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# DISPUTE RESOLUTION

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## ADR AND THE RULE OF LAW

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- Building Trust in Mediation
- ADR in China
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# Which Is Better, Food or Water? The Rule of Law or ADR?

By Michael Moffitt

Some questions are pointless. One of the members of my household is a kindergartner, and she specializes in nonsensical normative comparisons: which is better, oatmeal or motorcycles? Sunshine or juice? Green or yellow?

Some questions are helpful because they have important, factual, potentially transformative answers. Why does an apple fall to earth from a tree? How does this drug interact with that drug? What is clogged in my garbage disposal?

Some questions are helpful, not because of their answers, but rather because something important happens as one is trying to develop an answer. Many theological and spiritual traditions feature such questions—focused, for example, on the nature of the good or the purpose of life.

If we are to ask about the relative merits of the rule of law and dispute resolution, we ought to treat the question as falling into this final category of questions. That is, we ought to imagine that it is the process of pondering the question that will yield benefits, rather than one particular answer or another. Perhaps those who embrace the question know that they will never arrive at a definitive answer, while those who embrace a simple answer will have missed the treasure hidden along the path.

## What Are We Invited to Compare?

The rule of law presents a beautiful ideal. Dispute resolution presents a beautiful ideal. The sloppy realities of life prevent us from seeing perfect manifestations of either of these ideals in practice. Implementation problems do not detract from the validity or importance of the ideals. But the conspicuous gaps between ideals and practice create a risk that each side will merely attack a straw man version of the other's central tenets or practices, as I noted in an article in *Fordham Law Review* last year:

The one thing we cannot responsibly do is compare the idealized vision of one practice against the sloppy reality of the other. Proponents of litigation must not present the question as, “Which is better, (a) having a judge protect the powerless litigant through the promotion of public values as articulated by the law, or (b) sending that powerless litigant alone into the hallway to compromise away her rights?” Proponents of settlement must not present the question as, “Which is better, (a) employing fully inclusive deliberative discourse to reach an elegant, fair, and creative resolution, or (b) sending disputants into a formalistic process navigable only by the rich?”<sup>1</sup>

If we must compare the rule of law and dispute resolution, we should compare either the beautiful ideals of each, or we should compare the sloppy reality of each.

Complicating either of these sorts of comparisons, however, is the close relationship between the rule of law and dispute resolution. In my view, the existing conversation on this topic lacks a good analogy or metaphor to capture the nature of the relationship between these two sets of principles and practices. Below I suggest three contending images, each drawn from the natural world.

## Of Parasites

In biology, some pairs of linked organisms are described as parasites and hosts. The fundamental relationship between parasite and host is pretty awful from the host's perspective. Head lice have a great time hanging out on certain people's heads, but the owners of the aforementioned heads get nothing good from the lice's tenancy. Similarly, a lamprey attaches itself to a host fish, and then proceeds to suck blood and fluids out of the fish until the lamprey is sated or until the host fish dies. Parasites are understandably unpopular.

Some people on each side of the “rule of law versus dispute resolution” debate appear to frame the relevant relationship as parasitic. Some of the most fervent advocates of the rule of law<sup>2</sup> have suggested, for example, that ADR is sucking the lifeblood (read: lawsuits) from our courts, thereby depriving courts of the opportunity to play their critical role in the promotion of the rule of law, particularly because settlements rob courts of the opportunity to articulate law. Others have suggested that the prominence of settlement has so profoundly eroded young lawyers' skills as litigators that they are functionally incapable of bringing cases to trial, with the self-perpetuating result that even cases warranting trials wind up being settled.<sup>3</sup> Still others argue that the rule of law is undermined when dispute resolution permits private actors to contract out of the shared set of parameters established by the law.<sup>4</sup> Under each of these views, the rule of law was functioning beautifully until parasitic dispute resolution practices came along and latched on, and now the “good” vision of the rule of law is at risk.

Some of the most fervent advocates of dispute resolution treat the rule of law with parallel disfavor. Many mediators bristle at the notion that mediation ought to be constrained or driven principally (or even partially) by narrow notions of legal entitlements. They mourn the loss of expansive solution sets, party self-determination, and expansive problem definitions. Arbitrators and arbitration parties in many contexts have come to rue the “overjudicializing” and “overlegalizing” of arbitration. A process

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## ***Which Is Better, Food or Water?***

*(continued from page 8)*

they once touted as delivering speed, efficiency, finality, and subject-matter expertise, many participants now see as having been infested by the rule of law kudzu. In each of these views, dispute resolution was working well until parasitic rule of law notions came and poisoned the process.

This parasitic imagery to describe the relationship between the rule of law and dispute resolution is flawed in at least two ways. First, each story relies on a questionable vision of how things looked before the “invasion” of the other. Each story gives its own side a primordial prominence and independence that would

be difficult to support empirically. Second, neither explains why the parasite has been so difficult to remove. Whatever time line one imagines, if the “other” were truly so unwelcome, we ought to see at least some instances in which the parasite is absent. Both sides’ parasite imagery is almost certainly flawed.

### **Of Evolution and Inseparability**

Biology offers a second possible image of the relationship between two linked organisms—inseparability. Plant cells used to look different than they do today.

Today's plant cells include chloroplasts, organelles that convert sunlight into energy through photosynthesis. But chloroplasts have distinct genetic material and divide independently in a way that strongly suggests that chloroplasts were once entirely separate from plant cells. The most prominent biological explanations today hold that somewhere along the line, cyanobacteria (whose DNA is closely related to chloroplasts) infected primitive plant cells, or that primitive plant cells tried to eat the cyanobacteria. Eventually, the two developed a symbiotic relationship, with each profiting from the other's presence. And still later, as each evolved, they lost their independence. Today, chloroplasts cannot survive independent of a plant cell, and the presence of chloroplasts is part of what makes a plant cell a plant cell, because photosynthesis occurs only with the assistance of chloroplasts. In short, the two are no longer separable.

One could not sensibly have a conversation about whether chloroplasts are more important than plant cells. The two are so hopelessly intertwined that one could profitably describe their features, but one could not argue one's superiority over the other.

Might this imagery help with the conversation about the rule of law and dispute resolution? Are the two so inseparable as to make it effectively impossible to excise one from the other? Probably not.

One of the few things on which proponents of the rule of law and proponents of dispute resolution might heartily agree is that the two remain distinct. The rule of law and dispute resolution may hold some compatible ideals, and they may provide mutual benefits in practice, but they are not the same thing. One knows whether one is in mediation or in litigation. One can tell the difference between judge and arbitrator. One knows whether one is privately crafting a forward-looking deal or publicly arguing for the state to impose pre-established remedies based on a determination of what happened in this case. But being linked is different from being inseparable. Proponents on each side of the conversation continue to speak as though one could have one without the other, and so long as that is even a theoretical possibility, the two are not inseparable.

Of course, dispute resolution and the rule of law continue to evolve. Their foundational theories and the efforts to realize each in practice look different today than they did a hundred years ago. And a hundred years is a blip on the radar screen in evolutionary terms. So perhaps it is the height of hubris to declare that the two will forever be separate, no matter what happened with plant cells and chloroplasts. Perhaps their current linkage is a precursor to their eventual inseparability. But I don't think we're there yet, and I can't currently envision how we ever would be.

### Of Mutualism and Symbiosis

Biology offers a third image of linked organisms—symbiotic mutualism—which I think is more apt for the purpose of providing an image of the relationship

between the rule of law and dispute resolution.

Relationships characterized by symbiotic mutualism appear in many contexts. For example, clown fish (including the cute ones that appear in *Finding Nemo*) commonly live among the tentacles of sea anemone. The territorial clown fish protect the anemone from invertebrates that eat anemones, and fecal matter from the clown fish provides nutrients to the anemone. At the same time, the anemone's stinging tentacles provide a refuge for the clown fish, which has developed protection against the effects of the anemone's poison.

Indeed, in some circumstances, the symbiotic relationship is so strong that one or both of the sides involved *needs* the other to survive. For example, our stomachs contain a combination of microorganisms known colorfully as "gut flora." These bacteria and other organisms get a nice, warm place to live, and we get help with digesting last night's buffalo wings.

The rule of law and dispute resolution have a mutual symbiotic relationship. Each depends on certain contributions from the other in order to thrive—and perhaps even to survive.

### What the Rule of Law Provides for ADR

The rule of law, in its current incarnations, provides at least three things to the theory and practice of dispute resolution. First, the rule of law provides disputants and prospective disputants with at least some understanding of each party's entitlements and legitimate expectations. Among the functions of law, although surely not its only function, is providing a clear picture of the rights each of us holds with respect to each other and with respect to the state. Absent some sense of these entitlements entering a dispute resolution process, resolution would be difficult to achieve because each party might reasonably have an unbounded set of expectations about the potential solution set.

Second, the rule of law provides a vehicle for enforcing the outcome of a dispute resolution mechanism—giving effect to rights and obligations. This is true both for litigation and its alternatives. Declaring someone to hold an entitlement to something is hollow absent the prospect of enforcement, as I have previously noted:

The assumption that courts' decisions will necessarily take effect is a given only to those whose experience is limited to relatively recent domestic litigation. Those of us who have worked internationally know that in many countries, it is far from obvious that a court's decision will translate into action on the ground. Indeed, not so long ago, it was an open question whether an unpopular court order would take effect in the United States. The



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compelling images of National Guard troops in Little Rock, Arkansas, helping to enforce the decision to desegregate schools are often rightly used to illustrate the triumph of law and justice. One might also reasonably use those images as a reminder of the fragile dependence of law and justice on implementation. Litigation's promise includes the promise of implementation.<sup>5</sup>

The rule of law supports dispute resolution efforts by providing some assurance that the terms upon which a dispute is resolved (whether through litigation, arbitration, mediation, or some other process) will take effect.

Third, the rule of law creates behavioral boundaries for those engaged in a dispute resolution process. If there were no threat of sanction under the rule of law, how often would private bargaining be characterized by fraud? How often would mediations be marked by coercion? How often would attorneys place knowingly perjured testimony into evidence or fail to be fully candid with the court or tribunal? I cannot make any empirical claims about the answer to any of these questions. Perhaps dispute resolution mechanisms would not devolve into purely Hobbesian nightmares. But every dispute resolution mechanism I can think of functions best when it has at least some assurance that its participants will not engage in the worst possible behavior. The rule of law can take much of the credit for providing that assurance.

### What ADR Does for the Rule of Law

Similarly, dispute resolution provides the rule of law with at least two contributions on which the rule of law relies. The first of these contributions is that dispute resolution creates scale effects for the rule of law. In isolated instances, the state can step in, declare a set of rights to exist, and then enforce those rights in a way that upholds the rule of law. The state cannot, however, hope to create a society living under the rule of law if the state is required to act as the enforcement vehicle at every turn. Even under the most totalitarian, expansive vision of the role of government, the rule of law depends more on the decisions of private actors than it does on the intervention of the state. Virtually every human interaction raises the prospect of multiple different legal entitlements coming into play. A simple walk through a shopping mall raises the prospect of a variety of mischievous interactions that call to mind a law student's first-year curriculum (contracts, torts, property, criminal law, etc.). And yet, the measure of whether the rule of law is working well in our daily lives is almost always the absence of the heavy hand of the state. We engage in transactions, resolve differences, and move on with our lives in ways that are consistent with the underlying themes of the rule of law because of interaction patterns rooted in dispute resolution.

Second, dispute resolution makes it possible for the state's machinery to articulate and enforce the rule of law in those instances when doing so is necessary. In part, this is a simple matter of capacity: courts do not have the resources to address every grievance that could potentially give rise to a lawsuit. In short, courts would be buried to the point of ineffectiveness if there were no plea bargains and no settlements or alternatives to litigation.

But the interaction between dispute resolution and the rule of law is deeper than merely questions of institutional capacity. Dispute resolution removes a nonrandom selection of cases from courts' dockets. If it is functioning well, dispute resolution filters out the "right" cases. It takes the cases for which dispute resolution's structure is better suited—for example, those in which truly creative outcomes are possible, those in which nonadversarial exchanges can improve or heal relationships, and those in which a dispute potentially affects people who lack legal standing or the capacity to join in a law-focused resolution process. The cases dispute resolution leaves for the courts, then, are ones for which the courts are better matched. Dispute resolution, in effect, serves not just a docket-thinning function, but also a triage function for the courts. And in this way, courts' resources better serve the rule of law.

Because I view the rule of law and dispute resolution as symbiotic and mutual, I could not begin to say which one is better. Each needs the other in order to meet its potential.

Now, which is better, the clown fish or the sea anemone? That is the sort of question my kindergartner could embrace. ♦

### Endnotes

1. Michael Moffitt, *Three Things to Be Against* ("Settlement" Not Included), 78 *FORDHAM L. REV.* 1203, 1224 (2009).
2. See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L.J.* 2619 (1995) (arguing that settlement deprives the public of the litigation-driven articulation of public norms); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Ideology*, 9 *OHIO ST. J. ON DISP. RESOL.* 1 (1993) (arguing that settlement favors harmony over justice); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 *WIS. L. REV.* 631 (arguing that settlement erodes the justice system by decreasing appellate review opportunities).
3. See, e.g., Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 *UCLA L. REV.* 833 (1990) (arguing that "we should worry about having too little rather than too much adjudication," given the effects of routine settlement on litigators' practices); Luban, *supra* note 2 at 2623 (citing skills development for attorneys as a benefit of litigation).
4. For an outstanding treatment of the relationship between settlement and public values, including an overview of those who hold this negative view of settlement, see Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 *FORDHAM L. REV.* 1143 (2009).
5. Moffitt, *supra* note 1 at 1209.