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EQUITY, ADR, ARBITRATION AND THE LAW: DIFFERENT DIMENSIONS OF JUSTICE

THE FOURTH KEATING LECTURE

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(1) Introduction

1. Nat King Cole famously sang that love is a many splendoured thing. So is justice. Indeed, justice and love have much in common. Love makes the world go round happily and passionately; justice makes it go round properly and compassionately. And, like love, justice has inspired writers, philosophers, social and political reformers throughout the ages; and perhaps a poet or two. Above all, at least from my point of view, it has guided judges throughout the ages, each of whom in this country has for many centuries been committed to and required by the judicial oath to 'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will': to do justice.
2. I too want to discuss justice this evening, but I do not want to talk about what Joe Jacob recently called 'any abstract justice or . . . any philosopher's idea'¹, or even any idea of justice which has inspired social and political reformers. I want to focus on justice in the sense that

¹ Jacob, *Civil Justice in the Age of Human Rights*, (Ashgate) (2007) at 2.

Francis Bacon, philosopher, Lord Chancellor, statesman, scientist and, less creditably, acceptor of bribes, and, much more questionably, the alleged true author of Shakespeare's plays, used the term. Bacon, at the time Attorney-General, in his submission to the infamous Court of Star Chamber during the proceedings against Sir John Hollis and others, for traducing public justice, famously said that 'if we do not maintain justice, justice will not maintain us.'² I want to focus on the justice that maintains us; for which the courts exist to secure for society; and to which, as Lord Diplock put it in *Bremer Vulcan*, 'every citizen has a constitutional right of access'.³

3. I intend, in other words, to focus on our civil justice system, the means by which civil justice is achieved, and its place in our society. In doing so I shall focus on three aspects: first, the purpose of the civil justice system, which is to say, its role in society; second, the meaning of justice following the Woolf reforms; finally I turn to justice's different dimensions: equity, ADR, arbitration and the law. I turn then to justice's purpose. Before doing so I should express my profound gratitude to John Sorabji for all his help in preparing this lecture.

(2) Justice's Purpose

4. The civil justice system has, as we all know, been the subject of a considerable degree of scrutiny and reform over the past two decades, the aim of which has been to increase access to justice; to, in Bacon's terms, enable justice to better maintain us. There have however been concerns that those reforms have not enabled justice to better maintain us and that the Jackson recommendations will do no better. There have been concerns that, as Professor

² *Proceedings against Sir John Hollis, Sir John Wentworth and Mr Lumsden*, (13 James I (1615)), in *A Complete Collection of State Trials Vol. II* Howell (ed.) (London, 1816) at 1029.

³ *Bremer Vulcan v South India Shipping Corporation Ltd* [1981] AC 909 at 917.

Dame Hazel Genn put it in her recent and impressive Hamlyn Lectures, that ‘civil justice has been downgraded’⁴ in recent years. As she said,

‘. . . it is hard not to draw the conclusion that the main thrust of modern civil justice reform is about neither access nor justice. It is simply about diversion of disputants away from the courts. It is essentially about less law and the downgrading of civil justice.’⁵

Far from maintaining justice, so that it can better maintain us and our civil society, there is a concern that we have stepped back from the truth Bacon identified.

5. One of the central fears, if not the central fear, which haunts Professor Genn’s Hamlyn lectures is that justice’s purpose has been lost from the lexicon of policy makers, politicians and judges. She fears that the siren song of service sector language, of customers, of consumers, is leading us to the death of civil justice. The point is perhaps best illustrated by an observation made by Robert Dingwall, which Professor Genn cites in support of her argument. Dingwall argues that,

‘[S]uccessive UK governments have decided that, although civil justice may be a public service, it is not a public good . . . they see the system as providing only private benefits for individuals rather than collective benefits for the society as a whole . . . The creation of precedents and the creation of law, through the civil justice system, is not perceived by government as contributing to the general welfare in the same way as state-provided education or health care.’⁶

6. A couple of years ago, the Ministry of Justice stated that ‘The civil and family courts are principally concerned with resolving private disputes between individuals or companies. These are not criminal cases.’⁷ The implicit point appears to be that in the civil and family

⁴ Genn, *Judging Civil Justice*, (Cambridge) (2010) at 25.

⁵ Genn, *ibid* at 69.

⁶ Dingwall & Cloatre, *Vanishing Trials?: An English perspective*, *Journal of Dispute Resolution* 7 (2006) 51 at 67, cited in Genn (2010) at 36 – 37.

⁷ Ministry of Justice, Civil Court Fees 2008, response to consultation (CP(R)31/08) (<http://www.justice.gov.uk/consultations/docs/civil-court-fees-response.pdf>); at 7, for further comment see Morrish C, *Costs Seminar*, (03 July 2009) (Manchester University) (<http://www.judiciary.gov.uk/docs/costs-review/speech->

justice systems there is no, or at least a very limited, public good involved. There is service to the public, but this is seen by the Ministry to be different from the public good. Civil justice is seen, and wrongly seen, simply as a service to the public provided by the State. That it has an intrinsic value as a public good – through clarifying the law, providing a proper framework for economic activity, and securing the proper and lawful relationship between individuals, and between individuals and the state, preventing people resolving their disputes by force – is not properly recognised.⁸ Instead a false dichotomy is implied to exist between the criminal justice system on one hand and the civil and family justice systems on the other hand. This is dangerously wrong.

7. The question then is what is the civil justice system's purpose?? Is it simply a '*part of the service sector of the economy*'⁹? Or is it more than that? The starting point for answering this question and exposing the lie at the heart of the view that civil justice is simply providing a service to consumers, can be found in something James Madison, fourth President of the United States, wrote in *Federalist Paper No. 51*. He noted there how 'Justice is the end (that is, the aim) of government'.¹⁰
8. Justice here no doubt has multiple meanings. In the context of the legislative and executive arms of government it is political and social justice and their implementation; and there is, as we all know, a good deal of scope for disagreement here as to what constitutes political and social justice which I happily leave to the philosophers and politicians. As Alexander Hamilton, Federalist Paper co-author, done to death in the famous duel with Aaron Burr, and who narrowly missed being the second US President, would have pointed out to

[chancellor-high-court.pdf](#)) and Clarke MR, *Access to Justice: Hope Springs Eternal* (<http://www.judiciary.gov.uk/docs/speeches/mr-mary-ward-lecture-150709.pdf>) at 7ff.

⁸ See Genn (2010) at 16ff.

⁹ Middleton cited in Clarke (2009) at 8.

¹⁰ Hamilton, Madison and Jay, *The Federalist Papers*, No. 51 (Oxford) (2008) at 259.

Madison, there is of course a third branch of government, of the State: the judicial branch, which is also committed to justice's achievement.¹¹

9. In the Federalist Papers, Hamilton drew a famous distinction between the three branches: the executive dispensing honours and holding 'the sword of the community', thus emphasising the executive's role in providing security and defence for the State; the legislature commanding the 'purse' and prescribing how the 'duties and rights of every citizen' are to be regulated, thus emphasising the fundamental role the legislature has over the State's budget and the promulgation of law; and finally the judicial branch, which held neither sword nor purse nor legislative power, and 'neither FORCE NOR WILL but merely judgment.' And insofar as judgment was concerned the judicial branch depended on the executive branch for ensuring its rulings were implemented.

10. This distribution of power and responsibility, as Hamilton put it, proved 'incontestably that the judiciary is beyond comparison the weakest of the three departments of power.' He went on to add that as the weakest of the three branches of government, the judicial branch, 'can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.'¹² With the growth of judicial review, human rights, and EU law, this may, at least today in the UK, be a somewhat extravagant assessment of the judiciary's weakness. The powers of the judiciary may seem to be growing, but, let me emphasise, there can be no doubt about the sovereignty of Parliament¹³ in our system: a point underlined by the Human Rights Act 1998, which does not place ultimate policy-decisions in the hands of the judicial branch of government as it does not permit the

¹¹ E.g., Hamilton, in Hamilton, Madison and Jay, *The Federalist Papers*, No. 77 (Oxford) (2008).

¹² Hamilton, *ibid*, at 380.

¹³ That sovereignty carries with it responsibilities, not least respect for the independence of the judiciary, which, less than a week ago was reaffirmed by the new Lord Chancellor in his oaths before the Lord Chief Justice and assembled judiciary.

courts to strike down the will of Parliament, the legislative branch. Rather – as I have said before¹⁴ – it represents a shrewd compromise; one which provides the courts with the power to adjudicate on the question whether legislation is compatible with rights conferred under the Act, while leaving it to Parliament to decide whether, as a matter of policy, any legislation adjudged rights-incompatible requires amendment. We maintain a separation of powers.

11. The three branches of the State, executive, legislative and judicial, each can be said to provide a service: ensuring security and providing administration could tritely be categorised as services provided by the executive; enacting just laws could, equally tritely, be categorised as a service provided by the legislature. But they are hardly services in the sense of a service provided, for instance, by a supermarket or a utility provider. The difference is emphatically not one of degree but a difference of kind. And the same is true of the judicial branch. In a trite way the adjudication of disputes and the enforcement of rights, whether those arising in the context of the criminal, family or civil justice systems, could be categorised as services provided to the public as consumers, but, to put it at its very lowest, that is not the full story.
12. What Hamilton and Madison showed is that each branch of the government, acting in its own sphere, not only because it operates as a check and balance to the other branches, is more than a service provider. Each is a public good, a necessary element and part of the State. Each plays a fundamental role in ensuring, in a liberal democracy, that justice is achieved; that is to say, in the wider context, that the State and citizens are kept secure, that laws are promulgated by duly elected Parliaments, that rights, as between citizen and the state or citizen and citizen are enforced through the correct application of right fact to right

¹⁴ Neuberger, *The Supreme Court: Is The House Of Lords 'Losing part of itself'?*, at [30] (<http://www.judiciary.gov.uk/docs/speeches/mr-supreme-court-lecture-dec-2009.pdf>).

law: that the rule of law is maintained. They do not do so because the executive and the legislature are a branch of government and the judicial system is a part of the service sector of the state. They do so because they are each a branch of the State; all three are required, in their different ways, to secure justice in the realm.

13. Hamilton's discussion highlights the need to take care in analysing the nature and relationship between the executive, legislative and judicial branches of the government, of the State. It highlights how, as Professor Genn's Hamlyn lectures echo, care needs to be taken to ensure that we do not lose sight of the true purpose and role of the judicial branch. If we as a society forget that the judicial branch exists, again as Hamilton put it, to 'secure the steady, upright, and impartial administration of the laws',¹⁵ we forget its role as an essential part of the State and we can then be cruelly and fatefully misled into thinking that it simply provides 'private benefits for individuals' when in truth, just like the criminal justice system, it provides 'collective benefits for the society as a whole . . .' through securing the rule of law.

14. All aspects of the service sector depend on a framework of democratically enacted just laws, and their just administration by the courts in a safe and secure society. Without that framework no service sector could truly operate. To put it another way the privatization or consumerization of civil justice – packaging the justice system as '*a public service as opposed to an arm of government*'¹⁶ as Professor Genn puts it – is a denial of justice as it is a denial of one part of the framework on which the service sector depends. The question then arises how the civil justice system can properly ensure justice is done. Here I turn to the second part of tonight's lecture: Justice after the Woolf reforms.

¹⁵ Hamilton, *ibid.*

¹⁶ Genn, *ibid.*, at 47.

(3) Justice following the Woolf reforms

15. It is one thing to join Madison in affirming the commitment to the belief that the civil justice system exists to do justice, it is another to give content to that commitment. What does it mean to do justice in this context? What does it mean following the Woolf reforms?
16. The traditional, the pre-CPR, answer to that question was relatively straightforward and well-understood. Justice was achieved by the courts reaching a judgment on the substantive merits of each individual case. Justice meant the achievement of substantive justice through the application of true fact to right law.¹⁷ This is achieved not for its own sake, but in order for the courts, as Bentham put it, to secure, 'to the utmost possible amount, execution and effect to the enactments of the substantive code.'¹⁸
17. The singularity of this aim had a consequence, as followers of architecture might well know. 'Form ever follows function. This is the Law'¹⁹, said Louis Sullivan, the famous early twentieth century American father of modernism. The merits of that statement may be debated in the field of architecture, but it seems to me to be clearly true where the justice system is concerned. Its form – its structure and processes, should clearly reflect and follow its function. And those structures and processes should equally clearly operate consistently with its function. Indeed, as with novels, where form and content cannot and should not be regarded as compartmentalised or segregated, so form and function cannot be divorced when it comes to the law. They are interdependent: one follows and interacts with the other, in an almost iterative fashion. How then should form follow and interact with function?

¹⁷ Woolf (1995) at 214 – 216; Genn, *ibid* at 14.

¹⁸ Bentham, *Principles of Judicial Procedure, with the outlines of a Procedure Code* in *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh) at 11.

¹⁹ Sullivan, *The Tall Office Building Artistically Considered*, (1896)
(<http://academics.triton.edu/faculty/fheitzman/tallofficebuilding.html>)

18. Where substantive justice is the aim, courts, processes and procedures will need to be designed and operated consistently with it. They will, all other things being equal, be designed and operated so as to maximise the prospect that it is achieved in each case. And they were. As Edmund-Davies LJ put it forty years ago in *Associated Leisure v Associated Newspapers*, the commitment to substantive justice's achievement was seen to be an 'all-embracing principle', to which 'all other considerations must be subordinate.'²⁰
19. Woolf changed that. He accepted that for the English civil justice system justice – substantive justice - was something we 'loved not wisely but too well'²¹. In this regard he referred back to Lord Devlin's conclusion that, the 'fallacy inherent in our High Court procedure of civil litigation is just that - that where justice is concerned, time and money are no object.'²² Time and money could indeed logically be no object in a system which understood substantive justice's achievement as an all-embracing principle to which all other considerations must be subordinate. From that we can say, as Woolf concluded the pre-Woolf civil justice system's problems flowed. How then did Woolf change things?
20. Lord Woolf changed things by broadening out the concept of justice. It would mean more than substantive justice. It was to be balanced by an equal commitment to procedural justice's achievement²³. Such a radical change would it might be thought have called for a detailed, an explicit, analysis, but it can fairly be said that the Woolf reports did not provide as detailed an exegesis of what this meant as might have been expected. Some critics such as Professor Genn go further and say that the Woolf reforms, like many other civil justice reforms, fail to appreciate fully the link between 'procedure, fairness and substantive

²⁰ *Associated Leisure v Associated Newspapers* [1970] 2 QB 450 at 457

²¹ Shakespeare, *Othello*, Act 5, scene 2.

²² Devlin, cited in *What's Wrong with the Law* (Zander ed.) (1970) 75-7 as cited in Woolf (1995) at 19.

²³ Woolf (1995) at 215.

outcome'.²⁴ I am not sure that I agree; Lord Woolf's proposals expressly deal with the need to change the system from its previous commitment to substantive justice to a commitment to a more subtle and nuanced blend of justice, namely to substantive AND procedural justice; or as the overriding objective has it, 'to deal with cases justly'.²⁵

21. How has this change broadened our concept of justice? First, the overriding objective encapsulates a commitment to the idea that civil justice is a public good and not simply a service to the public. It does so in two ways. First, the CPR as a whole was intended to give expression to what Woolf called the 'fundamental purpose of the rules and of the underlying system of procedure.'²⁶ Those rules encompass many discrete provisions aimed at both ensuring procedural justice e.g., case management rules designed to secure equality of arms, an efficient and cost-effective process, as well as rules aimed at ensuring substantive justice's achievement e.g., the case management rules in CPR 1.4(c) and (d), rules of evidence, rules prescribing penalties for giving false statements and emphasising the need to give true evidence.²⁷

22. Secondly, the overriding objective itself, implicitly contains a commitment to ensuring substantive justice is done. Its achievement is an aspect of what it means to talk of procedural justice. A fair process is one which is not only fair in terms of matters such as equality of arms, the availability of an independent and fair tribunal, an ability to effectively participate in proceedings, open justice and so on. It is equally a matter of fairness that it should seek to produce a substantively just decision. That is not to say however that a

²⁴ Genn, *ibid* at 68, "In all these reports (civil justice reviews from around the world), the discussion of fundamental reform proceeds with little acknowledgment of any link between procedure, fairness and substantive outcome."

²⁵ Sorabji, *B v B: forwards or backwards for the overriding objective*, (24) CJQ (2005) 414.

²⁶ Woolf (1996) at 274 – 275.

²⁷ E.g., CPR 22, 31 – 35.

process can only be fair if it does produce substantive justice in each individual case. That commitment is one element of many each of which go together to render process fair.

23. The commitment to achieving substantive justice must of course always play a central purposive role in the operation of civil process ensuring that the system provides the public good of enforcing individual rights and developing the law, thereby supporting the rule of law. It, of course, also provides a service to the public, in that it enables individuals to gain the benefit of having their dispute resolved according to the facts and the law. That private benefit is the shadow cast by the public good. And like all shadows their existence arises as a consequence of the existence of something profoundly more substantial.
24. The overriding objective encapsulates a commitment to the idea that civil justice operates for the public good in another way. It does so in way that in some cases can work to the detriment of individual litigants. Balancing procedural justice against substantive justice led Woolf and our justice system to recognise a central truth, and one our civil justice system had overlooked in its previous adherence to the belief that substantive justice in each individual case was its sole aim. The civil justice system exists for all citizens. It provides a benefit for all and should be properly accessible by all. If it is not it cannot properly provide a general public benefit; it cannot properly be a public good.
25. The overriding objective recognises that truth by underlining how, in managing litigation, the courts have to consider the effect of its procedural decisions, and the conduct of individual litigants, on all litigants²⁸. Disproportionate access to process by individual litigants in a world where resource allocation is finite will inevitably have a negative impact on what ought to be a fair resource allocation to other litigants. An all-embracing commitment to substantive justice in the individual case can by reducing access to justice for

²⁸ CPR 1.1(2)(e).

other litigants reduce the justice system's ability to achieve its aim of achieving substantive justice in those other cases. A balance has to be struck to ensure that the justice system is properly able to act in the public interest²⁹.

26. This balance is practically struck by active case management conducted consistently with the overriding objective. If the civil justice system simply existed to secure private benefits it could safely leave the conduct of litigation, as it did in the pre-Woolf years, in the hands of litigants. They could manage the litigation in whichever manner they believed best furthered their private interest, with the court acting at their request to ensure that it did progress at a pace that best served that interest. Active case management by the courts emphasises however that the civil justice system provides a public good. The court manages, or should manage, litigation now so as to ensure that not only does individual litigation proceed at a proper pace and cost, but that it is managed in such a way that all litigants have proper access to justice. It is actively managed to ensure that the wider public interest in securing effective access to justice – to a fair and proportionate process which balances substantive and procedural justice – for all is achieved.

27. Securing the public good in some cases will of regrettable necessity require the court to make a difficult choice in abridging private benefits that can accrue to individual litigants. Enforcing unless orders, imposing procedural sanctions where litigants have not conducted litigation consistently with the overriding objective, with a process that if properly followed is fair to all litigants, may well have a negative impact on specific individual litigants obtaining a private benefit, but in doing so the wider public good is served. Justice in the wider sense is done, even if substantive justice in the individual case is denied or, as I said,

²⁹ *Orange Personal Communications Services Ltd v Hoare Lea (A Firm)* [2008] EWHC 233 (TCC) at [31], “The overriding objective (in CPR Part 1) is concerned with saving expense, proportionality, expedition and fairness; the Court's resources are a factor. This objective whilst concerned with justice justifies a pragmatic approach by the Court to achieve the objective.”

abridged to a certain degree. If it can be abridged does this mean that it has the same value as, for instance, ADR?

28. With that in mind I turn to look at justice's different dimensions: equity, ADR, arbitration and the law.

(4) Justice's Different Dimensions: Equity, ADR, Arbitration & the Law

29. Where doing justice means no more than the achievement of substantive justice it could properly be said that claimants must not just stand, as Hepburn put it, 'within the temple of justice, [but that they] must have entered it through a particular door'³⁰, a door marked law within which judges dispense substantive justice accordingly. Historically, that was of course exactly how English civil justice dispensed justice. It required plaintiffs, as they were then called, and still are called in all other common law systems, to enter through the common law door, to seek justice in the Courts of King's Bench, Common Pleas, and Exchequer.

30. A singular approach did not of course last for too long. A second door soon opened to complement and supplement the first door. That was the door marked Equity; the common law's twin administered by the Court of Chancery, its jurisdiction arising from the prerogative of grace³¹. The second door did not swing open in order to undermine or downgrade civil justice as it existed in those bygone medieval days. On the contrary, it swung open in order to ensure that the justice system could properly ensure that substantive justice could be done.

³⁰ Hepburn, *The Historical Development of Code Pleading in America and England*, cited in Reppy, *Introduction to Civil Procedure Actions and Pleading at Common Law* (Dennis & Co) (1954) at 95 – 96.

³¹ Adams, *The Origin of English Equity*, (16) *Columbia Law Review* (1916) 87 at 89.

31. Equity arose as a second doorway to justice as a consequence of defects, weaknesses and limits in the common law. As any law student knows, it developed in part to mitigate the strict rules and rigours of the common law. The courts of equity could, by invoking equitable principles, effectively stay or even overrule the sometimes rather formalistic and technical principles and procedures applied by the courts of Kings Bench, Common Pleas, and Exchequer. Thus, the common law courts were limited to awarding damages and applying strict rules of legal ownership; the Chancery Court could grant equitable relief, and recognised beneficial ownership.
32. Equity, with its ecclesiastical origins in the canon law process known as the *denunciatio evangelica*³², administered the Lord Chancellor was more concerned with conscience and fairness. So it developed doctrines such as relief from forfeiture and penalties, time not being of the essence, and proprietary estoppel to mitigate the strict rules of common law contract, and concepts such as the bona fide purchaser without notice, to balance the interests of two innocent parties with competing interests.
33. Procedurally, it differed from the common law too. Its bill process was, at the outset at least, simpler, quicker, more flexible and cheaper than the common law forms of action. It was as Spence put it, originally a system of law with no fixed “*rules or forms of procedure*”, but was simply governed by the application of “*principles of Equity and conscience*.”³³ In contrast to the rigours of common law procedure, a suitor could come to equity simply praying the Lord Chancellor for relief in the simplest terms. One, perhaps extreme, example of this simplicity is cited by Avery, from an early equity petition that merely asked the Lord Chancellor to

³² Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, (1955) 71 Law Quarterly Review 223

³³ Spence *The Equitable Jurisdiction of the Court of Chancery* Vol. 1 (1846) (Stevens & Norton) at 710 & see 367 – 368.

*'Set me on a way how I shall spece in my right for I dir not gon home for doute of my life.'*³⁴

Such simplicity and informality did not, of course, last. Over time its process became as technical and complex as the common law. Great reforming Lord Chancellors, such as Lords Bacon and Nottingham developed equity's rules and procedures. The consequence of this was by the 19th Century equity procedure had become so like common law procedure in its technicality, complexity and expense that it struck terror in the hearts of litigants³⁵. As Bowen LJ (later Lord Bowen) put it,

*"(despite) all its distinction and excellence, the Court of Equity was practically closed to the poor. The middle classes were alarmed at its very name, for it swallowed up smaller fortunes with its delays, its fees, its interminable paper process."*³⁶

34. Equally equity also ceased to rely on the flexibility of conscience as a guide to its substantive development. As is well known Selden, a common lawyer to the tips of his fingers, famously did not approve of this, referring to equity as 'a roguish thing' varying 'according to the conscience of him that is Chancellor, and as that [conscience] is larger or narrower so is equity'.³⁷ Perhaps rather less grouchily and more percipiently, Lord Mansfield CJ, another great common lawyer (and one well-acquainted with equity, said 'If courts of law adhere to the mere letter of the law, the great men who preside in Chancery will ever devise new ways to creep out of the lines of the law, and temper [it] with equity.'³⁸ Substantive equity developed so that by 1818, Lord Eldon LC said in relation to his forthcoming retirement from the Lord Chancellorship that 'Nothing would inflict on me greater pain, in quitting this

³⁴ Year Book, 9 Edward IV vi 26 in Avery *An Evaluation of the Effectiveness of the Court of Chancery under the Lancastrian Kings*, (86) *Law Quarterly Review* (1970) 84 at 85 – 86.

³⁵ Baker, *An Introduction to English Legal History*, (Butterworths) (Fourth Edition) (2002) 97ff.

³⁶ Bowen, *A Century of Law Reform* (MacMillan & Co) (1901) at 527ff.

³⁷ *Table Talk of John Selden* (ed Pollock) (1927) at 43.

³⁸ *Doe d Perrin v Blake* (1769) 1 *Collectiana Juridica* 283 at 321.

place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.'³⁹

35. In the great modernising legislation of the 1870s, the value of both the common law and equity was recognised, but, as had always been the case, where the rules of the two systems differed, those of equity prevailed. So, after some 700 years, equity and common law were united, although not perhaps to the extent described by Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council*⁴⁰, where he expressed the view that the common law and equity have been fused to such an extent since 1875 that equity jurisprudence had effectively disappeared from English law; a view which has been condemned as by the eminent authors of *Meagher Gummer and Lehane on Equity*, as “*the low water-mark of modern English jurisprudence*”⁴¹. Equity had not disappeared, as the 1873 Judicature Act intended, it was simply administered by one and the same court which administered law; and administered in a way which was intended to render it easier, cheaper and quicker to enter the temple of justice than before.

36. Notwithstanding their historical differences and their development since the 1873 reforms, what was always and remains undoubtedly true is that equity and law were and are both ultimately concerned, as US Supreme Court Justice Joseph Storey put it, with ensuring the achievement of ‘substantial (that is to say, substantive) justice between the parties. . .’⁴². The common law and equity may have differed in many ways – they were administered by different courts, they operated distinct processes – but as doorways to justice they both led into the same temple of justice. This fundamental truth was formally recognised in the

³⁹ *Gee v Pritchard* (1818) 2 Swans 402 at 414.

⁴⁰ [1978] AC 904.

⁴¹ Second edition at (xv) cited in *Lancrest Ltd v Asiwaju* [2005] EWCA Civ 117 at [16].

⁴² Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, (Little Brown & Co) (1886) (4th Edition) at 41ff.

1870s, when the two justice systems were, as we all know, fused together and the High Court was born. This then is justice's first dimension; the dimension where through equity and the law the courts have sought to achieve substantive justice.

37. Justice's second dimension, is one which made its first statutory appearance in England in the late 17th Century: arbitration⁴³. The Arbitration Act 1996 has a long provenance. Arbitral process has a considerable amount in common with the formal judicial process. It may take place outside the civil justice system, but it generally involves a formal, private, process and the determination of a dispute by a neutral tribunal generally chosen by the parties for its expertise in respect of the issue in dispute. Saying that its formal process does not entirely sit outside the formal justice system; given the role the court has in determining, for instance, appeals on points of law arising out of any arbitral award under section 69 of the Arbitration Act 1996. The structural similarity between arbitration and adjudication in the present context is this: they both involve a formal process the aim of which it to arrive at a formal determination of the dispute by an independent third party on the substantive merits of the dispute. As such arbitration can also be seen to open another doorway to substantive justice.

38. Many aspects of the arbitration process are based on the court's procedure, but it has developed in ways which the courts would, even now, do well to study – for instance in terms of controlling the time for speeches and examination of witnesses. The extent to which courts should, and indeed properly can, follow the imposition and enforcement of such strict time limits (save where specifically mandated by the CPR – e.g. in relation to timings mandated for fast track cases) is a matter I can do little more than mention this evening. However, the philosophy of the CPR seems to me to support such an approach, as does the

⁴³ 9 & 10 Will. III c.15.

thrust of the Jackson report, and, indeed, as does the likely increased pressure on court resources.

39. ADR however differs from adjudication and arbitration. It rests on the consensual resolution of a dispute rather than its formal adjudication or determination by a third party. Its aim is not substantive justice's achievement in the sense that formal adjudication, and even arbitration, seek it. Its focus, as Professor Main in a fascinating article entitled *ADR: The New Equity*, has described it, is a much more, 'individualized justice'.⁴⁴ That is to say, it is a relatively new form of justice, which, when compared with traditional litigation (like equity, particularly in its early days) involves far greater procedural flexibility and a far greater range of remedies than formal adjudication. As a result, it is, in many cases, better able to achieve a just or fair outcome for the parties, provided that they both have the will to settle their differences. Fair here not because the outcome necessarily reflects the substantive legal merits of the underlying dispute but rather because the parties have both participated in a consensual process and reached a mutually agreeable resolution. It is a justice not based on a commitment to substantive justice's achievement.

40. ADR as justice's third dimension thus can be seen as fundamentally distinct from its first and second dimensions. As Main put it, 'contemporary civil justice is administered by dual systems, with formal adjudication on one hand, and a constellation of ADR methods on the other'.⁴⁵ They are two systems running side by side because the first two dimensions, to differing degrees seek to secure substantive justice, whilst ADR does not. Since Lord Woolf's Interim Access to Justice report, there has been a concerted effort by government, the senior judiciary and ADR practitioners to promote the use of ADR as a means to resolve disputes. The Jackson civil costs review rightly has rightly joined in that process of affirmation, as it

⁴⁴ Main, *ADR: The New Equity*, 74 U. Cin. L. Rev. (2005 – 2006) 329 at 329.

⁴⁵ Main, *ibid.*

called for a proper and serious campaign to ensure all those involved in litigation are aware of its benefits⁴⁶. However, there is a very important caveat to be entered at this point.

41. Professor Main rightly sees formal adjudication and ADR as complementary systems of dispute resolution. He expresses a concern however that ADR is becoming drawn into the formal civil justice system. The consequence he sees of this is the ADRization (sorry) of litigation and vice versa.⁴⁷ Down this road lies the transformation of ADR into something which goes by the name of ‘complementary dispute resolution.’ There are two dangers here. First, it may see ADR – like equity before it – lose the advantages it had originally. In becoming more like litigation, more formal, rule-bound and less flexible it may, just as 18th and 19th Century equity did, cease to offer an effective alternative route to dispute resolution. Second, there is a more fundamental danger, which stems from a failure to understand the fundamentally different roles which formal adjudication and ADR have. The danger is perhaps best expressed in Lightman J’s dictum from *Hurst v Leeming*, while mediation was not in law compulsory ‘alternative dispute resolution is at the heart of today’s civil justice system . . .’⁴⁸ This dictum suggests that ADR post-Woolf is not just part of the civil justice system but the very essence of it.

42. If the civil justice system simply provided a private benefit to individuals – the view which sees justice as no more than a part of the service sector of the economy rather than a branch of government – such an idea could, at least in theory, be right. If resolving disputes simply involved conferring private benefits ADR could properly lie at the heart of the civil justice system and might lie at the heart of Woolf’s commitment to the idea that procedural and substantive justice are equal aims of the justice system. The civil justice system is not

⁴⁶ Jackson, Review of Civil Litigation Costs: Final Report (HMSO) (December 2009), at xxii & 355ff.

⁴⁷ Main, *ibid* at 397.

⁴⁸ [2001] EWHC 1051 (ChD) at (4).

however part of the service sector and confers more than simply private benefits. That is as true post-Woolf as it was true pre-Woolf. As such it is a system which cannot ever properly be said to have at its heart ADR. A civil justice system which had ADR at its heart, which placed too great a weight on it, whatever it might be, it would not be a civil justice system. The commitment to ADR's promotion in the Woolf reforms, the CPR, and now the Jackson Costs Review recommendations, must be seen in light of this; in the light of the fact that the civil justice system is a branch of the government. This truth effects how we assess how justice's form properly follows function post-Woolf.

43. The first point is that each of the three dimensions of justice – equity and law, arbitration, and ADR – has a part to play in the civil justice system. The part they have to play will be, as it always was, determined by the fact that, as George Washington put it, 'the due administration of justice is the firmest pillar of good government'.⁴⁹ The central role is that of formal adjudication by the courts administering equity and law. That lies at the heart of our civil justice system; without it doing so we have no framework for securing the enforcement of rights and the rule of law. Neither arbitration nor ADR, as beneficial as they are, can provide that framework. Supplementary and complementary roles are played by those two dimensions of justice. They too can secure justice for individuals through the resolution of disputes. But they do so because they exist within the framework of law and its enforcement by formal adjudication. Without formal adjudication they would be mere epiphenomena.

44. The second point is that the post-Woolf commitment to proportionality weaves ADR more tightly into the fabric of civil justice, to borrow Sir Jack Jacob's phrase, than ever before: it

⁴⁹ George Washington to Edmund Randolph, 28 September 1789, George Washington Papers at the Library of Congress, 1741 – 1789, Series 2, Letterbook 22. (http://lcweb2.loc.gov/cgi-bin/query/P?mgw:1:/temp/~ammem_HL2r::)

gives it a crucial role to play in dispute resolution. It does so not because it requires courts to divert cases from their formal adjudicative process to ADR as part of a downgrading and downsizing of the civil justice system. It does so because it is an expression of our commitment to civil justice as a public good. Proportionality and the overriding objective increase ADR's importance, but it will never ever render it a substitute for adjudication in every case. Promoting and facilitating the use of ADR for those cases where it will be of genuine advantage to the parties – because of, for instance, its informality, the flexibility of its processes and the availability of remedies not available to the litigation process – is of benefit not only to those litigants but also to the justice system. It is of benefit because it ensures that only those cases which truly call for, truly require, formal adjudication utilise the limited resources available to the justice system.

45. And it must be recognised that even the most efficiently and well-resourced civil justice system would struggle to provide a Rolls Royce service for all potential disputes. The diversion of those cases that can properly be diverted from formal adjudication ensures, first, that the litigants in those cases that are settled by ADR gain a private benefit; second that those litigants who properly require recourse to formal adjudication gain a private benefit through gaining better access to civil justice; and finally, the public good is served not only by both types of case being properly resolved, but also because the framework of law is sustained, precedent is developed and law is clarified for the benefit of all, for the public good by the civil justice system. A proper and greater commitment to ADR, as an element of the commitment to proportionality, serves the public good. But it only does so within the context of a commitment that sees the first two doors to the temple of justice kept firmly open to those who need to enter by them.

(5) Conclusion

46. I started this evening's lecture by referring to justice as a many splendoured thing. It is. But it can only be so if we continue to recognise that it is a public good and that the civil justice system, like the family and criminal justice systems, is a branch of government. If we lose sight of this it will soon lose its splendour. It will cease to maintain our civil society. And it will ultimately undermine the efficacy of both arbitration and ADR as effective means of private dispute resolution. As far as justice is concerned private benefit arises within a framework of public good.

47. The Woolf reforms were intended to enable the civil justice system to better maintain us and our commitment to the rule of law. They did so through introducing a concept of proportionality into English civil justice; they thereby modified its commitment to substantive justice's achievement. They did so in order to, paradoxically, increase our commitment to it, by balancing it with a commitment to procedural justice. In doing so, we now rightly promote ADR as litigation's invaluable twin, but we should take care to ensure it does not become its identical twin as equity became common law's identical twin in the 19th Century. As such we have what Sanders described as a 'multi-door courthouse'.⁵⁰ Each of those doors exists to confer a public good rather than simply a private benefit either directly as formal adjudication and arbitration do or indirectly as ADR does. As long as we remember this each door will maintain our commitment to justice and the rule of law.

48. Thank you very much.

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⁵⁰ Sanders, as cited in Main, *ibid* at 402.