SYMPOSIUM ON DISPUTE RESOLUTION

On 16 October 1987 the Faculty of Law sponsored a Symposium on Dispute Resolution in connection with the annual Viscount Bennett lecture. Four distinguished visiting scholars (Dean Kinvin Wroth and Professors Thomas Cromwell, Claude Belleau and Arnold Weinrib) presented papers on which seven members of the Faculty commented. What follows is the revised text of those presentations except that of Professor Weinrib, which was unavailable for publication.

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Pluralism and Uniformity in the Common Law Legal Tradition

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My purpose in these introductory remarks is to provide a context for your discussion of alternative dispute resolution in its various specific modern forms. By "alternative dispute resolution," I, of course, mean resolution of disputes in a variety of nonjudicial forums ranging from administrative tribunals and small claims courts to private arbitration, mediation and negotiation. I will try to provide both some historical perspective and some sense of the place of alternative dispute resolution in the broader landscape of disputing and resolving.

First, a word about my title. It conveniently, if ambiguously, embraces the different sets of paradigms which two recent students of the social impact of the legal order in 19th-century England and the United States have used as a framework for their historically focused discussions. These studies bring to light early forms of alternative dispute resolution which the received history of the common law tends to obscure.

Harry Arthurs in his *Without the Law*, a study of change in English law, describes two analytical models of the legal world which we all inhabit.[1] "Legal centralism" is the classic jurisprudential model which gives law an independent existence as a social and intellectual reality. The centralist view focuses on the single political system of a society which gives law its legitimacy and is the source of its authoritative articulation, interpretation, and application. In Arthurs' terms, "legal pluralism" is the social scientists' perception. Law is a behavioral phenomenon that takes many forms ranging from the customary rules and practices of particular social groups to the formal law of the centralist. The focus of the pluralist is not on the authority or the interpretation of

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[1] H.W. Arthurs, *"Without the Law": Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: Univ. of Toronto Press, 1985) at 1-3.

law but on its varied sources in the social order and its functional role in describing or guiding the behavior of the groups and individuals which make up that order.

Jerold Auerbach's paradigms in *Justice Without Law?*, his study of alternative dispute resolution mechanisms in United States history, are social, rather than legal models.[2] In Auerbach's thesis, society moves from a "communitarian" to a "pluralistic" model. In the communitarian model, a community of individuals with a shared consensus as to values uses the power of community to assure uniformity of belief and behavior. In this model, the focus is on each community as a separate entity with its own order, functioning independently of any other communities that may exist in parallel to it or may, indeed, embrace it. The behavior of individuals is subject only to the social control imposed by the community. When the society grows more complex, individuals can no longer be sustained solely by the values or order of the community, and the pluralistic model emerges. In the pluralistic society, communitarian values and processes are abandoned and a legal order that is the product of accommodation among the many systems of values within the society takes over.

The terminology of Arthurs and Auerbach appears inconsistent, but they are talking about the same phenomena. Auerbach's autonomous "communities," existing within a larger political order, are examples of the varied sources of law embraced in Arthurs' concept of legal pluralism. Auerbach's "pluralistic" society which emerges when communities break down is governed by Arthurs' legal centralist regime.In these remarks, I use "pluralism" to describe a social and legal order in which many different bodies of law and modes of process are recognized and none predominates. "Centralism" in my terms is an order in which uniformity is instilled by the prestige and acceptance of a single, formal, state-sanctioned body of law and process.

Both Arthurs and Auerbach identify nonjudicial dispute resolution as a principal virtue of a pluralist society. That virtue disappears when centralism takes over. Arthurs and Auerbach each describe earlier eras in which pluralism flourished. State-sanctioned law and process existed as only one of many systems. Thus, justice was not only more simply and inexpensively available but was tailored to the needs and values of particular "communities" or interest groups within the society. The formal law and process of the modern centralist regimes are not only slow and costly but tend to reflect and serve the dominant social and economic elements of the society, from which the lawyers and judges come.[3]

I propose a different model to explain these phenomena. In my view, pluralism and centralism are not competing models but complementary aspects of a single model. Changing demographic and economic circumstances, or intellectual or technological change, may cause one or the other of the regimes to assume dominance in any given era. Or the predilections or presuppositions of the historian or social scientist may illuminate one more brightly than the other in any given study. But in fact, in the historical epochs which Arthurs and Auerbach describe, both pluralism and centralism are present. The only question is the relative balance between the two.

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[2]J.S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983) at 1-17.

[3]See generally H.W. Arthurs, *supra*, note 1 at 1-12, 189-96, 206-14; J.S. Auerbach, *supra*, note 2 at 3-17, 138-47.

Having completed this brief book review, I shall now turn to a more specific account of the changing relationship of pluralism and centralism as they affect the history of dispute resolution in England, the United States, and Canada. I believe that in both England and America centralism becomes the major, if not dominant, system at a rather earlier date than Arthurs and Auerbach suggest; that, in the United States at least, pluralism continues to flourish within the framework of common values that the formal law and process of centralism reflect; and that the balance thus struck is a "Good Thing,"[4] providing a foundation for widespread use of alternative dispute resolution on which Canada is now in a position to build.

Our legal cultures share the heritage of 17th-century England, where both law and the legal system were strongly pluralist. Coke in his *Commentary on Littleton* could identify 15 separate bodies of English law, among which the common law ranked only fourth after the law of the Crown, the law and custom of Parliament, and the law of nature, in that order. Other "laws" recognized by Coke included the civil law, the law of the forest, the law merchant, and various bodies of local law.[5] At the same time, in England there existed a wide variety of specialized and local courts and royal commissions, which administered these specialized bodies of law — often applicable only to a particular trade, locale, or Crown interest. In addition, extrajudicial arbitration was extensively relied on in the settlement of commercial disputes.[6]

Yet, characteristically, Coke in this famous passage reflected a reality that was more historical than contemporary. This apparently pluralist system of law and process was before his eyes becoming increasingly subject to the rules and tribunals of a centralist regime. The Tudor monarchs in the 16th century, through a creative combination of prerogative fiat and Parliamentary enactment, had erected the prototype of the modern bureaucratic state.[7] Thus, many of the seemingly pluralist judicial and administrative tribunals of Coke's time were in fact components of a developing centralist regime of law and process.

Under Coke's own leadership at the beginning of the 17th century, the central courts asserted the power that was to make the common law the driving force of our legal system. The King's Bench claimed jurisdiction to review and control inferior courts by the extraordinary writs of *mandamus*, *certiorari*, *habeas corpus* and prohibition. With these potent weapons, Coke took on and vanquished the ecclesiastical courts, the court of admiralty and other prerogative courts. Only the Court of Chancery withstood the

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[4]See W.C. Sellar & R.J. Yeatman, *1066 and All That: A Memorable History of England Comprising All the Parts You Can Remember Including One Hundred and Three Good Things, Five Bad Kings, and Two Genuine Dates* (New York: E.P. Dutton Inc., 1931).

[5]E. Coke, *The First Part of the Institvtes of the Lawes of England: or, A Commentarie upon Littleton* (London: Societie of Stationers, 1628, fascimile ed., New York & London: Garland Publishing Inc., 1979) at 11.

[6]T.F.T. Plucknett, *A Concise History of the Common Law* 5th ed. (London: Butterworth & Co., 1956) at 173-75; W. Holdsworth, *History of English Law* 7th ed. (London: Metheun & Co. Ltd., 1956) vol. I at 64-193, 526-632; W. Holdsworth, *History of English Law* (London: Metheun & Co. Ltd., 1964) vol. XIV at 187-96; E. Powell, "Settlement of Disputes by Arbitration in Fifteenth-Century England" in (1984)2 *Law and Hist. Rev.* 21 at 25-26.

[7]T.F.T. Plucknett, *supra*, note 6 at 44-45, 176-85, 195-96; W. Holdsworth, *History of English Law* (Boston: Little, Brown & Co., 1924) vol. IV at 54-217.

challenge.[8] After a century and a half of further common-law consolidation, epitomized in Blackstone's *Commentaries*, Lord Mansfield's creative adaptation of the law merchant opened the common-law courts to a wide range of commercial litigation previously heard in admiralty or in local mercantile courts.[9]

Despite these forceful assertions of the primacy of the common law, Arthurs' account shows that more than 200 years were to elapse between Coke's *Institutes* and the disappearance of the pluralism of feudal England. Not until 1846 were the varied and decentralized local courts that administered common law, custom, and equity, replaced by the county courts as a nationwide system of uniform common-law courts. With the further reforms of the 1870's, the triumph of the common law and the centralist regime seemed complete.[10] As Professor Schwartz's address reminds us, Dicey in 1885 could proclaim the rule of law, the principle that all governmental action was subject to the law of the land as administered in the courts.[11] Nevertheless, in Arthurs' view the vestiges of pluralism persisted. Isolated communities preserved their internal rules. Administrative agencies developed and applied immense bodies of regulatory law. Arbitration remained a major factor in the resolution of disputes. More recently, with the bold assertion of the power of judicial review in Britain, these pluralist forms have increasingly come to operate within the framework and subject to the control of a centralist system of law and process.[12]

In the United States, the path from pluralism to centralism has been clearer and more direct. Recent studies of law and society in the colonial period, including Auerbach's, have focused on the asserted prevalence of a communitarian model in which the decentralized and independent political-religious units that were the New England towns acted as primary agencies of dispute resolution for their members.[13] Among the vast array of towns and congregations across 150 years of colonial history, numerous examples of resolution of disputes by mediation or accommodative consensus can be found. Yet, it is clear that from nearly the beginning of the period, formal law and a formal legal system were established and grew steadily in sophistication and complexity.

This legal system in the colonies was a centralist antithesis of pluralism. The New England puritans particularly saw as a major goal of their "City on a Hill" the elimination of the irrational complexity and discretion in the English legal system which they had fled. Thus, in Massachusetts they established a three-tiered judicial

[8]W. Holdsworth, *supra*, note 6, vol. I at 459-65, 552-59; T.F.T. Plucknett, *supra* note 6 at 191-98.

[9]See generally, C.H.S. Fifoot, Lord Mansfield (Oxford: Oxford University Press, 1936) fascimilie ed. (Ann Arbord, Mich.: Xerox Univ. Microfilms, 1975).

[10]H.W. Arthurs, *supra*, note 1 at 13-49.

[11]B. Schwartz, "Fashioning an Administrative Law System" in this issue at 58. See L.K. Wroth, "Rule of Law" in L. Levy and others, eds, *Encyclopedia of the American Constitution*, (New York: Macmillan Publishing Co., 1987).

[12]H.W. Arthurs, *supra*, note 1 at 167-214.

[13]See for example J.S. Auerbach, *supra*, note 2 at 18-46; M. Zuckerman, *Peaceable Kingdoms: New England Towns in the Eighteenth Century* (New York: Alfred A. Knopf, 1970); D.T. Konig, *Law and Society in Puritan Massachusetts: Essex County, 1629-1692* (Chapel Hill: Univ. of North Carolina Press, 1979); W.E. Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825* (Chapel Hill: Univ. of North Carolina Press, 1981); B.H. Mann, "The Formalization of Informal Law: Arbitration before the American Revolution" (1983) 59 *N.Y.U. L. Rev.* 443.

system consisting of justices of the peace, county courts of first instance, and a single province-wide Superior Court. Appeals with jury trial *de novo* and a second chance in the Superior Court assured that, while in the run of cases, trial and adjudication were at a relatively informal local level, the common law as perceived by the high court of the province would be uniformly applied in every action. At the same time, pluralist features such as arbitration, reference under rule of court, and use of the law merchant were incorporated in this centralist system.[14]

Moreover, from the earliest time in the colonies, there was formal law as well as community. While lawyers were anathema to many of the colonists in the earlier period, colonists nevertheless conducted their commercial, property, and personal affairs in accordance with a combination of formal law and custom that was based on the English common law and the legal doctrines borrowed and absorbed from it in the law of the colonies. While geography and moral and philosophical commitment to the idea of community may have in the early days meant that many disputes in many communities, even those involving commercial and property matters, were in fact resolved by communitarian methods, it nevertheless remains true that from the beginning there was a substantial current of disputes that were brought to and resolved in the formal legal process with reference to formal law and under formal legal procedure. By the 18th century, resort to formal law and formal process had become dominant.

In particular, Auerbach and others have pointed to the New England towns as the "peaceable kingdoms" whose communitarian values and dispute resolution methods were the chief means of social control.[15] In fact, the very corporate structure of the Massachusetts towns was spelled out in an elaborate body of provincial statutory law covering the organization and conduct of town government, local taxation, church relations, and a wide range of specific governmental powers. The courts of the Province frequently entertained actions challenging conduct under this legislation and filled gaps in the statutory scheme by interpretation. Moreover, though towns did resolve many disputes by an internal process of accommodation and consensus, there was a large volume of both criminal prosecution and civil litigation in the courts. In addition to routine property, tort, and contract actions, there are numerous examples of judicial resolution of the very kind of complicated family or neighborhood feud most susceptible of community accommodation.[16]

By 1774, this system as established in Massachusetts, together with the other constituent elements of local government under the Charter of 1691, had come to embody and protect the key social and economic interests of the inhabitants of the Province. Britain sought to dismantle or co-opt the elements of the system through the so-called "Intolerable" or "Coercive" Acts of 1774 that, among other things, would have given the Crown sole power to appoint and remove Massachusetts judges and full control of

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[14]See L.K. Wroth & H.B. Zobel, eds, *Legal Papers of John Adams* (Cambridge, Mass.: The Belknap Press, 1965) vol. I at xxxviii-xliv.

[15]See works cited *supra* at note 13.

[16]See L.K. Wroth, "Possible Kingdoms: The New England Town from the Perspective of Legal History" (1971) 15 *Am. J. Legal Hist.* 318 at 318-30. This is a review of Zuckerman, *supra* at note 13.

the selection of juries. This threat to the patterns of social and economic activity which had flourished under the community standards enforced in a locally constituted court system brought on the civil disobedience which culminated in the American Revolution.[17]

The final act of the Revolution was the adoption of the United States Constitution, the bicentennial of which we in the United States have been so noisily celebrating this year. That complex instrument embodied on a national level the rejection of British institutions which the Declaration of Independence had begun. Together with Parliamentary sovereignty and supremacy, that rejection included rejection of the pluralism which the unwritten British Constitution had allowed to continue. A form of pluralism was preserved and institutionalized in our federalism, but the adoption of state constitutions on the same principles meant that each state was a microcosm of the centralist system that the national charter established. Moreover, the perceived universality of the common law, as well as the supremacy of federal law under the Constitution, served to pull these plural sovereignties towards centralism. In 1803, when Marshall's decision in *Marbury* v. *Madison*[18] made express the power of judicial review that was necessary to implement the rule of law, the institutionalization of centralism in the structure and rhetoric of the legal system of the United States was complete, and the dominance of lawyers — noted by de Tocqueville in the 19th century[19] and so apparent today — was assured.

In the 200 years of American constitutionalism, there have been many individual manifestations of pluralism. As Auerbach points out, communitarian dispute resolution methods can be identified in a variety of contexts throughout American history.[20] Even today, whether in the internal polity of a private club or the internal rules of a religious order, communitarian systems continue to exist. The point is that they have always existed within the context of the formal legal system. The unifying force of a national government, however, together with the overt use of the judicial power as a medium for testing all conduct against the rule of law have served to establish and maintain the dominance of the centralist perspective in rhetoric and in fact.

Today, like Canada, the United States is increasingly concerned with the performance of the judicial system in its primary function of dispute resolution. "Alternatives to Court" is the title of a course at my law school and describes the current preoccupation of not only the bench and bar but of a large segment of the public as well. In terms of the historical pattern which I am presenting, the key issue raised by this concern is whether the alternative dispute resolution movement reflects merely an effort to restore economy, efficiency, and access to an overburdened judicial system or whether it represents the occasion if not the opportunity for a restoration of the values

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[17]See L.K. Wroth, "Province in Rebellion: an Interpretive Essay" at 141-45, in L.K. Wroth and others, eds, *Province in Rebellion: A Documentary History of the Founding of the Commonwealth of Massachusetts, 1774-1775* (Cambridge, Mass.: Harvard Univ. Press, 1975) [in book and microfiche].

[18](1803) 1 Cranch 137.

[19]Alexis de Tocqueville, *Democracy in America*, 9th edition, P. Bradley, ed. (New York: Alfred A. Knopf, 1963) vol. I at 274-76, 278.

[20]J.S. Auerbach, *supra* at note 2.

"without the law" that Arthurs, Auerbach and others have seen as the essence of a pluralist system. I suggest that the history and structure of American Constitutionalism and the system of private law that has grown up within it inevitably mean that alternative dispute resolution will complement the present legal system, not remake it. At the same time, the history that I have reviewed offers numerous instructive examples of alternative dispute resolution methods being used to good effect to ameliorate the cost, delay, and inaccessibility of the formal legal system.

I will now offer a brief look at the alternative dispute resolution landscape in light of my preceding comments. Before considering alternative dispute *resolution*, it may be helpful to think a bit about *disputes* in their total context and in their relation to the body of "law," in the centralist sense, which surrounds them. As the recent work of Marc Galanter has emphasized,[21] disputes which actually result in trial in the courtroom are the very small peak of a massive iceberg. Only a tiny fraction of disputes in which litigation is commenced by pleading and service of process result in trials. If, to pursue the metaphor, we consider the formal litigation process as the portion of the iceberg visible above the surface of the water, we may then consider the far larger number of human interactions in which disagreement about terms or results is sufficiently focused to qualify as a dispute to be the portion of the iceberg below the surface. These subsurface disputes are resolved by a variety of means short of the commencement of litigation, ranging from entirely informal and personal agreement, which presumably resolves the large majority of them, through various more formal means of nonjudicial dispute resolution. To pursue the metaphor to its outer limits of usefulness, if disputes are the iceberg, the infinite sea in which the iceberg floats represents the vast and uncountable number of human interactions, whether personal connections or commercial transactions, which occur every minute of every day without dispute.

The last point is critical to an assessment of the role of formal law and the legal system in society. Formal law is not merely a series of rules of decision which come into play in order to resolve disputes. Rather, formal law represents a complex system of rules which serve to guide behavior in every form of human activity. Moreover, formal law can even serve the affirmative purpose of providing ready-made mechanisms, such as forms for particular transactions, to facilitate the conduct of certain types of human activity. Surely, we are all aware that even today in our supposedly litigation-crazed society, most lawyering represents time spent on giving advice intended to conform conduct to these rules or base activity on them. Similarly, the formal legal system in which these rules are articulated and applied has an indirect role in every activity under the rules. Its very existence is the source of awareness on the part of the actors that failure to abide by the rules or misapplication of them can result in sanctions or other corrective action through the formal system. Thus, the uniform body of law propounded by the centralist model has continuing and pervasive social utility as a primary means of dispute prevention.

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[21] M. Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society" (1983) 31 *U.C.L.A. L. Rev.* 4 at 4-71.

Let me now turn more specifically to alternative dispute resolution mechanisms. There are four categories which it is useful to consider.

1. *Court-annexed alternative dispute resolution* is the approach most closely linked to the formal legal system. As the term suggests, this approach involves the use of various alternative dispute resolution devices as mandatory or voluntary steps in the litigation process. Such devices have their most ancient origins in the use of masters in equity and, in many of the states at least, referees in actions at law. More recently, these devices have been supplemented by judicial procedures under which conciliation, mediation, binding or nonbinding arbitration, and the so-called summary or mini-trial, have been made available or required in civil actions. The issues presented for resolution by these means have been formed through the conventional stages of pleading and other trial procedure and resolution is carried out directly under the eye of a judge. Court-annexed alternative dispute resolution, while it may involve some softening of legalistic approaches and values, is thus primarily an extension of the existing legal system. It has as its principal purpose the relief of crowded court dockets and the saving of time and expense for individual litigants.

2. *Nonjudicial formal alternatives* present a broader array of dispute resolution methods but an array that nevertheless is directly connected to formal law and the formal legal system. Examples of these devices include administrative tribunals such as worker's compensation or unemployment compensation commissions; small claims courts, successors to the 18th-century justices of the peace, which are technically judicial but are characterized by the use of simplified procedure and relaxed rules; and more radical examples of the modern era, such as the neighborhood justice center or the court-annexed dispute resolution center. Arthurs might characterize these methods as pluralistic. I suggest that in the United States, at least, they are centralist phenomena because their legitimacy and effectiveness are dependent on formal law and a centralist regime which polices them through the medium of judicial review.

3. *Private dispute resolution methods* represent a third category, also of ancient lineage. Arbitration by legal agreement has long been known in Anglo-American law, as well as in other legal systems.[22] In more recent years, statutory provisions assuring that the results of arbitration are binding and enforceable have made the device more effective but at the same time closer in pattern to litigation. More recently, mediation by agreement, using the services of private mediators, has become a possible alternative independent of litigation. Because these devices depend on agreement of the parties for their effect, whether enforceable or non-

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[22] See E. Powell, *supra* at note 6; B.H. Mann, *supra* at note 12; W.I. Miller, "Avoiding Legal Judgment: The Submission of Disputes to Arbitration in Medieval Iceland" (1984) 28 *Am. J. Legal Hist.* 95 at 95-134.

binding, they too are ultimately tied to the formal legal system. The common law and statutory provisions which establish them and define their effect are examples of facilitative mechanisms of formal law. Because their results may ultimately be subject to judicial scrutiny, and because their format is inherently adversarial in nature, these methods tend to draw on formal law for substance and resemble the formal legal system in procedure. Nevertheless, they have been frequently and widely resorted to because, compared to judicial resolution, they remain relatively inexpensive and simple.

4. *Communitarian dispute resolution methods* are those embraced in Auerbach's communitarian paradigm.[23] The methods themselves range from informal discussion and conciliation through mediation, arbitration, and formal hearing or trial. The characteristic that distinguishes communitarian methods from the first three types is that the communitarian methods are confined to a single "community" united by religious, ethnic, commercial, or other social interest. The communitarian methods are used within the community either to resolve generic types of disputes which might otherwise enter the formal legal system or to resolve disputes arising over matters of community values and interests that are not regulated by the formal law of the society but are part of the "law" in Arthurs' pluralist sense. The determinations of these dispute resolution mechanisms are binding and final on the members by virtue of the pressure which the community is able to bring to bear on the membership. This binding effect, obviously, can continue to exist only so long as the interest of the members in maintaining their status and membership in the community predominates over their broader interests which the society as a whole may reflect and protect. Moreover, to the extent that the existence and structure of the community and the covenant that binds its members are themselves creatures of formal law, the sanction for communitarian methods is ultimately found in the centralist regime.

There is renewed interest and emphasis on all of these forms of alternative dispute resolution in both the United States and Canada today. This awakening of interest is in large part the function of a pragmatic desire to reduce the cost and enhance the efficiency of the civil justice system. At another, deeper level, however, alternative dispute resolution is perceived as a means of delegalizing our societies to serve values and interests not adequately recognized by the present centralist regimes of formal law and process. The work of Arthurs and Auerbach sets forth the view that delegalization would in fact represent a return to an earlier golden age of pluralism.

My comments suggest that indeed the principal mechanisms of alternative dispute resolution have ancient roots. The history, however, tends to refute the notion of a golden age of pluralism. From an early date in both Great Britain and the American

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[23]See J.S. Auerbach, *supra* at note 2.

colonies, the institutions of pluralism — local courts, administrative bodies, social and religious communities — operated within the framework of an increasingly elaborate and articulated regime of state-sanctioned law and process. In Britain the more random and pragmatic development of judicial power as a matter of common-law doctrine meant the longer survival of pluralist institutions and a continuing ambiguity as to their role. In the United States the emergence of judicial review as a Constitutional power and duty of the judiciary made clear the subjection of pluralist institutions to the centralist regime. Throughout the historical developments, however, alternative dispute resolution mechanisms did not disappear.

The present Constitutional system of the United States incorporates the model which has resulted from this history. The mechanisms of alternative dispute resolution remain as options to be exercised as a matter of choice when the benefits of economy, efficiency, or specialized determination outweigh the cost of loss of interests or rights protected by the formal legal system. We have today the opportunity to adjust the balance in the use of these mechanisms by making them more effective and more accessible. Our goal should not be to restore some mythical golden age of delegalized innocence. Rather, we should seek to establish a system of alternative dispute resolution that will serve the goals of a free society by making the maximum range of choice available to all citizens.

In Canada today, as you contemplate the issues and opportunities embodied in alternative dispute resolution, you stand as the heir of both the British system with its longer tolerance of pluralism and of the American rejection of pluralism. I suggest that the Charter of Rights points you towards a position like that of the United States, in which the dichotomy between judicial dispute resolution and its alternatives is a false one. You have opted for a formal centralist structure of legal rights and a machinery to implement that structure as the means for recognizing and protecting particular social and economic values and interests for the nation as a whole. Thus, alternative dispute resolution must always operate against a background of rights that can only be adjudicated in a judicial forum.

In this view, alternative dispute resolution is the method of choice when the social or economic costs of judicial resolution exceed the benefit to be obtained from the full protection of legal interests. The alternative methods are always available. The question is where that cost-benefit balance is to be struck at any given time. The real challenge for all of us today is to devise and provide access to dispute resolution methods which will attain for all citizens efficiency in the process and satisfaction with its results without sacrificing the rights which the rule of law protects and guarantees.