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ADR and Transitional Justice as Reconstructing the Rule of Law

Michal Alberstein

I. INTRODUCTION

The alternative dispute resolution (ADR) movement is usually considered to be an initiative focused on efficiency and private ordering.[1] During the 1980s and 90s, a broad academic debate developed around the clash between the aspiration of law to articulate public values through adjudication and the encouragement of settlement driven solutions by ADR proponents.[2] Many scholars have perceived the goals or consequences of ADR to be the privatization of justice and some of them have dreaded the post-institutionalized legal universe of ADR.[3] In contrast to these critical views, some scholars[4] have emphasized the public aspect of ADR

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1. For the first theoretical link between theories of bargaining and private ordering, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979). For a contemporary presentation of ADR as returning to the idea of private ordering as manifested in the writing of the Legal Process school of law, see MICHAL ALBERSTEIN, PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION (2002); *see also* Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1, 25-30 (2000).

2. *See* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Michele G. Hermann, *The Dangers of ADR: A Three-Tiered System of Justice*, 3 J. CONTEMP. LEGAL ISSUES 117 (1989-1990); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1991); Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 LAW & SOC. INQUIRY 145 (1988); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482 (1987); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397 (1985); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

3. Judith Resnik, *Many doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 262-63 (1995).

4. Richard C. Reuben, *Public Justice: Toward a State Action Theory of ADR*, 85 CAL. L. REV. 577, 579-83 (1997).

and its potential for ADR to promote democracy and liberalism[5] and have pointed to its transformative potential in terms of moral values[6] and public good.

This paper addresses the role of ADR in reconstructing the rule of law following the critique this idea received during the 20th century, and exemplifies this role through reference to another alternative movement in law—The Transitional Justice movement. In contrast to efforts to reconcile the notion of the rule of law with ADR, or to demarcate the proper interaction between these social institutions in achieving justice,[7] this paper argues for a deeper connection between the two notions: After briefly analyzing the intricate meanings of the rule of law notion through history and its relation to ADR, the paper continues to suggest that the critique of this notion has inspired the development of both domestic ADR and international Transitional Justice, and that the resemblance between these movements can be explained by this inspiration.

The Transitional Justice movement manages transitions to democracy and responses to systematic or widespread violations of human rights. "It seeks recognition for victims and to promote possibilities for peace, reconciliation, and democracy."[8] The movement arose two decades ago, in response to political changes in Latin America and Eastern Europe.[9]

From a first impression, the movements of ADR and Transitional Justice seem unrelated and represent opposite initiatives focused on the private and the public spheres. A deeper look suggests a contemporary framing of mediation and ADR *as* Transitional Justice, and calls for an inspection of the common principles of these two movements as alternatives to older perceptions of the rule of law. The reference to the common principles of alternative legal movements and to the ways in which these principles answer the critique of the rule of law will enable the author to clarify the reconstructed notion of the rule of law that alternative movements support.

This paper begins by briefly presenting diverse perceptions of the rule of law as they developed historically and suggests possible links between the different perceptions of it and ADR thinking. Following this presentation, the paper describes the critique of the rule of law and the ways in which common principles of both ADR and Transitional Justice answer it. It presents the ways in which these principles are operating within each movement.

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5. *See, e.g.*, Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 348-49 (2004); *see also* Lawrence E. Susskind, *Consensus Building, Public Dispute Resolution, and Social Justice*, 35 FORDHAM URB. L.J. 185, 190-91 (2008). *Cf.* Hiro N. Aragaki, *Deliberative Democracy as Dispute Resolution? Conflict, Interests, and Reasons*, 24 OHIO ST. J. ON DISP. RESOL. 407, 410-11 (2009); Alex Wellington, *Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism* 12 CAN. J.L. & JURIS. (1999) 297.

6. *See, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994). The authors offered to perceive mediation as a process which aims to encourage moral growth in terms of empowerment and recognition. *See also* Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: an Imaginary Conversation*, 3 J. Contemp. Legal Issues 1, 14 (1989).

7. Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with The Rule of Law*, 56 DEPAUL L. REV. 569, 573 (2006-2007).

8. *See* International Center for Transitional Justice, *What is Transitional Justice?*, http://www.ictj.org/en/tj/, at para. 1 (last visited Mar. 13, 2011).

9. *Id.*

Promoting educational processes that combine a variety of tools to transform a conflict is common for both ADR and Transitional Justice. In contrast to the past perception of a clash between public values and pragmatic private solutions, more compatibility can be found today between these spheres. This compatibility is explained in this paper by exploring the ways in which both movements try to answer the fundamental critique of the concept of the rule of law.

II. THE RULE OF LAW AND ITS RELEVANCE TO ADR THINKING

The rule of law is an important political idea that has gone through a few transformations throughout history, and various interpretations of this idea exist today.[10] There are some theorists who emphasize the formal aspects of this notion, focusing on the restriction of the sovereign by law.[11] Others speak about formal legality and add the requirement of public prospective rules, which are general, equally applied, and certain.[12] Others perceive this notion in a more substantive way and depict it as including the protection of human dignity and individual rights.[13] Some new perceptions even include welfare rights within the notion of the rule of law.[14] This paper will use a common general definition of the rule of law first in its classical form:

> Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[15]

The attributes of generality, equality, and certainty are crucial for this formal notion of the rule of law. Supplementing this formal notion contemporary democracies accept the following idea:

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10. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 127, 129-31 (2004).

11. *See id.* at 129-31

12. *Compare id.* at 131; *with* L. FULLER, THE MORALITY OF LAW ch. II, 33-94 (1964).

13.

> [T]he term 'rule of law' seems to mean primarily a corpus of basic principles and values, which together lend some stability and coherence to the legal order. . . . The rule of law is an amalgam of standards, expectations and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed. Nor can substantive and procedural fairness be easily distinguished: each is premised on respect for the dignity of the individual person . . . .

T.R.S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM 21 (1993).

14. Tamanaha describes the thickest substantive versions of the rule of as incorporating: formal legality, individual rights, and democracy, and "social welfare rights":

> [I]t is also concerned with the establishment by the state of social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realized. Freedom of expression is meaningless to an illiterate; the right to vote may be perverted into an instrument of tyranny exercised by demagogues over an unenlighted electorate; freedom from government interference must not spell freedom to starve for the poor and destitute.

TAMANAHA, *supra* note 10, at 112-13 (citation omitted).

15. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 80 (1994) (citation omitted).

> [T]he rule of law does not mean merely a formal legality which assumes regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and the full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression; . . . democracy is an inherent element of the rule of law.[16]

Some of the principles that scholars tend to derive from the idea of the rule of law are irrelevant for the discussion of ADR. Such is the principle that "*[a]ll laws should be prospective, open and clear.*"[17] The same is true regarding the principle that "*[l]aws should be relatively stable*";[18] "*[t]he independence of the judiciary must be guaranteed.*"[19] ADR cannot promote such principles because the main emphasis of the movement is enhancing processes that usually do not generate public rules.[20] The most relevant principle of the rule of law that corresponds with ADR thinking and actually goes together with the idea of procedural justice is the idea that "*[t]he principles of natural justice must be observed.*"[21] "*Open and fair hearing, absence of bias, and the like are obviously essential for the correct application of the law, and thus . . . to its ability to guide action.*"[22]

One of the advantages of ADR and especially mediation, as discussed in the literature, is the more open environment it provides for the parties, the possibility of the parties to express themselves—to listen and to be heard back—are all unique opportunities that a formal legal procedure does not usually enable.[23] In an interesting way, mediation here offers to work through this principle of the rule of law by going against the failure of the formal adjudicatory process to provide such natural justice. This emphasis is sometimes promoted nowadays in the name of procedural justice as studied in social psychology,[24] and some scholars refer to such a quality through the notion of Therapeutic Jurisprudence.[25] The ability of

16. TAMANAHA, *supra* note 10, at 111 (quotations and citations omitted).

17. JOSEPH RAZ, THE AUTHORITY OF LAW 214 (1979).

18. *Id.*

19. *Id.* at 216-217.

20. For an offer to promote the public effect of ADR through encouraging more publicity of mediation agreements see David Luban, *Settlements and The Erosion of The Public Realm*, 83 GEO. L.J. 2619 (1995).

21. RAZ, *supra* note 17, at 217.

22. *Id.*

23. For the importance of participation and self-determination within the practice of negotiation and mediation, see CARRIE MENKEL-MEADOW, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 153-77, 270 (2005).

24. For an overview of procedural justice, see generally EDGAR ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988). For an exploration of the relevance of this notion for negotiation and mediation, see generally Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 Wash. U. L.Q. 787 (2001); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473 (2008).

25. "Therapeutic Jurisprudence concentrates on the law's impact on emotional life and psychological well-being. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences." International Network on Therapeutic Jurisprudence, para. 1, http://www.law.arizona.edu/depts/upr-intj/ (last visited Mar. 11, 2011); *see also* David Wexler, *Adding Color to the White Paper: Time for a*

alternative legal mechanisms to make legal rules more acceptable and to promote compliance with the rule of law is a well-known quality of ADR in the past decade, and it has implications for the criminal justice arena as well.[26]

Another principle of the rule of law that is relevant for ADR thinking is the idea that there is "a government of laws, not men."[27]

> [L]aw is reason, man is passion; law is non discretionary, man is arbitrary will; . . . law is objective, man is subjective. The inspiration underlying this idea is that to live under the rule of law is not to be subject to unpredictable vagaries of other individuals – whether monarchs, judges, government officials, or fellow citizens. It is to be shielded from the familiar human weaknesses of bias, passion, prejudice, error, ignorance, cupidity or whim.[28]

Although ADR studies are dedicated partly to the understanding of human biases and for the promotion of inter subjective productive interactions, ADR also has a strong emphasis on depersonalization and on overcoming the subjective, competitive dimension of human negotiation. Within integrative negotiation we try to "[*s*]*eparate the people from the problem*," to find common interests and use objective criteria to reason without resorting to a battle. [29] It is a private government of principles, reason, and problem-solving through business making orientation. It is not a power struggle among men and women, who each follow their subjective preference.

Despite some corresponding principles as discussed here, some of the tenets of the rule of law seem to be at odds with the ADR perception, and others seem like they have no relation to the ADR movement at all. From a historical perspective, the establishment of the ADR movement was considered as going against the idea of the rule of law: referring disputing parties to negotiation, mediation, or arbitration and away from adjudication goes against the governance of rules and gives back control to the people. Another argument can present the movement as a call against the substantive rule of law as developed by an activist Supreme Court during the 1970s, and a return to a more formalistic notion of the rule of law—a focus on sorting between procedures, a strict separation between a private market and a public law, and a greater emphasis on choice and predictability.[30]

Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence 44 CT. REV. 78 (2007-2008) (arguing that the principles of procedural justice should be supplemented by behavioral and psychological practical principles which have developed within the growing field of Therapeutic Jurisprudence).

26. For an exploration of therapeutic and alternative modes within the criminal justice system, see BRUCE J. WINICK & DAVID B. WEXLER, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (2003); REHABILITATING LAWYERS (David Wexler ed., 2008); HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE (Herald Press 1990).

27. TAMANAHA, *supra* note 10, at 122 (quotations omitted).

28. *Id.*

29. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 11, 17-39 (1983).

30. For an elaboration of such a claim in historical context, see generally JEROLD S. AUERBACH, JUSTICE WITHOUT LAW (1983). For an equivalent argument that presents the ADR movement as a

Nevertheless, despite some interpretations of ADR as promoting a formal or substantive notion of the rule of law, in this paper the claim will be made that a reconstructed notion of the rule of law—a more procedural one—is promoted by alternative movements in law. This assertion will be supported through the analysis of the most public and international (in contrast to private and domestic) alternative movement in law—Transitional Justice.

III. ADR AND TRANSITIONAL JUSTICE AS PROMOTING THE RULE OF LAW, AND AS OVERCOMING CRITIQUE

A. Alternative Movements in Law

The critique of the rule of law and the lack of belief in the legal profession have produced various institutions and emerging legal regimes that aim to substitute and supplement the declining credibility of classic legal institutions. A basic argument that this paper strives to promote is that there are particular modes of overcoming critique, and that the ADR movement shares this mode of reconstruction with other alternative movements.[31] There is an emphasis on process; an emphasis on constructive conflict intervention; deconstruction and hybridization; a search for an underlying hidden layer; acknowledgement of emotions; community work and empowerment. These elements will be traced in the following section while referring to two movements that offered institutional alternatives to the old liberal regime: ADR and Transitional Justice.

The Transitional Justice movement represents a systematic response to widespread human rights violations and is usually used in relation to democracies in transition that strive to implement the rule of law.[32] Transitional Justice is a movement that emerged in the late 1980s and early 1990s, in response to political changes in Latin America and Eastern Europe.[33] These changes required peaceful transitions to democracy while dealing with past wrongs.[34] Transitional operative

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return to formalism, see Austin Sarat, *The 'New Formalism' in Disputing and Dispute Processing*, 21 LAW & SOC'Y REV. 695 (1987-1988).

31. The circular ways in which the rule of law idea recurs and reconstructs itself in western history is addressed by Brian Tamanaha:

> Beginning at the end of the nineteenth century and continuing through the late twentieth century came loud and repeated warnings from theorists about the decline of the rule of law. It is an odd paradox that the unparalleled current popularity of the rule of law coincides with widespread agreement among theorists that it has degenerated in the West.

TAMANAHA, supra note 10, at 60. In another place I have developed the argument that classic perceptions of pragmatism, that have prevailed in the intellectual and public spheres during the 1950s and before, have recurred and revived in ADR thinking. Such a reconstruction was done sometimes unconsciously by outdated practitioners who were transforming old ideas into practical manuals. *See* ALBERSTEIN, *supra* note 1, at 185-250. The same sequence can be articulated in this area.

32. For an intellectual analysis of the rule of law in situations of transitions to democracy see generally RUTI TEITEL, TRANSITIONAL JUSTICE (2000); for an exploration of various transitions and the principles of this new field, see generally vols. 1-3 TRANSITIONAL JUSTICE: HOW DEMOCRACIES RECKON WITH FORMER REGIMES (Neil Kritz ed., 1995).

33. *See* International Center for Transitional Justice, *What is Transitional Justice?*, http://www.ictj.org/en/tj/, at para. 1 (last visited Mar. 13, 2011).

34. *Id.*

acts include pronouncements of indictments and verdicts; the issuing of amnesties; reparations and apologies; the promulgations of constitutions and reports.[35]

Although the common perspective on the rule of law would suggest that an ADR focus in the domestic sphere is hostile to the rule of law and Transitional Justice initiatives are crucial for the development of the rule of law,[36] the assumption here is that both movements promote a reconstructed notion of the rule of law, based on the common principles that characterize legal alternatives. These principles will be overviewed in the following sections, explaining them first, and then exploring their relation to the critique of the rule of law.

B. Process Emphasis

1. Process Emphasis as a Common Principle

In philosophy, the idea of process as overcoming substantive arguments is a familiar solution to old metaphysical problems. Within the American philosophy of pragmatism this tendency is mostly celebrated in the following way: instead of determining between dichotomies such as mind and body, experience and reason, or being or not being there is a constant shift toward "becoming." Process is used in order to embrace paradoxes by containing oppositional logics of the previous discourse within the new regime.[37]

The ADR movement has a primary interest in developing structured processes to deal with legal disputes and conflicts in general. A professional ADR practitioner is familiar with a variety of processes, and is trained to evaluate the relative strengths and weaknesses of them in a concrete conflict situation, while "*fitting the forum to the fuss.*"[38] An important pillar of ADR is the idea that process matters, and that the most violent and complex conflict can be avoided or resolved through skillful process management. The initial sequence in constructing the pragmatic problem-solving model of mediation, which is the predominant mediation style within ADR practice, is overcoming the dichotomy between hard

35. TEITEL, *supra* note 32, at 220.

36. For a critique of the use of rule of law in developing countries, see Laura Nader, *Globalization of Law: ADR as "Soft" Technology*, 93 AM. SOC'Y INT'L L. PROC. 304, 304 (1999) ("While the ills of the West's corporatization of the world have long been debated and catalogued, often neglected is the role the law plays in empowering the rich, disenfranchising the poor, and serving as the 'handmaiden to empire'".); *see also* Anthony P. Greco, *ADR and a Smile: Neocolonialism and the West's Newest Export in Africa*, 10 PEPP. DISP. RESOL. L.J. 649 (2009-2010) (addressing the dangers in incorporating modern legal reforms such as ADR into developing nations, and critically examines rule of law projects through postcolonial framework).

37. For an overview of pragmatism, see generally THE REVIVAL OF PRAGMATISM (Dickstein, M. ed., 1998); MATHHEW FESTENSTEIN, PRAGMATISM AND POLITICAL THEORY: FROM DEWEY TO RORTY (1997); PRAGMATISM: FROM PROGRESSIVISM TO POSTMODERNISM (Robert Hollinger & David Depew eds., 1995); PRAGMATISM: A READER (Louis Menand ed., 1997); SANDRA B. ROSENTHAL ET AL., CLASSICAL AMERICAN PRAGMATISM: ITS CONTEMPORARY VITALITY (Smith, J. E. ed., 1999). For the relation between the philosophy of pragmatism and the emphasis on process and on overcoming dichotomies, see ALBERSTEIN, *supra* note 1, at 1-99.

38. Frank E.A. Sander & Stephan B. Goldberg, *Fitting the Forum to The Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 46 (1994).

and soft negotiation through process mindfulness.[39] Under the pragmatic perception of mediation, the initial incentive for developing a new style of negotiation relates to entering a second order negotiation over the process itself: "*The second negotiation concerns how you will negotiate the substantive question: by soft positional bargaining, by hard positional bargaining, or by some other method. This second negotiation is a game about a game—a meta game.*"[40]

The "meta game" emphasis reflects the high process awareness in any ADR practice. In the same tone, Transitional Justice writing assumes that democracies in transition require a variety of processes to deal with human rights violations, and that a range of responses including war trials, but mostly restorative processes, and also memorial and educational activities, should be utilized and combined in order to deal with a specific effort of transition. The inherent paradox of the notion of "the rule of law" in transition lies in the fact that constituting a new democratic regime is based on the preexisting system of law that was considered valid and legitimate in the past, and now is mostly perceived as evil and illegal. The old system is supposed to transform and recreate itself as a completely different system through process and in context.[41] Transitional Justice mechanisms help to construct this impossible self-referential shift of a regime reconstructing itself by adopting a range of diverse practices which both punish and heal, preserve and destruct, compensate and forgive.[42]

One of the familiar transformative processes — The Truth Committee — usually has a unique epistemology that assumes consensual processes as a way to overcome the choice between punishment and impunity:

> Public knowledge about the past is produced through elaborate processes of representation by perpetrators, victims, and the broader society, grounding the historical inquiry with a basis for social consensus. It is a truth that is publicly arrived at and legitimated in non-adversarial processes that link up historical judgment with potential consensus.[43]

Sometimes the committees are based on local methods of dispute processing, and have to overcome inherent contradictions between global and local law:

> Traditional mechanisms based on customary law arise as a challenge or supplement to internationalized norms of transitional justice and, at the same time, must reckon with them as forces of procedural and normative

39. FISHER & URY, *supra* note 29, at 9-10.

40. FISHER & URY, *supra* note 29, at 10.

41. *See* TEITEL, *supra* note 32, at 11-20.

42. For a discussion of the contextual operation of the notion of the rule of law within transitional movements, see generally Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformations*, 106 YALE L. J. 2009 (1997).

43. TEITEL, *supra* note 32, at 81.

> standardization. This presents a situation of legal pluralism, which may be defined as two or more legal orders within the same social field.[44]

Mediating contradictions and overcoming tensions through process orientation is a central operating principle of the Transitional Justice movement. Promoting peace and justice simultaneously, while denying their apparent contradiction in another context, is part of this tendency.

2. Process Emphasis as Overcoming Critique

Within the ADR thinking, the idea of process is presented as overcoming the distributive aspects of the bargaining situation. In terms of political ideas, it offers deliberation and reasoned elaboration,[45] instead of sheer power and arbitrary decisions. The use of process orientation for resolving disputes can be perceived as answering the critique of formal legality, which is a tenet of the rule of law as presented above.[46]

Formal legality entails the assumption that judges decide cases through objective, detached deduction, and it was severely challenged and attacked by the Legal Realism movement which was operating in law in the first half of the 20th century.[47] The Legal Realist critique, which was familiar to the ADR scholars, referred to judges' decision making as indeterminate, subjective according to some of them, and overall — guided by men and not law.[48] The ADR movement can be described in this sense as taking the decision making power from the "suspicious" judges and giving it back to the reasonable parties who are educated by the efficient process manual. The parties can produce their own rules based on "objective criteria"[49] and such a consensual selfless process is a guarantee for just rules.

The Transitional Justice movement presents the process of transition as capable of implementing a substantive rule of law in places where usually only a formal rule of law existed. Transforming a legal regime was always a paradox for legal thinking, and much has been written about the transformations of basic

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44. Rosemary Nagy, *Traditional Justice and Legal Pluralism in Transitional Context: The Case of Ruanda's Gacaca Courts*, *in* RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES 86, 86-87 (2009).

45. The term "reasoned elaboration" was used by the Legal Process movement in law, which was a more public and internal legal response to the critique of the rule of law. *See* ALBERSTEIN, *supra* note 1, at 100-84;*see generally* Eduard G.White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VIRGINIA LAW REVIEW 279 (1973) (describing the emergence of the process oriented judicial decision making style, which emphasizes principles and bounded discretion); Garry Peller, *Neutral Principles in the 1950's*, 1988 U. MICH. J.L. REFORM 561 (following the intellectual routes of the emphasis on process during the 1950s in jurisprudential thinking, and describes this emphasis as domestication of the legal realist critique) (1988).

46. *See supra* section II of this Article.

47. *See* AMERICAN LEGAL REALISM (William W. Fisher, III et al. eds., 1993).

48. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (1930) (attacking the premises of predictability and objectivity in law, and describing decisions of judges as based on idiosyncratic considerations and psychological biases).

49. The use of objective criteria is the fourth principle of the collaborative model of negotiation which Fisher & Ury offer. FISHER & URY, *supra* note 29, at 12.

norms[50] and the tension between violence and justice.[51] The process of transition, which is usually declared as limited by time and as combining different practices, is considered as constructing the new society, which will be the sovereign that will carry the new rule of law. This is a transformative notion of the rule of law.

C. Constructive Future-Oriented Intervention

1. Constructive Intervention as a Common Principle

Both ADR and the Transitional Justice movement espouse a constructivist optimistic consciousness focused on future orientation. Their choice to reject the more pessimistic descriptive perspective on their field of intervention is an ideological preference that is typical in an after critique mode. This gesture can be characterized as almost a Nietzschean[52] mode in which after realizing that there is no god, no metaphysical truth, no external criteria to rely about, the immediate outcome is not necessarily nihilism and despair, but instead a pure will to extract the constructive picture of reality.

The emphasis on process in ADR thinking has a specific goal, which is to manage conflicts constructively while striving for transformation and resolution. In contrast to descriptive theories of social psychology or conflict studies, which may focus on various strategies to deal with conflicts without preferring any strategy, and in contrast to adjudicative mechanisms, which focus on evaluating the conflict based on the past, this discipline has a profound "bias" in favor of an integrative style of intervention, which is focused on the future. As Roger Fisher, one of the authors of 'Getting to Yes' wrote, the book "*blurs a desirable distinction between descriptive analysis and prescriptive advice.*"[53] Instead it deals with "*what intelligent people ought to do*" rather than "*the way the world is.*"[54] Colla-

50. HANS KELSEN, PURE THEORY OF LAW 337 (1934); *see also* RAZ, *supra* note 17, at 122-45.

51. Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 1-29 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1992).

52. *See generally* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL (1886) (Nietzsche calls for creativity, self assertion, originality and a courageous use of "the will to power", which is the only human guide "beyond good and evil") *See also* Stanford Encyclopedia of philosophy at http://plato.stanford.edu/entries/nietzsche/ (last visited April 7, 2011).

53. J. James White, *The Pros and Cons of 'Getting to Yes,* 34 J. LEGAL EDUC. 115, 120-24 (1984) (reviewing ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Roger Fisher commenting on the review)). The pragmatic model, the dominant mediation practice, is described by Roger Fisher as motivated by an urge to become an "activist" and to engage in reality in a constructive mode. *Id. See* ALBERSTEIN, PRAGMATISM AND LAW, *supra* note 1, at 251-320.

54. *See* ROGER FISHER, ELIZABETH KOPPELMAN, & ANDREA KUPFER SCHNEIDER, BEYOND MACHIAVELLI 11-12 (1994). Fisher is not interested in the theoretical external account of negotiation, which maintains that negotiations can be either competitive or collaborative and that it all depends on the "motivational orientation" of the parties. *Id.* He does not accept the claim of a tension existing between claiming and creating values in negotiation as a reflection of the inherent prisoner dilemma that characterizes the bargaining situation, and is not interested in the balanced formula of "the mixed motive" in negotiation. *Id.* He aspires to transcend the academic stance of a spectator, and to engage in reality in a problem-solving mode. *Id.*

borative constructive future oriented interventions ideally will include win-win solutions and are at the core of ADR thinking.

Transitional Justice studies and practices share a goal-oriented constructive mode as well. They focus on building a democratic regime, based on a human rights culture within a society that experienced extreme human rights violations. As Ruti Teitel, one of the leading scholars of the movement said:

> [T]he conception of justice in periods of political change is extraordinary and constructivist: It is alternately constituted by, and constitutive of, the transition. . . . Responses to repressive rule inform the meaning of adherence to the rule of law. . . . The association of these responses with periods of political change advances the construction of societal understanding that transition is in progress.[55]

Exploring the truth about the past might be part of the transitional scheme, but the whole process aims to tailor the transformed society through a careful management of diverse attitudes.

2. Constructive Intervention as Overcoming Critique

The choice to be constructive and to orient the intervention towards the future can be considered as a consequence of a skeptical attitude that doubts the possibility to apply objective rules through careful reasoning. When the idea of the rule of law as governing through formal rules fails, constructive future oriented activity might become the preferred option over nihilism. ADR thinking thus emphasizes the choice of being hopeful within a relativistic setting. Transitional Justice processes operate in the same mode when they aim to push the society forward, with a hope to overcome the trauma through establishing a new legal regime. At the core of these studies there is a deep acknowledgement of the insufficiency of the abstract idea of the rule of law to ensure real justice, and thus a range of activities are offered in order to reconstruct the public sphere.

D. Deconstruction and Hybridization

1. Deconstruction and Hybridization as a Common Principle

Reform movements have their unique ways of promoting their constructivist processes, and a main characteristic of their transformative practice is the deconstruction of the superficial picture of the reality in which they intervene. There is usually a possibility to divide the relevant problem into diverse sub-problems, and through this hybridization the transformation process can be realized. Transforming an "all or nothing" legal picture into a multiple array of problems which are partly resolvable and manageable can change the quality of legal intervention and may contribute to a more effective practice.

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55. TEITEL, *supra* note 32, at 6.

Designing systems to process and prevent conflicts is an important ADR subfield, and breaking ostensibly unsolvable big disputes into small workable phases is a common practice that ADR studies promote in various ways. Hybridization includes deconstructing the "big conflict," which seems like a win-lose / all or nothing choice into an array of diverse interests which each call for specific methods and solutions. As Roger Fisher claimed:

> The danger inherent in big disputes and the difficulty of settling them suggests that, rather than spend our time looking for peaceful ways for resolving big issues, we might better explore the possibility of turning big issues—even issues like Hitler and Communism—into little ones. . . . Viewed from this perspective, adjudication appears not as a process for settling big conflicts, but rather as one that is valuable because it tends to fragment conflict situations by cutting off and serving up for decision one small issue at a time.[56]

An important manifestation of the hybridization principle within ADR thinking is the development of the concept of dispute system design, which is the purposeful creation of an ADR program by an organization to manage conflict through a series of steps or options for process.[57] Designing a system to manage disputes helps to break them into small manageable negotiations, and providing multiple tracks of processing for conflicts helps to address their complexity more seriously. Dealing with preventing and resolving disputes by elaborate process choice mechanisms is a manifestation of this principle.

Transitional Justice practices operate in the same mode when the overall conflict is broken into spheres that are managed differently.[58] The actual transition to democracy in a concrete society requires a systematic planning, which incorporates elements of retribution with reconciliation, in order to balance justice with peace.[59] Even the choice between substantive justice as punishment for offenders of the old regime and procedural justice as the avoidance of retroactive punishment (substantive and formal rule of law) is determined on a contextual basis, in view of the other transitional practices at a certain society.[60]

Transitional justice aims at facilitating the apparently paradoxical needs of the government in negotiating politically viable, long term solutions with large segments of the population on the one hand, and victim needs for closure and reparations on the other. In this sense, it aims at simultaneously supporting the needs for peace and the needs for justice. As the International Center for Transitional Justice declares:

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56. ROGER FISHER, FRACTIONATING CONFLICT 921 (1964).

57. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT xi-xvii (1988).

58. For the correlation between dispute system design and transitional justice, see Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289 (2009).

59. *See id.* at 291-297.

60. *See* TEITEL, *supra* note 32, at 11-26. *See also* Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 24 (Public Law and Legal Theory, Working Paper 40, 2003).

> The many problems that flow from past abuses are often too complex to be solved by any one action. Judicial measures, including trials, are unlikely to suffice . . . . After two decades of practice, experience suggests that to be effective transitional justice should include several measures that complement one another. For no single measure is as effective on its own as when combined with the others.[61]

Punishing war criminals, establishing truth committees, and enhancing human rights culture through education can all be a part of a transitional scheme established to systematically address specific situations of human rights violations.[62]

2. Deconstruction and Hybridization as Overcoming Critique

Turning big questions, such as the rule of law, to smaller manageable projects, such as conflict management and interest focus, is a common ADR practice. The articulation of objective criteria during the final stages of problem-solving negotiation, after dealing with interest finding and options invention, is considered more probable in ADR thinking than finding an initial consensus among conflicting parties in society. In Transitional Justice, a variety of processes, some with contradicting elements, are offered to a society in transition in order to promote both peace and justice. The critique of the rule of law is in a sense avoided through multiple gestures that either deny the problem, bypass it, or address it only symbolically, while focusing on the management of the whole project. Although the definition of the rule of law remains controversial among transitional justice practitioners, developing evaluative criteria to measure the diverse dimensions of transitional processes becomes part of their operations.[63]

E. The Search for an Underlying Hidden Layer

1. A Hidden Layer as a Common Principle

When reform movements in law offer their analysis of legal practices, there is usually a hidden layer that can be exposed and addressing it can tremendously

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61. International Center for Transitional Justice, *What is Transitional Justice?*A Holistic Approach, paras. 2-3, http://www.ictj.org/en/tj/ (last visited Mar. 13, 2011).

62.

> Without any truth-telling or reparation efforts, for example, punishing a small number of perpetrators can be viewed as a form of political revenge. Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as "blood money"-an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims' legitimate expectations of justice, truth and reparation, is not only ineffective from the standpoint of accountability, but unlikely to succeed in its own terms.

Id. at para. 8 (last visited Mar. 13, 2011).

63. Geoff Dancy, *Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice* 4 THE INT'L J. OF TRANSITIONAL JUSTICE 355, 361 (2010). "To say, for example, that building rule of law should be a goal of transitional justice is a statement of an ideal, the content of which needs to be filled with a particular instrumentalism. This act of filling is the establishment of evaluative criteria." *Id.*

improve the existing status quo. The hidden layer might be needs or interests, and its existence enables the adversaries to transform the apparent contradiction that might appear on the surface of the upper layer.

Referring to the ADR movement, at the core of the mediation process, which is central to ADR practice, stands the idea that there is an underlying phase of conflicts disguised by the surface of contradicting claims.

> The basic problem in a negotiation lies not in conflicting positions, but in the conflicts between each side's needs, desires, concerns and fears. . . . Interests motivate people; they are the silent movers behind the hubbub of positions.[64]

Moving from the superficial misleading surface of the conflict, which usually entails positions, to the "real" underlying substance of needs and interests enables a "win-win" unique mediation outcome which transcends distribution and competition.

The Transitional Justice approach has an equivalent emphasis in transcending political struggle through a pragmatic, future-oriented focus on needs of both sides. The victims need reparation. Most of the offenders need amnesty and forgiveness. Society needs the truth of violations to be told. Both to move forward and to rehabilitate society at large. All these needs can be answered by various parallel practices of transitions.

2. A Hidden Layer as Overcoming Critique

Going beyond positions when thinking of ADR, and addressing the underlying needs of victims and offenders in Transitional Justice, is a sequence that aims to escape the doubts that exist when trying to address these conflicts by articulating rights in an all or nothing mode. In the same way as in legal decision making, process emphasis would say that rules are indeterminate but principles and policies that underlie the rules are manageable.[65] They can produce a legitimate authority based on an elaborate consensus. In the Transitional Justice context, the emphasis on needs helps to find an acceptable principle for distributing justice and reframes the conflict in a less adversarial sense. If a victim's offender and society have some shared needs, there is more legitimacy to control society by trying to answer them and there is not an obligation to use mainly retributive modes.

F. Acknowledgment of Emotions and Depersonalization.

1. Acknowledgement of Emotions as a Common Principle

All of the reform movements share a reconstructed perception of the judicial subject and they strive to enrich and transform legal consciousness through the emphasis on the relational aspect of legal interactions. The acknowledgement of

64. FISHER & URY, *supra* note 29, at 40-41.

65. ALBERSTEIN, *supra* note 1, at 137-45.

emotions as a significant element in human disputes is an innovation that aims to produce a new legal self, which is less individualistic, less separated, and more caring and empathic.

ADR practice reflects a growing interest in emotions and presents them as integral parts of the conflict picture.[66] Following developing research on the importance of emotions as sources of information and as having a rational level which is given to understanding, mediation studies increase the focus on emotions and provide explicit manuals to handle them, and to understand their role within a conflict.[67] The principle of "*separating the people from the problem*," which is central to mediation practice, encourages depersonalization and externalization of the conflict.[68] Active listening is sometimes presented as the tool of promoting this goal.

Transitional Justice studies offer a complex response to the situation of severe violence, and they tend to avoid a retributive approach that uses clear cut articulations of guilt and innocence. It can be argued that the movement uses the same principle of "*separating the people from the problem*" when it treats both victims and offenders as victims of horrifying regimes. The structural violence or war that resulted in human rights violations is considered as "the problem." This problem has detrimental effects on each side of the political conflict and thus, working together to overcome the violence and for the implementation of democracy is the best way to overcome the collective trauma. The perpetrators are not "bad." The apartheid or the human rights violation is bad, and the community should be united in overcoming the trauma it produced. Separating between channels for expressing emotions, such as truth committees and channels of criminal prosecution is another manifestation of acknowledgement and management of emotions within a Transitional Justice framework. An emphasis on forgiveness, encouragement of apologies, and reconciliation is part of this orientation.

2. Emotions Acknowledgement as Overcoming Critique

The rule of law deals with law and not men, but the acknowledgement of emotions might be considered as a response to the alienation that such a principle provokes. The acknowledgement of both movements of the relational foundation of human interactions can be considered as a construction of the rule of law as more feminine — not of men but of women as well. It is a development of an alternative perception that is not based only on rules or strict rights. It examines the psychological conditions for compliance with the rules, and regulates the appearance of emotions within the public sphere.

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66. *See, e.g.*, Daniel. L. Shapiro, *Negotiating Emotions*, 20 CONFLICT RESOL. Q. 67 (2002).

67. See, for example, the emphasis on feelings in the more recent writing inspired by the Program on Negotiation at Harvard Law School: STONE, DOUGLAS, PATTON, BRUCE & HELEN, SHEILA, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (Penguin 2010). The authors discuss "the feelings conversation" which is one of the most important ones within a negotiation. *Id.* at ch.5; *see also* ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2005) (outlining five concerns which underlie emotions in negotiation and explain how to address them).

68. This is one of the four principles of integrative negotiation as presented by Fisher & Ury. FISHER & URY, *supra* note 29, at 10, 29-32.

G. Community Work and Empowerment

1. Community Work as a Common Principle

The two alternative movements that are discussed here share a "grass root" emphasis on working with non-governmental organizations, community representatives, and local leadership to promote their goals. The emphasis on empowerment through encouraging pluralist perceptions and trying to integrate diverse perspectives into a more effective legal practice is what signifies these movements and differentiates them from more top-down projects of reform and transformation.

Some of the roots of the ADR movement are justice centers that develop in neighborhoods and try to promote access to justice and empower the local population through the teaching of dispute resolution skills. ADR philosophy encourages all sides of a conflict to be in charge and to serve as the primary sources of resolution. An important quality of mediation, which is the paradigmatic ADR mechanism, is its non-authoritarian emphasis.[69] Autonomy and informed consent are the core values of mediation,[70] and process choice and empowerment are foundational principles for ADR practice in general. A famous "father" of modern mediation, Lon Fuller, presented its anti-authoritarian quality by declaring that:

> The central quality of mediation [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another. This quality of mediation becomes most visible when the proper function of the mediator turns out to be, not that of inducing the parties to accept formal rules for the governance of their future relations but of helping them to free themselves from the encumbrance of rules and of accepting, instead, a relationship of mutual respect, trust and understanding that will enable them to meet shared contingencies without the aid of formal prescriptions. . . .[71]

Working with the parties and helping them to craft their own rules is an important drive of mediators, and designing systems of dispute resolution mechanisms is also done following a deep inquiry into the interests of the various stake holders at the organization.[72]

Transitional Justice processes usually utilize aboriginal practices and local reconciliation mechanisms and turn them into modern tribunals which help to transform the violent regime into a peaceful one. In a similar way that ADR strives to

69. Lon L. Fuller, *Mediation – Its Forms and Functions*, 44 S. CAL. L. REV. 305, 314-15 (1971).

70. *See* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 776-77 (1999) (claiming the "absence of informed consent in mediation undermines this commitment to autonomy.").

71. Fuller, *supra* note 69, at 325-326.

72. Schneider, *supra* note 58, at 290-91, 309-310, 313-314.

abate traditional court paternalism and empower the sides of a conflict, Transitional Justice places the burden of problem-solving in the hands of the local or newly founded regime. In Rwanda, for example, locally based Gacaca courts, were an important component of the transitional scheme:[73]

> The Gacaca Courts system will allow the population of the same Cell, the same Sector to work together in order to judge those who have participated in the genocide, identify the victims and rehabilitate the innocents. . . . To prove that the Rwandan society has the capacity to settle its own problems through a system of justice based on the Rwandan custom.[74]

Through this bottom-up emphasis Transitional Justice practices advance a local rule of law and support legal pluralism through the acknowledgement of community justice.

2. Community Work as Overcoming Critique

Doubt in the possibility of the rule of law to govern society encourages grass root development that is more spontaneous and open-ended. In ADR, this motivation has inspired a pluralistic niche of norm generation and professional standards requirements, combined with an inclusion of any hybrid process and new model into the developing field. The movement encourages private ordering, which is presented as more objective and rational than public decision making. The new governance idea in law is another manifestation of this tendency to substitute authority with negotiation and to overcome the rule of law critique.[75]

In Transitional Justice the deference toward the community choice explains the open-ended framing of the Transitional Justice mechanisms as always given to the choice and reconstruction of the community at stake. In cases of international programs spreading the rule of law, the use of ADR within the transitional setting enables the Transitional Justice movement to overcome the critique of the rule of law reforms in developed countries. Critics present such reforms as ethnocentric and imperialist.[76] Instead, pursuing the alternative principles of working from the bottom up enables more empowerment to local communities and legitimizes intervention programs as less intrusive. A reconstructed rule of law that is much less authoritarian is encouraged by such initiatives.

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73. Nagy, *supra* note 44, at 93. "The motivation for Gacaca was not just expedient capacity but also the desire to establish tradition-based processes at the community level in order to involve ordinary Ruandans, especially rural ones, in truth, justice and reconciliation." *Id.*

74. Government of Rwanda: Gacaca Juridictions, http://www.rwandagateway.org/justice/spip.php?article91, at paras. 4-5 (last visited Mar. 13, 2011).

75. For an exploration of the intellectual links between the ADR movement and New Governance, see Amy Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008) (reviewing ANDREA KUPFER SCHNEIDER; CHRISTOPHER HONEYMAN, THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR (2006)). For an overview of the New Governance movement in law see Orly Lobel, *The Renew Deal: The Fall Of Regulation and The Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); *see also* William H. Simon, *Solving Problems Vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 173-198 (2004).

76. For a critique of rule of law projects in developing countries see generally Nader *supra* note 36.

IV. CONCLUSION

The complex idea of the rule of law has various connections with the ADR movement, but at some historical moments within the development of this movement it was considered as contradicting ADR and as threatened by its operation. In the international arena, the use of ADR for the implementation of the rule of law was more common and was considered as contributing to transition to democracy. This paper argues that there are similarities between these two alternative movements: The first one —Transitional Justice regulates transitions to democracy in the last few decades, and the second one — ADR, is focused on domestic dispute resolution. Their connection is explored through reference to their shared principles as alternatives to law.

Through this analysis, this paper argues that the common principles of the two movements demonstrate an effort to overcome the critique of the rule of law through the shared principles of alternatives. In an interesting way, such a reframing provides some hope for internalization of a more advanced and reconstructed notion of the rule of law, and not only of refuting it. Such a reconstruction is possible within a discourse of alternatives. It should not be considered as a metaphysical answer to a hundred years of critique, but more like a pragmatic manual that can be supported and adopted if a real transformation in private disputes or in society at large is searched for.