afforded. Precedents have the potential to help not only parties choosing between ADR or court solutions; they can also contribute in preventing further disputes, mobilizing them, displacing them or transforming them.²²⁶

Although the weight of precedents differs based on individual countries in the civil law system, the doctrine of *stare decisis* is entirely absent in this system. In principle, lower courts are not bound by the decisions of superior courts, and individual courts, higher or lower, are not required to follow their own decisions in subsequent similar cases.²²⁷ The fact that courts in some civil law countries choose to follow their precedents is more an optional practice than a legal obligation.

Civil systems need, therefore, to reduce their firm reliance on legislation and its corollary deductive reasoning. Such a reform could allow other forms of legal reasoning to flourish and enable a process of bottom-up and fact-based rule creation. This approach could enable non-state actors to develop binding practices and courts to develop rules, either through deductive legal reasoning from legislation or through inductive and analogy when there is no legislation. Such a reform could help them not only achieve justice faster and less costly but also assist in creating tools that support the development of ADR.

VI. CONCLUSION

ADR has evolved as one of those powerful practices whose time has come and thus hard to resist.²²⁸ This article does not advocate for swimming against this current. It is not a debate on whether or not ADR. It does not either argue that ADR is incompatible with the civil law system. It is simply a contribution on how to better incorporate ADR in this legal system. While acknowledging that ADR has the potential to offer benefits across all legal systems, this article stresses that ADR success in new lands depends on how they assess the causes for dissatisfaction peculiar to their justice systems; how they design their own ADR processes that respond specifically to those causes; and how they implement these processes as part and parcel of the whole reform of their justice system.

Some may argue that the ADR train has left the station and any attempt to call for an assessment in countries of the civil law system risks

²²⁶ See Marc Galanter, *Justice in Many Rooms*, in *ACCESS TO JUSTICE AND THE WELFARE STATE* 159, 157 (Mauro Cappelletti ed., 1981) (arguing that the relation of courts to disputes is multidimensional).

²²⁷ STEINER, *supra* note 219, at 89–90.

²²⁸ See BARRETT WITH BARRETT, *supra* note 1, at 239.

delaying the progress already achieved. However, such a review could help more than hurt. An assessment could have an impact on reassessing and reforming this legal system and readjust ADR which, by the way is still in its embryonic stage in those countries, and thus better serve disputants and the justice system as a whole.