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“Dispute Resolution, Justice, and the Common Good”

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## DISPUTE RESOLUTION, JUSTICE, AND THE COMMON GOOD

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**Abstract:** Rule of Law development initiatives tend to involve a preference for formal or state law over informal or customary law. Formal court-based adjudication is regarded as the optimal dispute resolution mechanism for promoting economic development, and certainly as preferable to non-state dispute resolution mechanisms such as community-based mediation. This paper compares the goals of formal and informal methods of dispute resolution, with specific reference to adjudication and mediation. Whereas adjudication seeks generally to resolve disputes according to justice, understood in classical Western thought as the constant and enduring will to render to each what is due, informal dispute resolution is oriented more towards the common good, understood classically as the maintenance of a peaceful social order that allows people to pursue their individual and collective goals in community. These understandings of justice and the common good are not uncontroversial but their respective ideologies are strongly at play in contemporary dispute-resolution developments. The paper refers to the examples of the United States and China but its primary focus is theoretical rather than practical, that is, the discussion aims to contribute to the conceptual discourses surrounding justice and the common good.

**Keywords:** dispute resolution, justice, common good, adjudication, mediation, alternative dispute resolution (ADR)

### I. INTRODUCTION

In contemporary jurisprudence the broad categorization of methods of dispute resolution as “formal” and “informal” places adversarial litigation in the former category and various forms of customary or “alternative” dispute resolution, including arbitration, negotiation and mediation, in the latter category.<sup>1</sup> Rule of Law development initiatives tend to involve a preference for formal or state law over informal or customary law. Leigh Toomey remarks that development assistance programs in the law and justice sector have traditionally focused on reforming state

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<sup>1</sup> There are no easy classifications in this field. One UN study speaks of “a continuum between informal and formal justice providers or systems rather than of a set of sharp distinctions”; depending on their context, the study suggests, different types of informal justice systems occupy different points on the continuum, “according to their structural, procedural and normative features”. UNDP, UNICEF and UNWomen, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (Copenhagen: Danish Institute for Human Rights, 2012), p. 54. Cf. S. Roberts, *Order and Dispute* (New York: Penguin, 1979).

legal institutions to the exclusion of customary legal systems and this is “often because of host country pressure to achieve quick results, limited familiarity of foreign lawyers with the concepts of customary law, and donor reluctance to support customs that substantively or procedurally violate human rights norms”—and yet, she adds, rule of law practitioners deployed to developing and post-conflict countries are increasingly confronted with the reality, “that customary legal systems are the preferred and, for the foreseeable future, the only viable means of dispute resolution available to the vast majority of people”.<sup>2</sup> In this paper I want to approach some of the issues at stake in this context by comparing the goals of formal and informal methods of dispute resolution, with specific reference to adjudication and mediation.

In the West, Judith Resnik observes, adjudication became a requisite aspect of successful, market-based economies during the twentieth century: “During the course of that century, democratic principles of equality insisted on the dignity of all persons. An array of individuals became eligible to bring claims into courts, and both public and private providers became accountable through adjudication to explain a variety of their decisions.”<sup>3</sup> Court-based adjudication is premised on adversarial litigation, characterized by quite formal legal contestation and adjudication and a high degree of litigant or party activism.<sup>4</sup> In this paper reference will be made mostly to adjudication in the common law United States (US) context, but it is worth remarking that *inquisitorial* civil law systems are just as “adversarial” in this regard as *adversarial* common law systems: the “zero-sum outcomes typically produced by common law courts of law” are also produced in civil law jurisdictions.<sup>5</sup> At any rate, because of the substantial expense involved in litigation, as well as its relative ineffectiveness (there are inordinate delays, and the vast majority of filed cases settle before a court

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<sup>2</sup> L.T. Toomey, *A Delicate Balance: Building Complementary Customary and State Legal Systems*, 3 *The Law and Development Review*, no. 1 (2010), 156-207, at 156.

<sup>3</sup> J. Resnik, *Whither and Whether Adjudication?*, 86 *Boston University Law Review*, (2006), 1101-1154, at 1101.

<sup>4</sup> R. A. Kagan, *Should Europe Worry about Adversarial Legalism?*, 17 *Oxford Journal of Legal Studies*, no. 2 (1997), 165-183, at 166-168.

<sup>5</sup> V. Waye and P. Xiong, *The Relationship between Mediation and Judicial Proceedings in China*, 6 *Asian Journal of Comparative Law*, no. 1 (2011), Article 2 (at 21).

decision), in the early twenty-first century adversarial litigation and adjudication are institutions in relative decline.

While in parts of the world what is now called, “alternative dispute resolution” (ADR), has had a long, uninterrupted history, over the past few decades it has come to have a formidable presence in the global legal landscape. Many nations are experimenting with alternatives to court adjudication: these range from efforts to revive traditional local dispute-resolution institutions to those aimed at importing court-connected mediation models from abroad. In this paper I focus on mediation, the outcomes of which are ideally, “reached by facilitated negotiation and consent, rather than externally imposed decisions, [and are therefore] widely thought to lead to greater satisfaction, legitimacy, implementability, and voluntary compliance.”<sup>6</sup> Robert P. Burns suggests that, broadly speaking, mediation is “the practice through which a third party engages in a conversation seeking resolution of a situation that the parties find problematic”, and observes that his description has to be so generic “because the forms of mediation and the styles of mediation have become so diverse”.<sup>7</sup> Carl Minzner emphasizes that it is important “not to make simplistic assumptions that mediation here equals mediation there”.<sup>8</sup> Mediation takes different forms in China, for example, including administrative mediation; mediation during arbitration proceedings; court-based, judicial mediation during trial proceedings; and people’s, community-based meditation (*renmin tiaojie*). Generally speaking, Chinese forms of mediation are more aggressive and interventionist, as well as more explicitly educational in nature, than Western mediation.<sup>9</sup>

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<sup>6</sup> C. Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering* (2002) 10 *Journal of Law & Policy* (2002), 37-61, at 53.

<sup>7</sup> R.P. Burns, *Some Ethical Issues Surrounding Mediation* (2001) 70 *Fordham Law Review*, no. 3 (2001), 691-717, at 701. In the West the most prominent divide is between “facilitative” and “evaluative” mediation styles, and another important divide is between “problem-solving” and “transformative” mediation. L.L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *Harvard Negotiation Law Review* (1996), 7-51.

<sup>8</sup> C. Minzner, *China’s Turn Against Law*, 59 *The American Journal of Comparative Law*, no. 4 (2011), 935-984, at 971.

<sup>9</sup> X. Di and Y. Wu, *The Developing Trend of the People’s Mediation in China*, 42 *Sociological Focus*, no. 3 (2009) 228-245.

In comparing the goals of adjudication and mediation I refer in particular to conceptions and ideologies of “justice” and “the common good” in those goals. I suggest that whereas adjudication seeks generally to resolve disputes according to justice, understood in classical Western thought as the constant and enduring will to render to each what is due, informal dispute resolution mechanisms like mediation are oriented more towards the common good, understood classically as the maintenance of a peaceful social order that allows people to pursue their individual and collective goals in community. I then discuss how these conceptions and ideologies may be at play in two contexts: first, the so-called “turn against law” in the US, in which the rise of ADR has taken place against a background in which fewer than 10% of litigated cases result in a court-based, adjudicated decision; and second, the late-twentieth century turn *to* formal law (*fa*) and adjudication in China and the subsequent “u-turn” leading to the revival of mediation in recent years.

These understandings of justice and the common good may be described, broadly speaking, as Aristotelian-Thomist, but not “Thomist” as this term is applied to communitarian or other, similar virtue-based ethical theories;<sup>10</sup> to “new” or other types of natural law theory;<sup>11</sup> or to the strand of Thomism that, at least according to Joseph Raz, focuses on making “the moral case for having legal authorities, of the law-making and law-applying varieties”.<sup>12</sup> Despite the apparent tendency in modern jurisprudence to consider John Finnis as the exclusive valid interpreter of St. Thomas Aquinas’s jurisprudence, classical justice theory has been elaborated Thomistically as

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<sup>10</sup> See e.g. A. MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981); M.J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); M. Walzer, *Spheres of Justice* (New York, NY: Basic Books, 1983); C. Taylor, *Sources of the Self* (Cambridge, MA: Harvard University Press, 1989).

<sup>11</sup> See e.g. J. Finnis, *Natural Law and Natural Rights* (Oxford: University Press, 1980).

<sup>12</sup> J. Raz, *About Morality and the Nature of Law*, 48 *American Journal of Jurisprudence*, no. 1 (2003), 1–15, at 7; see e.g. G.E.M. Anscombe, “On the Sources of the Authority of the State”, in G.E.M. Anscombe, *Collected Papers, Vol. III: Ethics, Religion and Politics* (Oxford: Blackwells, 1981); T. Honoré, *Making Law Bind* (Oxford: Clarendon Press; New York: Oxford University Press, 1987).

an approach to the discovery of entitlement by thinkers such as Michel Villey (1914–1988),<sup>13</sup> Chaïm Perelman (1912–1984),<sup>14</sup> and Garrett Barden (b.1938).<sup>15</sup>

It is this strand of Aristotelian-Thomism that I defend in this paper and in particular its essentially descriptive or non-normative accounts of justice and the common good. By “descriptive or non-normative” I mean that the concepts of justice and the common good are not considered as value-laden in this tradition as in others; that is, the Aristotelian-Thomism that I defend is not properly a part of what is usually termed “normative jurisprudence”.<sup>16</sup> Moreover, in classical thought justice is primarily a method of enquiry, so the huge emphasis on social justice in modern justice theory is not reflected in the broader, classical approach to justice;<sup>17</sup> and neither do we find in classical thought the widespread presumption that justice can and should be expressed in the form of principles or axioms.<sup>18</sup> Similarly, and in

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<sup>13</sup> M. Villey, *Leçons d'histoire de la philosophie du droit* (Paris: Dalloz, 1962); *La Formation de la pensée juridique moderne* (Paris: Montchrestien, 1968); *Seize essais de philosophie du droit* (Paris: Dalloz, 1969); *Critique de la pensée juridique moderne* (Paris : Dalloz, 1976); *Le droit et les droits de l'homme* (Paris : Presses Universitaires de France : 1983).

<sup>14</sup> C. Perelman, *Justice et raison* (Bruxelles: Presses Universitaires de Bruxelles, 1963); *Droit, morale et philosophie* (Paris: Librairie Générale de Droit et de Jurisprudence, 1968); *Rhetoric and Philosophy*, 1 Philosophy and Rhetoric (1968), 15-24; *Le Raisonnable et le déraisonnable en droit* (Paris: Librairie Générale de Droit et de Jurisprudence, 1984).

<sup>15</sup> G. Barden, *After Principles* (Notre Dame, IN: University of Notre Dame Press, 1990); *Essays on a Philosophical Interpretation of Justice: The Virtue of Justice* (Lampeter: Mellen Press, 1999).

<sup>16</sup> In *Normative Jurisprudence* (Cambridge: Cambridge University Press, 2011) Robin West aims to reinvigorate normative legal scholarship that both criticizes positive law and suggests reforms on the basis of stated moral values and legalistic ideals. For West (p. 2), “the demands of justice, the ideals we have or should have for law, or the nature of the ‘good’ that a good law exhibits and that a bad law lacks [...] should be defining questions of jurisprudence”.

<sup>17</sup> T. Murphy, *Ethics, Politics, and Types of Justice*, 2 *Transnational Legal Theory*, no. 1 (2011), 135-143; T. Murphy, *Dos teorías sobre la justicia social [Two Theories of Social Justice]*, trans. C. Alonso Mauricio, 10 *Eunomía*, no. 1 (2016), 78-89.

<sup>18</sup> Rawls’s two well-known principles of justice dominate the landscape (J. Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1999, revised ed.), p. 53) of modern justice theory. Cf. Barden (1990), *supra* note 16.

contrast to normative utilitarian or other political-philosophical approaches, in this tradition the conception of the common good describes a neutral framework within which civil society is able to function. While the paper refers to the US and China, its primary focus is to contribute to the conceptual discourses surrounding justice and the common good.

The next section of the paper shall set out in more detail the classical conception of “justice” underpinning litigation and adjudication, and also the classical conception of the common good as the maintenance of peaceful social order. The third and fourth sections examine ideas of justice and the common good in the discourses surrounding contemporary dispute-resolution developments in, respectively, the US and China. Some concluding comments are offered in the final section.

## II. CLASSICAL CONCEPTIONS OF JUSTICE AND THE COMMON GOOD

In setting out his taxonomy of the virtue of justice in Book V of the *Nicomachean Ethics*, Aristotle presupposed what later became the Roman law definition of justice—the rendering to each what is due, which he calls “particular justice”. Aristotle distinguishes between particular justice and justice in a “universal” or general sense; and he classifies particular justice as either natural or conventional and, additionally, as either distributive, rectificatory, or reciprocal. In my view this is the best available conceptual framework for the understanding and study of different types of justice,<sup>19</sup> but here I focus exclusively on setting out the idea of particular justice.

The virtue of particular justice, which is one virtue among many (and therefore not the whole of virtue), refers to a person’s dealings with others.<sup>20</sup> The idea that there is “particular justice” comes from the ordinary—pre-philosophical—idea that people are *entitled* to things. Particular justice is simply the virtue involved when the matter at hand has to do with making sure that each person has what he is entitled

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<sup>19</sup> See G. Barden and T. Murphy, *Law and Justice in Community* (Oxford, Oxford University Press, 2010).

<sup>20</sup> *Nicomachean Ethics*, V.1129b30.

to.<sup>21</sup> As has been said, Aristotle presupposed what later became the Roman law definition and we may speak of the Aristotelian-Roman-*Thomist* tradition of law and justice not only because of St. Thomas Aquinas's Aristotelianism in general but specifically because the account of justice in the *Summa Theologiae* is based on St. Thomas's reformulation of the Roman law definition. The Roman definition is set out in Justinian's *Institutes*: "*Iustitia est constans et perpetua voluntas ius suum cuique tribuens*".<sup>22</sup> In English this definition reads (roughly, because "*ius suum*" is so difficult to translate into English):<sup>23</sup> "Justice is the constant and enduring will to render to each what is due". St Thomas's version is: "Justice is the habit whereby a person with a lasting and constant will renders to each his due".<sup>24</sup>

In this tradition justice is a moral virtue, a type of virtue described by Aristotle as, "a state of character concerned with choice, lying in a mean, i.e. the mean [relative] to us, this being determined by a rational principle, i.e. by that principle by which the man of practical wisdom would determine it".<sup>25</sup> In the Aristotelian-Roman-*Thomist* tradition of law and justice, the virtue of justice is an *approach* or a *method of enquiry* into the discovery of who is entitled to what in whatever circumstance in which entitlement needs to be settled. Because the classical conception of justice is not substantive and instead refers to a method it has been criticized for its emptiness

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<sup>21</sup> The word "entitlement" may have a negative ring to it sometimes, as in the types of self-interest associated with a so-called "culture of entitlement", but the entitlement to which I refer is neutral in this sense. Nor is this idea of justice in any way related to the "entitlement theory" advanced in Robert Nozick's modern social justice theory, which addresses the just distribution of goods in society by attempting to describe "entitlement" vis-à-vis what Nozick terms, "justice in holdings" (*Anarchy, State, and Utopia* (New York, NY, Basic Books, 1974)). In contrast, "entitlement" in the Aristotelian-Roman-*Thomist* conception of justice refers to the ownership of benefits and burdens in a community; justice is the fair, proportionate and impartial method involved in discovering what those patterns of ownership are, that is, the method involved in discovering who is entitled to what.

<sup>22</sup> Justinian, *Institutes*, I.I.1. The definition is attributed in the *Digest* (1.1.10 Prologue) to Ulpian (d. 228 AD) but the idea appears at least as early as Cicero's *On Duties*, I.15. See Barden and Murphy (2010), *supra* note 19, p. 40.

<sup>23</sup> On this difficulty, see Barden and Murphy (2010), *supra* note 19, ch. 3.

<sup>24</sup> "[J]ustitia est habitus secundum quem aliquis constanti et perpetua voluntate jus suum unicuique tribuit." *Summa Theologiae*, II-II, q 58, a 1c.

<sup>25</sup> *Nicomachean Ethics*, II.6.

in that it offers no help in the effort to discover what in particular instances is “due” or to distinguish between just and unjust arrangements or distributions. This criticism is true enough but it is simply not relevant because the idea that justice constitutes an approach or a method of enquiry rather than a substantive theory reflects the nature of virtues, which exist as ways-of-being and ways-of-acting, that is, as forms of agency or methods. What in a person is a moral virtue or state of character, in a legislature or adjudicative body is a method.<sup>26</sup>

Justice is a virtue that is particularly relevant to legislative and regulatory deliberations as much as adjudicative ones because all of these refer to entitlements in jural communities, and it may of course also be relevant, and for the same reason, in normative contexts not touched upon directly by positive, state law. The task of a tribunal or a court of law is *always* to determine who in particular situations is entitled to what; similarly, and in contrast to the view that attaining justice is a paradigmatic purpose of state laws, such laws in fact express justice, that is, they express typically a communal sense of fairness in the entitlements that they delineate. Similarly, in relation to non-state, customary or “living” law, entitlements must be discovered and settled; indeed, for many theorists, among the plurality of state and non-state norms the norms of customary or living law are far more important for social ordering than the norms of state or official law.<sup>27</sup> What is just in a particular situation, in whatever normative context, is to be discovered in and through intelligent and reasonable discussion and investigation of that situation in the context of the jural community in

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<sup>26</sup> John Gardner suggests that one reason the law should be thought to be the sort of thing which ought to be just is because justice is a moral virtue and, “it is part of the nature of a moral virtue that anything that has the capacity for moral agency (including law) should exhibit it”. J. Gardner (2000), *The Virtue of Justice and the Character of Law*, 53 *Current Legal Problems* (2000), 149-184, at 151. Cf. Raz (2003) *supra* note 12, at 6 (“The law as a whole can have moral properties because its, or the majority of its, components, especially its laws or rules, have them.”) Gardner suggests that justice is about *allocation*, which in my view is an advance on Waldron’s idea that justice is about *distribution*. *The Primacy of Justice*, 9 *Legal Theory*, no. 4 (2003), 269-294; however, in the Aristotelian-Thomist tradition, while there can be no distribution without allocation, equally there can be no allocation with the discovery of *entitlement*.

<sup>27</sup> Cf. E. Ehrlich, *Fundamental Principles of the Sociology of Law*, Walter L. Moll (trans.), (Cambridge, MA: Harvard University Press, 1936); T. Murphy, *Living Law, Normative Pluralism, and Analytic Jurisprudence*, 3 *Jurisprudence*, no. 1 (2012), 177-210.

question.

“What a person is entitled to” may be positive or negative, a benefit or a burden. The Roman legal tradition developed the critically important idea of *ius*, for which there is no unambiguous translation into modern English but which may be rendered as “what is due”. Less accurate but nonetheless helpful other translations are “right” or “entitlement”. In Roman law, one may, for example, have a *ius* or “right” to the repayment of a debt owed to one, or to private property, but one may equally have a *ius* or “right” to allow one’s neighbour’s drain to pass through one’s yard, or to serve a prison sentence, or to pay a debt or fine.<sup>28</sup> In the classical tradition, then, a “right” (*ius*) is an entitlement in the jural community; it is what, further to investigation and consideration of what is just, is discovered to be due. Rights or entitlements of whichever type come into being only when they have been recognized, established, and honoured in particular situations, and thus St Thomas observed that the object of justice, that is, the situation that a just act is intended to bring about, “is called the just, which is the same as ‘right’. Hence, it is obvious that right is the object of justice”.<sup>29</sup>

In Aristotelian-Thomist thought human community is a *spontaneous order*, which stands in contrast to the modern understanding, exemplified in the image of social design in Rawls’s “original position”, of society as an *organization* established, effectively, by the agreement of pre-social individuals.<sup>30</sup> In the tradition of law and

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<sup>28</sup> When a right is a burden it is traditionally called a “servitude” (see Gaius, *Institutes*, ii.14, in W.M. Gordon and O.F. Robinson (trans. and eds.), *The Institutes of Gaius* (London: Duckworth, 1988), p. 18).

<sup>29</sup> *Summa Theologiae*, II-II, q 57, art 1. Barden and Murphy (2010, *supra* note 19, p. 218, emphases in original) thus argue that rights-claims of any kind, including claims that an individual or human right exists in a given situation, represent claims to entitlement. “All law—and all justice”, they suggest, “is in this sense about ‘rights’: to ask what type of person in the general case and what individual in a particular case is entitled to is to ask what right exists and who has what right in that particular case. Rights, therefore, like law and ‘the just’, are *discovered and decided*. All law, moreover, is about potential or actual conflicts of claims, for the function of a dispute over conflicting claims is to discover and determine rights.”

<sup>30</sup> Contractarianism seems often to be based on what Hayek termed an inability “to conceive of an effective coordination of human activities without ... deliberate organization by a commanding intelligence”. F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), p. 159. The idea of spontaneous communal order is taken often to deny the role of deliberate and patterned human

justice, ownership or entitlement of some kind is necessary for, and unavoidable in, communal human living, which is itself a necessity.<sup>31</sup> Humans have always owned—that is, have always been entitled to—things, although what they own and how they own them changes over time. To own something is to be entitled to possess it under certain conditions;<sup>32</sup> and “Who owns this thing?” and “Who is entitled to possess this thing?” are thus two versions of the same question, namely, the question of justice. Ownership is about entitlements and what constitute the entitlements in a jural community differs from society to society. This is not to assume that, at any one moment, what is generally accepted as owned by whomsoever was originally justly acquired; it is simply to assume the existence of ownership in communal living.

It is sometimes thought that if ownership is conceptually fundamental this is to imply that private property rights are an appropriate model for all entitlements, but this is not accurate. No particular form or forms of ownership are intrinsic to justice or law, so the ownership in question can include all types of *de facto* ownership, including private ownership, collective ownership, ownership of other people (slavery), ownership of our bodies (and body parts), and so on. And it is worth emphasizing too that the patterns of ownership in a community will not be restricted to positive, state law, but will rather extend to plural normative orders, each of which may address issues of entitlement differently. The idea of normative pluralism, including legal pluralism, is in other words presupposed in the classical approach

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agency in social development, but this is to perceive a false dichotomy between spontaneity and agency. In an evolutionary conception of society, “law” in the form of communal norms and morality are learned in much the same way and at the same time as language is learned, that is, spontaneously and in particular moral and linguistic contexts. See J. Gagnepain, *Du vouloir dire* (Paris: Pergamon, 1982).

<sup>31</sup> Neither Aristotle nor St Thomas says explicitly that humans have always lived in community: instead they take it for granted because they think humans cannot live otherwise (Aristotle, *Nicomachean Ethics*, IX.1169b.18; Aristotle, *Politics*, I.1253a.2; St. Thomas Aquinas, *Commentary on Aristotle’s Nicomachean Ethics*, IX.X.1891).

<sup>32</sup> See Barden and Murphy (2010), *supra* note 19, pp. 43-49. What one is entitled to possess may be a material or non-jural thing—a house, a horse, etc—or a jural thing—a debt, recognition as being the author of a work, punishment for a crime of which one has been found guilty, recompense for work done, etc. The distinction between corporeal, in themselves non-jural, things, and incorporeal or jural things is made by Gaius in his *Institutes*, ii.12, 13, and 14 (Gordon and Robinson (1988), *supra* note 28, p. 18).

outlined here.<sup>33</sup>

The idea that human community is a spontaneous order rather than an organization raises the question of how such an order is maintained. There are several extant conceptions of the concept of the common good,<sup>34</sup> but in the Aristotelian-Roman-Thomist tradition the common good represents simply the ongoing maintenance of peaceful social order. Civil society is an order into which humans are born, as they have always been born, without any original choice, and this society is maintained only if those within it choose and act well; if they do not, if they choose and act badly, the social order is undermined.<sup>35</sup> The classical conception of the common good is a conception of the framework within which such choices are made; the framework is required to maintain peaceful social order that in turn allows people to pursue their individual and collective goals in community.

Patrick Riordan distinguishes between two assumptions: first, the “good” or interest common to players on the same team in a competitive game, which is to win;

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<sup>33</sup> It is hard to deny normative pluralism as a social fact, as William Twining remarked, because we all encounter it every day, including norms relating to personal daily routines, informal rules of individual behavior and social interaction, driving and other transport etiquette and regulations, computer commands, spelling norms, as well as the multiplicity of norms and rules discussed in the media. *Normative and Legal Pluralism: A Global Perspective*, 20 *Duke Journal of Comparative and International Law* (2010), 473-517. Cf. Toomey (2010), *supra* note 2, at 158-160: “Contemporary rule of law practice in headquarters and field-based missions is now firmly based, albeit often unconsciously, on ... legal pluralism.” (at 158).

<sup>34</sup> For a taxonomy of eight versions, see D.P. Sulmasy, *Four Basic Notions of the Common Good*, 75 *St John’s Law Review*, No. 2 (2001), 303-311. Sulmasy’s taxonomy is extensive but not exhaustive: see T. Murphy and J. Parkey, *An Economic Analysis of the Philosophical Common Good*, 43 *International Journal of Social Economics*, no. 8 (2016), 823-840.

<sup>35</sup> See Barden and Murphy (2010), *supra* note 19, pp. 19-29. When a person, for example, tempted to steal, chooses not to steal, he chooses to maintain the community and its peaceful order; when, tempted to steal, he chooses to steal, he chooses to undermine the community and its peaceful order. The honest person chooses not to steal because he accepts that what he is tempted to steal belongs to another and he respects the owner’s interest and its place in the broader scheme of ownership in the community; when honest men and women live together, their honest choices contribute to bringing about and sustaining the community’s peaceful order, which is thus chosen, as it were, obliquely.

and second, the common good of all the competitors that the game be played fairly.<sup>36</sup> Obviously, the desire to win may easily, and often does, undermine a player's commitment to the common good understood in the second, broader sense, but it is this second sense—the sense that refers to all participants collectively—that is the classical sense of the common good. The common good of all competitors in a game that the game be played fairly, which is to say properly, is analogous to the common good of those living in community—the good common to all—that a peaceful social order be maintained. On this view, the common good “is peaceful and civil society in which humans can, for the most part, live their lives in cooperative harmony”<sup>37</sup>—it is about maintaining a stable social framework of peace and civility and it does not otherwise refer to the achievement or entrenchment of any set of normative or “political” values, or to any aim or goal common to everyone.<sup>38</sup> Individuals living in communities do in fact generally choose to live in this way because it is in the *self-interest of all* that the common good of peaceful order be maintained. The precise nature of self-interest is crucial here because, unlike selfishness, self-interest may take others' interest into account, and in relation to the common good it clearly does. C.S. Lewis captured this idea well when he remarked that human beings, “after all, have some sense; they see that you can't have any real safety or happiness except in a society where one plays fair, and it's because they see this that they try to behave decently”.<sup>39</sup>

This “framework conception” of the common good is also found in the work of Thomas Hobbes (who used the term “natural lust” to describe an order where

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<sup>36</sup> P. Riordan, *A Politics of the Common Good* (Dublin: Institute of Public Administration, 1996), pp. 18-19.

<sup>37</sup> Barden and Murphy (2010), *supra* note 19, p. 29.

<sup>38</sup> As Barden and Murphy remark, no social outcome—that is, no particular configuration of the social order—is an aim or goal common to all, “and neither does the common good refer to anything like the good of the majority or the good of any portion of the populace, whether calculated along utilitarian or other lines”. Barden and Murphy (2010), *supra* note 19, p. 29. Cf. Murphy and Parkey (2016), *supra* note 34.

<sup>39</sup> C.S. Lewis, “Right and Wrong as a Clue to the Meaning of the Universe”, in *Broadcast Talks* (London: Centenary, 1942), pp. 21-22.

selfishness prevails).<sup>40</sup> Although the natural, pre-civil society imagined in Hobbes' theory is not a part of St Thomas' thought, Hobbes' concept of civil society is in many ways close to that of St Thomas.<sup>41</sup> A constant in Hobbes' thought is the possibility that civil society will degenerate into a state of war; and that it does so degenerate, either into outright civil war or to some lesser violence, is all too common. Hobbes' overarching question, to which others are subordinate, concerns what is needed if people are to live in community without a state of constant war, "where every man is an Enemy to every man".<sup>42</sup> To which question the answer is "Peace"—or, we could say, the *framework* of peace. And, indeed, Hobbes states, ". . . the first, and Fundamentall Law of Nature . . . is, *to seek Peace, and follow it*".<sup>43</sup> Humans living together discover this fundamental and very practical law of nature—"to seek Peace, and follow it"—as necessary for any social order; and it is from this law that others follow. Hobbes suggested that humans were motivated to seek—and to choose—such peaceful order by the "Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their means to obtain them".<sup>44</sup> On this view, the desire for what allows a good life ("commodious living") and the hope of being able to live it are the desire and hope for the common good.

### III. ADJUDICATION, JUSTICE, AND THE COMMON GOOD

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<sup>40</sup> Another way of thinking about this conception of the common good is to consider a civil society that has collapsed and that is then reconstituted, such as in the case of a return to peace subsequent to civil war or extreme civil strife characterized by phenomena such as rioting, looting, and the non-functioning of state institutions. When a civil society collapses—into a so-called "failed state" or otherwise—the framework of peaceful order collapses, that is, the self-interest of all in the common good of communal peace is somehow compromised or challenged. This is not a collapse into a pre-social "state of nature" but rather into an order where selfishness prevails.

<sup>41</sup> See generally, G. Barden and T. Murphy, *Law's Function in Leviathan and De Cive – A Re-appraisal of the Jurisprudence of Thomas Hobbes*, 29 *Dublin University Law Journal* (2007), 231-259; cf. Barden and Murphy (2010), *supra* note 19, ch. 2.

<sup>42</sup> Hobbes, *Leviathan* [1651], C.B. Macpherson (ed.), (London: Penguin, 1968), p. 186.

<sup>43</sup> *Ibid.*, p. 190.

<sup>44</sup> *Ibid.*, p. 188.

Although it is usually implicit only, and although it is found at the origins of the *civil* law tradition, the idea of “justice” underpinning civil law *and* common law adversarial litigation and adjudication is the classical, Aristotelian-Roman-Thomist conception of justice. In line with this conception, the question addressed by courts in instances of adversarial litigation may be construed as *always* of the form, “In the case now before this court, what is due to each of the parties?” In the practice of litigation in archaic societies, the king or prince was as much a judge as a ruler, but in modern societies the courts fulfil the adjudicative function; that is, courts and judges are, or are hoped to be, capable of delivering justice: “when people dispute they take refuge in the judge; and to go to the judge is to go to justice; for the nature of the judge is to be a sort of living justice”.<sup>45</sup>

New statutory rights and delegation to administrative agencies and private providers were the greatest contributors to the broadening role of courts in developed market economies during the twentieth century, but gradually a range of problems began to undermine the attractiveness of litigation. Rising litigiousness caused delays in legal institutions already prone to acting slowly; the dependency on lawyers meant there was no easy way to avoid substantial litigation expenses; and the effectiveness of the system was challenged by studies showing repeatedly that fewer than 10% of all cases filed result in a judicially adjudicated decision.<sup>46</sup> Ultimately and not surprisingly there emerged a widespread public dissatisfaction with litigation systems in the West.<sup>47</sup> The dramatic growth of the number of cases resolved through

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<sup>45</sup> Aristotle, *Nicomachean Ethics*, V.1132a.20.

<sup>46</sup> See M. Galanter and M. Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 *Stanford Law Review*, no. 6 (1994), 1339-1391; M. Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *Stanford Law Review*, no. 5 (2005), 1255-1274; M. Galanter, *A World Without Trials*, 7 *Journal of Dispute Resolution*, no. 1 (2006), 7-27).

<sup>47</sup> Distress regarding the manner in which legal institutions function has not been confined to the public. In the US context, for example, Resnik remarks that the temptation for *judges* “to wish away all the cases, to advocate higher access fees, fewer appeals, less involvement in adversarial encounters, and the abandonment of adjudication, must be enormous”, but she urges that judicial exhaustion not be translated “into rules or practices that devalue adjudication but offer no constrained decisionmaking procedure to take its place.” *Failing Faith: Adjudicatory Procedure in Decline*, 53 *University of Chicago Law Review*, no. 2 (1986), 494-560, at 556.

alternative means has been characterized as a broad “turn against law” in the US since the 1970s.<sup>48</sup>

A key reference point in this broad “turn against law” was the articulation by Frank Sander of ADR as a field of legal inquiry and his proposed vision of what subsequently became known as the “multi-door courthouse”. In 1976, Chief Justice Warren Burger convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, known as the Pound Conference, to commemorate the 70th anniversary of Roscoe Pound’s 1906 speech to the American Bar Association in which Pound strongly advocated judicial reform. Sander proposed that courts be transformed into “Dispute Resolution Centers”, in which “the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.”<sup>49</sup> Sander wrote in 2000 that the idea behind the multi-door courthouse was to create,

“a comprehensive justice center where cases are screened and analyzed so that they can be referred to that process or sequence of processes that's best suited to provide an effective and responsive resolution. So, for example, if we have a dispute between two neighbors who continually fight over a joint driveway, what we need is not so much to determine their legal rights as to help them understand better their conflicting concerns and teach them how those can be accommodated more effectively in the future”.<sup>50</sup>

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<sup>48</sup> M. Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 Texas Law Review, no. 1 (2002), 285-304.

<sup>49</sup> F.E. Sander, “Varieties of Dispute Processing” in A.L. Levin and R.R. Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future* (St. Paul, MN: West Publishing, 1979), pp. 65-87. Cf. J. Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 Ohio State Journal on Dispute Resolution, no. 2 (1995), 211-265. Several writers have expressed reservations about the value of the term “alternative dispute resolution”. Many argue that arbitration and mediation are extremely different from one another, and that arbitration is more similar to litigation than it is to mediation or negotiation. Some express a preference for the phrase “appropriate dispute resolution” because it more accurately captures the notion that litigation, arbitration, mediation, and negotiation are alternatives to one another (whereas “alternative” suggests courts are the default option). See J.R. Sternlight, *Is Binding Arbitration a Form of ADR: An Argument That the Term ADR Has Begun to Outlive Its Usefulness*, 2000 Journal of Dispute Resolution, no. 1 (2000), 97-111.

<sup>50</sup> F.E. Sander, *The Future of ADR*, 2000 Journal of Dispute Resolution, no. 1 (2000), 3-10, at 5.

Over the last decades the ADR movement has become institutionalized in the US but still critics perceive the phenomenon of the “vanishing” trial as, “diminishing the ability of judicial adjudication to fulfill one of its key functions: the promotion of the public good”.<sup>51</sup> Moreover, rule of law concerns regarding ADR emphasize the tensions between fairness and efficiency, with reference in particular to procedural norms, the value of access to public adjudication, and the issue of inequalities in parties’ bargaining power.

For lawyers the rise of ADR was naturally “threatening and scary”.<sup>52</sup> The best-known sophisticated defense of adjudication vis-à-vis ADR came from Owen Fiss, who argued, in effect, that the *common good* of peace associated with mediated settlements comes at the expense of *justice*. Fiss emphasized that the judiciary possess,

“a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”<sup>53</sup>

Civil litigation, Fiss suggests, is “an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals,” and the duties embodied in

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<sup>51</sup> M. Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 *Cardozo Journal of Conflict Resolution*, no. 1 (2009), 1-28, at 2. The public dimensions of adjudication are said to include the dissemination of information about the imposition of state power and the legitimation of that power, and they also “enable a diverse audience to see the effects of the application of law in many specific situations. As various sectors of the public gain insight into law’s obligations and remedies, reaffirmation of those precepts occurs, or pressures emerge for judges and legislators to expand or to constrict extant rules.” Resnik, *Whither and Whether Adjudication?* (2006), *supra* note 3, at 1102.

<sup>52</sup> Sander, *The Future of ADR* (2000), *supra* note 50, at 6.

<sup>53</sup> O. Fiss, *Against Settlement*, 93 *Yale Law Journal* (1984), 1073-1090, at 1085.

this arrangement, Fiss says, are not discharged when the parties settle, which he describes as “the civil analogue of plea bargaining”.<sup>54</sup>

Sander responded by emphasizing that complex litigation in the pursuit of justice is not all that courts do, and he emphasized how so many cases are disposed of by settlement and negotiation, sometimes aided by court decisions on motions; ultimately, Sander argues, courts have two *separate* roles: “articulation of public values and interpretation of statutes and the Constitution ... and dispute settlement”.<sup>55</sup> He stresses that the ADR movement is “not an anti-court movement” but rather “an effort to have the courts more effectively doing those things that they are peculiarly fit to do, and have other institutions like arbitration and mediation dispose of those cases that don’t require the specialized expertise of courts”.<sup>56</sup>

The primary organization of dispute resolution professionals in the US has described alternative dispute resolution’s “conflicting values and goals” as including: “increased disputant participation and control of the process and outcome; restoration of relationships; increased efficiency of the judicial system and lowered costs; preservation of social order and stability; maximization of joint gains; fair process; fair and stable outcomes; and social justice.”<sup>57</sup> Although these goals include social *justice* and *fair* outcomes, evidently the key goal here is the preservation of social order and stability, and it is interesting to compare this list with Robert Baruch Bush’s list of societal goals for civil justice systems: resource allocation; social justice;

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<sup>54</sup> *Ibid.*, at 1089, 1075. “Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised” (at 1075).

<sup>55</sup> Sander, *The Future of ADR* (2000), *supra* note 50, at 5. Cf. E. Ryan, *ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives*, 113 *Harvard Law Review*, no. 7 (2000), 1851-1875, at 1853.

<sup>56</sup> Sander, *The Future of ADR* (2000), *supra* note 50, at 5.

<sup>57</sup> *Ensuring Competence and Quality in Dispute Resolution Practice*, Report 2 of the SPIDR Commission on Qualifications (Society of Professionals in Dispute Resolution, 1995), p. 5, quoted in L.L. Riskin, *supra* note 7, at 17 (note 34). On the more general question of the particular kinds of problematic situations appropriate for mediation, see L.L. Fuller, *Mediation—Its Forms and Functions*, 44 *Southern California Law Review*, (1971), 305-339.

fundamental rights protection; public order; human relations; legitimacy; and administration.<sup>58</sup> In discussing the goal of positive “human relations”, Bush’s account distinguishes between “social order” and “social harmony:

While it is not cited in the civil justice reform debate as often as some of the previous goals, another important societal goal is that the members of a society be able to get along with one another, on the individual and the group level. This involves mutual tolerance, respect, and even appreciation of different points of view and different modes of existence. It also involves a sense of common, shared humanity, and as a result, a sense of social solidarity. Positive human relations and social solidarity are important for their own sake, although they also relate to other goals. In a sense, this goal can be seen as a preventive approach to maintaining public order; but the latter is a discrete and more limited goal and need not involve direct attention to the quality of human relations. Social order is not necessarily social harmony.<sup>59</sup>

In this account social or public “order” need not involve direct attention to the quality of human relations, a high level of which leads to social or public “harmony”, which in turn gives rise to social or public “solidarity”. While this difference may be notable in contexts like contemporary dispute-resolution in China, the theoretical common ground here would seem to be *peace* or *peaceful social order*, which exist, albeit in different ways, in contexts of social order *and* social harmony.

In the preceding section we noted that Hobbes’s overarching question concerns what is needed if people are to live in community without a state of constant war, to which question the answer is the framework of peace or peacefulness. Humans living together discover a fundamental and very practical law of nature—“to seek Peace, and follow it”—as necessary for any social order; and it is from this law that others follow. In the third chapter of *De Cive* Hobbes explains the necessity of adjudication in terms of social peace:

“Furthermore because, although men should agree to make all these and whatsoever other laws of nature, and should endeavour to keep them, yet doubts and controversies would daily arise concerning the application of them unto their actions, to wit, whether what were done were against the law or not,

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<sup>58</sup> R.A. Baruch Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 Wisconsin Law Review (1984), 893-1034, at 908.

<sup>59</sup> *Ibid.*, at 916.

which we call the question of right; whence will follow a fight between the parties, either side supposing themselves wronged: it is therefore necessary to the preservation of peace, because in this case no other fit remedy can possibly be thought on, that both the disagreeing parties refer the matter unto some third, and oblige themselves by mutual compacts to stand to his judgment in deciding the controversy. And he to whom they thus refer themselves is called an arbiter. It is therefore the fifteenth precept of the natural law, *that both parties disputing concerning the matter of right, submit themselves unto the opinion and judgment of some third.*<sup>60</sup>

This conclusion, theorem, dictate of reason, or “natural law” is Hobbes's answer to the question: why are adjudicators—Hobbes uses indifferently “arbiters”, “arbitrators”, “judges”, “umpires”—necessary? Hobbes’s answer is that peace is the desired condition; conflicts between members of the society will arise; and the peaceful condition will be undermined and the conflicts will be resolved by violence between the contending parties unless a peaceful way of resolving them is discovered and implemented. Adjudication, when the contending parties submit their dispute to a judge and agree to abide by the judge’s verdict, is the only way to resolve them peacefully, “and where there is no judge, there is no end of controversy, and therefore the right of hostility remaineth”.<sup>61</sup> On this account, then, adjudication as a method of resolving disputes peacefully is oriented perhaps as much to the ideology of the common good as to that of justice.

#### **IV. MEDIATION, THE COMMON GOOD, AND JUSTICE**

Perhaps the most challenging aspect of understanding customary legal systems, according to Leigh Toomey, at least for Western-trained lawyers, “is that such understanding requires a departure from the mindset that Western concepts of justice should be the ultimate end of any legal system”.<sup>62</sup> In contrast to the goal of “giving to each what is due”, informal methods of dispute resolution tend to be oriented

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<sup>60</sup> Hobbes, *De Cive* [1642], edited with an introduction by Bernard Gert: *Man and Citizen (De Homine and De Cive)* (Indianapolis, IN.: Hackett, 1991), pp. 145-146 (emphasis in original).

<sup>61</sup> Hobbes, *The Elements of Law: Human Nature and De Corpore Politico* (J.C.A. Gaskin ed.) (Oxford: Oxford University Press, 1994), p. 95.

<sup>62</sup> Toomey (2010), *supra* note 2, at 161.

primarily toward social order and harmony rather the determination of parties' "rights". The maintenance of stability is prioritized ideologically because it is the fundamental pre-requisite for social prosperity. Konrad Zweigert and Hein Kötz have suggested that, in Far Eastern legal systems, "at any rate until recently ... law is a secondary and subordinate means of achieving social order, and it is used only as a last resort' and they explain this in socio-cultural terms:

"The harmony of society is seen as reflecting the general harmony of the world as evidenced in nature and the cosmos. The arid logic and external compulsion inherent in law make it a very rudimentary means of achieving order, though no doubt it is suitable for uncivilized peoples. Among civilized peoples, principles of behaviour should be obeyed voluntarily, and then they will prove effective in the community life of family, clan, and village; they come not from the law, but from the mass of unwritten rules of behaviour harmoniously integrated by tradition."<sup>63</sup>

This "mass of unwritten rules" exists in plural normative orders and, as Zweigert and Kötz say, it is "not directed to procuring that everyone obtains his due, but to preserving social harmony"; on this view, rather than have a winner and a loser in a dispute both parties must be able to "save face".<sup>64</sup>

Few societies, Louis Mok and Dennis Wong observe, "have been as self-consciously mediatory as the Chinese".<sup>65</sup> Mediation was the primary mode of dispute settlement from the ancient imperial era (2100 BCE) until the end of Qing Dynasty in 1911; it was an intrinsic part of Maoist rule and its legacy during the twentieth century; and it continues to play a hugely significant socio-legal role today. Confucianism advocates the prevention of wrongdoing and disputes by the

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<sup>63</sup> K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3<sup>rd</sup> ed., Oxford: Clarendon Press, 1998), pp. 70-71.

<sup>64</sup> *Ibid.* "Thus in the Far East law does not lead to a judicial decision in favour of one party, but to a peaceable settlement or amicable composition. There is much of the wisdom of the Orient here, and there are some echoes of it in the West. Thus a bad settlement, we say, is better than a good lawsuit, and a legal adviser may pride himself on never having had to go to court. Despite this, there is still this critical difference in style, that in the West man naturally fights for his rights and seeks a clear decision, treating a compromise as a thing perhaps to be settled for, and in the East the face-saving compromise is the ideal and a firm decision only a necessary evil."

<sup>65</sup> L.W.Y. Mok and D.S.W. Wong, *Restorative Justice and Mediation: Diverged or Converged?*, 8 *Asian Journal of Criminology*, no. 4 (2013), 335-347, at 339.

encouragement of virtuous living in accordance with the communal morality of *li*.<sup>66</sup> Confucian ethics stressed traditionally, “the virtues of compromise, yielding and non-litigiousness”, and regarded *fa* as appropriate for criminal law and norms only.<sup>67</sup> The strong aversion to litigation—consider the proverb, “It is better to be vexed to death than to bring a lawsuit”, as well as remarks in *The Analects*<sup>68</sup>—suggests that disputants ought to rely on *self*-criticism and moral persuasion to solve interpersonal conflicts.

Maoist ideology in post-1949 China reinforced the dominant status of mediation, and in particular its customary educative role. In gaining absolute control over every dispute resolution, the official approach under Mao still promoted

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<sup>66</sup> Diana Yun-Hsien notes that, in contrast to the general agreement that Confucianism is still an important part of East Asian societies (such as South Korea, China and Taiwan), there is little agreement as to what Confucianism means or which elements of East Asian culture are attributable to Confucianism; “Many things commonly counted as part of the Confucian legacy, such as family centered ethics, respect for elders and social harmony can also be described as attributes of many other cultures in different areas of the world and in different historical periods.” D. L. Yun-Hsien, *Civil Mediation in Taiwan: Legal Culture and the Process of Legal Modernization*, 6 University of Pennsylvania East Asia Law Review, no.2 (2011), 191-215, at 194. Bobby Wong argues that the praise of harmony and dislike of confrontational means of dispute resolution are not peculiar to Confucianism but constitute the common theme of all major schools of traditional Chinese philosophy. *Traditional Chinese Philosophy and Dispute Resolution*, 30 Hong Kong Law Journal, no. 2 (2000), 304-319.

<sup>67</sup> S. Lubman, *Mao and Mediation: Politics and dispute Resolution in Communist China*, 55 California Law Review, no. 5 (1967) 1284-1359, at 1286, 1290. But Teemu Ruskola notes the idea that, “whatever law China has known is a form that falls short of ‘real’ law”, a view implicit, he observes, “in the oft-stated claim that Chinese law has been historically exclusively penal and associated with criminal sanctions”. *Legal Orientalism*, 101 Michigan Law Review, no. 1 (2002), 179-234, at 182. Ruskola refers also to how communitarian and “other idealizations of the Chinese genius for mediation and harmony” tend to rely on notions of “Chinese non-legal non-subjectivity”, and warns that often this represents an uncritical Occidental acceptance of the Confucian ideological fiction that the Chinese “naturally delight in submitting themselves to the dictates of group morality”. *Ibid.*, at 229-230.

<sup>68</sup> “If the people are guided by laws and regulated by punishment, they will try to avoid the punishment but have no sense of shame; if they are guided by virtue and regulated by *li*, they will have the sense of shame and also become good.” Confucius, *The Analects*, Book 1, ch. 2. many writers note that traditional Chinese mediation emphasizes, “the emotional aspect [of conflicts or disputes] most and the legal aspect least”. Mok and Wong (2013), *supra* note 65, at 341.

mediation as the preferred method of conflict resolution “among brothers and sisters of the working class”: it advocated that all disputes among the people should be resolved “by persuasion and education, rather than by coercion, such as adjudication.”<sup>69</sup> However, economic modernization has seen the role and status of mediation in Chinese society challenged considerably: there was first a turn away from (community-based) mediation to adjudication, and then a “u-turn” back to (community-based *and* judicial) mediation.

China’s Communist Party began to liberalize the economy in 1978 and simultaneously began a process that seemingly could lead to the inclusion of the rule of law and the extension of human rights protections in the Chinese constitutional system. Reliance on Maoist-era mediation practices gave way to judicial reform efforts in the 1980s and 1990s that emphasized court-based trials and adjudication;<sup>70</sup> the focus on implementing procedural reform (by means of Five Year Plans for Judicial Reform) meant that, notwithstanding the provision in Article 85 of the Civil Procedure Law for the judicial mediation of disputes, there was a decline in mediation and a significant increase in levels of adversarial litigation during the 1990s.<sup>71</sup>

But the consequences of economic liberalization also included increased economic disparity, new forms of corruption, increasing individualism, and social dislocation and unrest. There has been a general rise in levels of disputation and conflict and these are manifest in the growth of China’s *xinfang* system of letters and visits, spawning “an enormous network of complaints offices traversing all levels of

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<sup>69</sup> Di and Wu (2009), *supra* note 9, at 228-229.

<sup>70</sup> The decline of people’s mediation during the 1990s was not uniform; there were differently evolving patterns of mediation in urban and rural China, related particularly to differing impacts of diverse socio-economic and cultural shifts in which “the pluralization of social values and norms makes it increasingly hard to have a universal ‘*li*’”. Di and Wu, *supra* note 9, at 236.

<sup>71</sup> This version of my paper does not draw out the distinctions between community-based mediation and judicial mediation in China; for some discussion see K.H. Ng and X. He, *Internal Contradictions of Judicial Mediation in China*, 39 *Law & Social Inquiry*, no. 2 (2014), 285-312; P.C.C. Huang, *Court Mediation in China, Past and Present*, 32 *Modern China*, no. 3 (2006), 275-314.

government and bureaucracy”.<sup>72</sup> Increasing citizen protests and fear of mounting social unrest led central Chinese authorities to rethink reform policies:

“Officials viewed domestic Chinese developments against the backdrop of the 2003-2005 ‘color revolutions’ that ousted authoritarian regimes in Eastern Europe and Central Asia. Starting around 2003, civil dispute resolution moved from the margins to become a central Party concern. Chinese authorities began to emphasize mediation in response to social stability concerns.”<sup>73</sup>

The past few years have thus witnessed the expansion and extensive deployment, driven by government and local authorities, of mediation as the chief method of dispute settlement. China’s government has sought to provide, “a means through which some of the harsher collateral consequences of rapid economic growth can be aired and addressed”; but noted also is the official fear of the emergence of a strong, independent judiciary acting as a neutral arbiter of disputes, including disputes relating to sensitive social and economic issues.<sup>74</sup>

The revival of mediation in China embodies a tension between the individual rights-oriented rule of law the government was seeking to introduce in accordance with classical justice ideology, and the informal dispute-resolution methods it needs for controlling conflicts in accordance with classical common good ideology. According to Minzner, the current Chinese “turn against law” is dangerous because it is “eroding the very institutions Chinese authorities themselves attempted to construct in the late twentieth century as a bulwark against social instability”; the reform policies and practices aimed at reviving mediation have included a “propaganda narrative” that is moving “towards populist, Party-led mediation and away from adjudication according to law”.<sup>75</sup> This might suggest that the revived mediation is oriented primarily to social order and not to social harmony, to refer to the distinction drawn by Robert Baruch Bush that was discussed in the preceding section, and in

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<sup>72</sup> Waye and Xiong (2011), *supra* note 5, at 11. Cf. C. Minzner, *Xin角度: Alternative to Formal Chinese Legal Institutions*, 42 *Stanford Journal of International Law* (2006), 103-179.

<sup>73</sup> Minzner (2011), *supra* note 8, at 947.

<sup>74</sup> Waye and Xiong (2011), *supra* note 5, at 12, 33.

<sup>75</sup> Minzner (2011), *supra* note 8, at 955.

which social or public “order” need not involve direct attention to the quality of human relations, a high level of which leads to social or public “harmony” (which in turn gives rise to social or public “solidarity”). It may be that the revived mediation is oriented more to social order because it combines community-based and judicial mediation, whereas preceding eras focused almost exclusively on the link between local harmony and locally-mediated settlements.

Perhaps one of the confusing aspects of the discourses on mediation *outside* of China, and particularly in the US, is the multifarious ways in which the term “justice” is invoked, which makes it quite an ambiguous reference point in many discussions of ADR. Jean Sternlight notes that examining the links between ADR, the rule of law, and justice “requires us to rethink the meaning of these terms”, and while creating a harmonious society is not part of the traditional definition of the rule of law, “some would say that learning to live together harmoniously, as a community, is a critical aspect of justice”; she refers to what could be called “common-good” understandings of justice that include ideas of balance and reconciliation and “the importance of all components of the society joining together to do a job well”.<sup>76</sup> Nancy Welch argues that judicial mediation should deliver to disputants, above all, “an experience of justice, more commonly referred to as *procedural* justice”,<sup>77</sup> while Michal Alberstein discusses the theoretical and moral values that the processes of mediation embody,

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<sup>76</sup> Sternlight, Jean R., *Is Alternative Dispute Resolution Consistent with the Rule of Law?, Lessons from Abroad*, 56 DePaul Law Review (2006), 569-592, at 591. In the international context, ADR is said to foster the rule of law in several ways, including the way in which it may bring community members together and establish greater social harmony, but critics of ADR often argue that its informal, private nature is hostile to the rule of law—“and ultimately”, emphasizes Sternlight in describing this form of critique, “to justice itself”. *Ibid*, at 569.

<sup>77</sup> Welch refers to research in the field of procedural justice that, she claims: “clearly reveals that citizens want the courts to resolve their disputes in a manner that *feels like justice is being done*. This yearning for the experience of justice is so profound that disputants’ perceptions regarding procedural justice affect their perceptions of the distributive justice that is delivered by a dispute resolution process, their compliance with the outcome of the dispute resolution process, and their perception of the legitimacy of the institution providing or sponsoring the process. Ultimately, insuring that mediation comes within a procedural justice paradigm serves some of the courts’ most important goals—delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary.” *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 Washington University Law Quarterly (2001) 787-861, at 791-792 (emphasis in original).

and in particular “the manner in which it promotes a different view of justice”.<sup>78</sup>

And as in justice theory generally a somewhat neglected aspect of the debate relates to *types* of justice. As has been said, Aristotle classifies particular justice as either natural or conventional and, additionally, as either distributive, rectificatory, or reciprocal. There is a tendency to construct a common-good type of justice in the form of “restorative” justice (often called, “reintegrative shaming” or “therapeutic jurisprudence”) which separates the inherent value of a person from the harmful act that person has committed. Leigh Toomey suggests that the most significant characteristic of customary dispute resolution is that it seeks, “to deliver restorative justice, rather than punitive sanctions, in order to achieve social reconciliation among the parties and with the community.... Ironically, this concept bears more than a passing resemblance to Western Judeo-Christian thought on ‘loving the sinner, but hating the sin’”.<sup>79</sup> Serious offences are excluded typically from this category of justice but it is worth remarking that in the Aristotelian taxonomy of justice, and in the classical account of justice, restorative justice is simply one form of what Aristotle termed “rectificatory” (or “commutative” or “corrective”) justice.

## V. CONCLUSION

I have argued that the Roman law definition of justice, grounded as it is in an evolutionary conception of human communities in which jural relations are characterized by forms of entitlement and in which justice is ultimately a method of enquiry, is the best available conception of the Western concept of justice-as-fairness; and I have argued also that the maintenance of a peaceful social order that allows people to pursue their individual and collective goals in community is the best available conception of the Western concept of the common good. These conceptions

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<sup>78</sup> Albertstein argues that in mediation there are internal ethical and procedural mechanisms in place which reveal, “an advanced jurisprudence of mediation as the development of communication based on an identity discourse”; this communicational mode is different from the “discourse of rights” characterizing legal practice and theory because it “incorporates a dialectic relationship between rights, needs and process sensitivity. As a new form of justice with its own values, mediation can itself be perceived as a civil good.” Alberstein (2009), *supra* note 51, at 1-3.

<sup>79</sup> Toomey (2010), *supra* note 2, at 164. Cf. Braithwaite, John, *Restorative Justice and a Better Future*, 76 *The Dalhousie Review* 1 (1996), 9-32.

of justice and the common good each takes a heuristic form,<sup>80</sup> and each incorporates implicitly a significant “conflict” element.<sup>81</sup> The conceptions are not uncontroversial but evidently the *ideologies* underpinning them are very strongly at play in contemporary dispute-resolution developments in China and the United States.

Robert Jacob has discussed the principle that the Christian prince (and its contemporary successor, the Western state) is bound by a “debt of justice” towards his subjects. The “debt of justice” refers to the idea that the state,

“owes justice to its subjects, meaning that it has the duty to decide any case brought to its courts. Any judicial demand must be examined. This idea flows from the identification of justice with a virtue both Christian and royal in nature. This duty was thus thrust on the state, and was operative throughout medieval Europe, where the inexecution of that duty (called denial or want of justice) was condemned by all major texts.”<sup>82</sup>

Jacob makes an important point here and one that is often overlooked. The deliberations of a court *must* come to a decision and conclusion. In a court case, for example, one cannot simply rest in the position that the evidence is insufficient to

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<sup>80</sup> Patrick Riordan (*The Common Good Goes Global*, 68 Milltown Studies (2011), 21-36) refers to how the Roman Catholic Church, while stressing the importance of the common good, does not specify what the common good in any disputed matter requires. In this case, Riordan argues, the common good is heuristic, “referring to what we have yet to discover”. Cf. P. Riordan, *A Grammar of the Common Good* (London: Continuum, 2008). Barden and Murphy (2010), *supra* note 21, argue that when the method of justice is employed in adjudication, the specific answer is unknown “but, for the enquiry to go forward, the heuristic form of the answer must be known; in the jurisprudential domain, the heuristic form of the answer is: X is entitled to Y from Z”. The concept of “heuristic” in all of these cases is borrowed from Bernard Lonergan’s *Insight* (London: Darton, Longman & Todd, 1957) p. 36.

<sup>81</sup> Stuart Hampshire argues for an idea of justice in the recognition that all conflict is inevitable and must be humanely tended to (*Justice is Conflict* (Princeton, NJ: Princeton University Press, 2001)), while Patrick Riordan refers to the common good in relation to determining “correct solutions in conflict situations”, and how this entails “taking part in the conversation of humanity in search of answers and solutions which are not known in advance but must be worked out in a situation of conflict through a political process”. *A Blessed Rage for the Common Good*, 76 *Irish Theological Quarterly*, no. 1 (2011), 3-19, at 3, 17.

<sup>82</sup> R. Jacob, *The Judge and the Sacred: Notes for a Comparative History of Western and Chinese Judicial Cultures*, 1 *Asian Journal of Law and Society* (2014), 17-30, at 20.

allow one to conclude either that there was or that there was not a contract, or that there was or that there was not a murder. For the properly judicial question is yet to be asked: In the absence of sufficient evidence what is due? “Unless the court answers that question it has failed to be a judicial—as distinct from being a merely factual—enquiry.”<sup>83</sup> For this reason, article 4 of the French *Code Civil* prompts the suggestion that a court that fails to decide is guilty of an injustice: “The judge who refuses to judge, under pretext of the silence, obscurity or insufficiency of the law, may be charged with committing a denial of justice”.<sup>84</sup>

But this idea of a “debt of justice” is not universal; in Chinese juridical culture, as Jacob also notes, a judge does not owe each and every subject an abstract justice but rather feels bound, in line with classical common good ideology, “only to bestow the type of justice most useful in terms of public order and prosperity”.<sup>85</sup> Indeed, Minzner refers to Chinese judges who press to mediate *after* they have actually conducted a full trial because they do not want to issue a decision.<sup>86</sup> This practice is in stark contrast to the justice ideology expressed in the French *Code Civil* and elsewhere. The difference gave rise to what Jacob describes as “irreconcilable logics of Justice in action”.<sup>87</sup> My suggestion is that the “logic” at work in the Chinese

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<sup>83</sup> Barden and Murphy (2010), *supra* note 19, p. 142.

<sup>84</sup> “*Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice*” (Loi 1803–03-05 promulguée le 15 mars 1803).

<sup>85</sup> Jacob (2014), *supra* note 82, at 23.

<sup>86</sup> A Chinese public interest lawyer tells Minzner, “They do this to protect their own judicial evaluations, raise their mediation rates, and guard against negative consequences of verdicts that are appealed or that generate citizen petitions (*shangfang*). Judicial mediation as practiced actually drags the process out and adds to the expense. Many foreign experts just don’t get that.” Interview, Beijing, July 13, 2010. See Minzner (2011), *supra* note 8, at 971-972.

<sup>87</sup> “[T]he opposition of the elementary symbols associated with justice in each of these cultures, the Western scales and the Chinese unicorn, offers a striking illustration of their differences. In the West, justice is conceived as the art of resolving disputes, each and every one, and this mission belongs to the state. Truth is obtained by balancing opposing pleas, regardless of their antagonism, no matter how their antagonism is resolved (on the one hand by a jury trial, on the other hand by an inquest), and the need to obtain judgment is perceived as urgent. In China, state justice was freed from the systematic resolution of cases. It only goes into effect when order and harmony are threatened. Just like the unicorn, which symbolizes divination,

and similar juridical contexts, where a peaceful social order is the paramount consideration, is not a logic of justice but rather a logic of the common good.

Postmodern forms of globalization are transforming traditional cultures rapidly, and in China these changes are intersecting with and being compounded by socio-economic and political transformations of a deep nature. It has been suggested that analyses, “that adhere rigidly or too greatly to the role of harmony in traditional Chinese culture may possibly be showing some lack of awareness of how significantly and deeply the situation is fluid rather than static”.<sup>88</sup> Yet if we look to *Chinese justice theory* we find an expression of classical *Western common good theory* that is grounded in this idea of harmony. Xunwu Chen has remarked that Confucianism “often receives only embarrassing lip service or meets contemptuous rejection by participants in the present discourse on justice in the West”; Chen identifies different reasons for this, including the idea that the Confucian view on justice is often regarded as “totalitarian, [or] at least authoritarian” rather than connected to any sense of fairness or impartiality, which are central values in Western justice theory.<sup>89</sup> The basic distinction between the *concept* of justice and *conceptions* of justice is important here: the concept of justice is “specified by the role which ... [its] different conceptions have in common”,<sup>90</sup> and because there are many different

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strength, and wisdom, it falls on the judge to detect, attack, and annihilate the disorder, but always with enough care to avoid causing greater disorder. This difference gave rise to irreconcilable logics of Justice in action.” Jacob (2014), *supra* note 82, at 29.

<sup>88</sup> J. Fewsmith, “Elite Responses to Social Change and Globalization”, in J. Howell (ed.), *Governance in China* (pp. 19-36) (New York, NY: Rowman and Littlefield Publishers, 2004), p. 19.

<sup>89</sup> X. Chen, *Justice as a Constellation of Fairness, Harmony and Righteousness*, 24 *Journal of Chinese Philosophy*, no. 4 (1997), 497-519, at 497.

<sup>90</sup> Rawls (1971), *supra* note 18, p. 5. Arthur Applbaum elaborates that a concept marks off the arena of a disputed idea that is filled, through normative argument, by conflicting conceptions with different content, criteria, or conditions, and he emphasizes that the distinction between a concept and its conceptions is not hard and fast: “It might shift over time as ideas get settled and then unsettled again. It might shift in the course of a single conversation, as we struggle to clarify where we disagree, and make judgments about whether, for a particular question, ordinary linguistic usage is more or less illuminating than stipulative definition, or whether highly moralized thick terms are more or less useful than relatively thin descriptions.”

and competing conceptions or theories of justice, sometimes we may lose sight of the fact that the *concept* or idea of justice is *itself* contested.<sup>91</sup>

The concept of justice seems to have different connotations in different cultures. In the Western tradition the idea of justice is connected typically with the idea of fairness,<sup>92</sup> whereas the Islamic concept of '*Adl* denotes quite specific ethical and political senses of balance, appropriateness and particularism.<sup>93</sup> In the Confucian tradition emphasis is placed on the connection between justice and the idea of order or harmony, especially social harmony. Fan Ruiping observes that Confucianism focuses on the pursuit and promotion of *intrinsic* goods such as the moral virtues, "because it is such goods that constitute the good of humans in the fundamental sense".<sup>94</sup> The classical Confucian tradition, according to Fan, "does not have a single concept congruent with the Western notion of justice in the sense of giving everyone his due" but he argues that the "cardinal moral virtue" of *ren* functions "to direct naturally unequal humans to live harmoniously among one another"; the Confucian idea of social justice is thus "to treat people harmoniously".<sup>95</sup> There are several contentious issues in Fan's analysis, including for example around the idea that *ren* is the equivalent of Aristotelian general (rather than particular) justice,<sup>96</sup> but his central line

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*Legitimacy Without the Duty to Obey*, 38 *Philosophy and Public Affairs*, no. 3 (2010), 215-239, at 216.

<sup>91</sup> Gallie, W.B. (1955–1956). *Essentially Contested Concepts*, 56 *Proceedings of the Aristotelian Society* 167-198.

<sup>92</sup> In the *Nicomachean Ethics* (V.1129a32), for example, Aristotle writes that "the just means lawful and fair", and fairness is in turn described in terms of *proportionality*. Recently, Amartya Sen discussed Rawls's foundational idea of fairness as, "a demand for impartiality [that is] deeply relevant to most analyses of justice ... [that] can be given shape in various ways". *The Idea of Justice* (London: Allen Lane, 2009), p. 54.

<sup>93</sup> See, e.g., H. Daiber, "Political Philosophy" in S. H. Nasr and O. Leaman (eds.), *History of Islamic Philosophy* (London: Routledge, 1996), pp. 842-885; H. Kassem, *The Idea of Justice in Islamic Philosophy*, 79 *Diogenes* (1972), 81-108.

<sup>94</sup> R. Fan, *Reconstructionist Confucianism: Rethinking Morality After the West* (Dordrecht: Springer, 2010), p. 48.

<sup>95</sup> *Ibid.*, p. 55.

<sup>96</sup> See T. Murphy and R. Weber, *Ideas of Justice and Reconstructions of Confucian Justice*, 26 *Asian Philosophy*, no. 2, (2016), 99-118, at 110-115.

of argument is valid. Chen, for example, observes that, “the kind of just society that Confucianism aspires to is a society of great harmony”,<sup>97</sup> although he interprets Confucian justice as a “constellation” of fairness, harmony and righteousness. As we have seen, the theme of the common good (or “justice-as-harmony”) is also very strong in the Confucian discourse surrounding dispute resolution.

But an important question remains: can mediated settlements or other alternative methods of dispute resolution truly not protect “rights”, considered as objectives of justice in the classical sense, *consistently*? Garrett Barden and I, while acknowledging that the moral or customary tradition of different communities may place differing degrees of emphases on the value of social harmony, have suggested that there is a danger in exaggerating this point. If two parties are at odds, we observed, “they might agree to abide by a judgment but hardly if they considered that the adjudicator had no interest at all in what is just”. On this account it may sometimes be better to accept a solution that one finds unjust for the sake of peace but one would find it hard to accept that one ought to do that all the time and on every issue: “Not only is imposed peace without justice likely to bring about a sense of instability, in general; it also seems unlikely that peace could be reached unless the solution seemed to both disputants to be sufficiently just.”<sup>98</sup>

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<sup>97</sup> Chen (1997), *supra* note 89, at 498.

<sup>98</sup> Barden and Murphy (2010), *supra* note 19, p. 41.

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