



Problems with Justice

in relation to arbitration, ADR, mediation, Consumer ADR, ombudsmen, business ADR
and courts

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Problems with Justice - what is it?

'like liberty and equality, justice is yet another notion at the very center of Western political, social, and legal thought whose boundaries are notoriously indistinct, ill-defined and incessantly contested'

Austin Sarat and Thomas Kearns, *Justice and Injustice in Law and Legal Theory*
(Ann Arbor, Mich., 1996)

Justice categorised

What is it?

Subjective Justice

What people want; what they thought and felt about the process; Satisfaction. Fairness - truth, honesty, dignity.

Objective Justice

Corresponds to established expectations.

Procedural Justice

Accessible Principled consistent impartial opportunity to present case transparent

Substantive Justice

Correct in law (corresponds to norms) v.s fair/equitable.

Other varieties include distributive, egalitarian, allocative, justice as fairness, social, macrojustice, restitutionary, perfect/pure procedural, imperfect, organizational, interactional, informational, interpersonal, formal, personal, pragmatic, corrective, deterrent, communicative, transitional,

- How much of any of the above do you need in a dispute resolution system?
- How do you answer the last question?
- How do you ensure any that you want?
- Who should do it?

What don't you need?

Contrasts

Adjudicative vs. Non-Adjudicative (Facilitative, Evaluative, ..)

Rights vs. Interests (or needs)

Consensual vs. Mandatory

Adversarial v. Non Adversarial

Public v. Private

Adjudicative (decision)

Litigation

Arbitration

Expert Adjudication

Non-Adjudicative (agreement)

Mediation

Conciliation

Negotiation

Ombudsman

Evidence, Due Process

Good Faith, Safety & Confidentiality



Peace over Justice?

- “There must be no Alsatia in England in which the King’s writ does not run” – Scrutton LJ, *Czarnikow v Roth, Schmidt & Co.* [1922] 2 K.B. 478, CA
- Art 5. UNCITRAL Model Law on International Commercial Arbitration
- But ETIPS and EU Investor Courts.
- Owen Fiss – “Against Settlement”
- Laura Nader – “Harmony Ideology”
- Ken Feinberg – “Against Settlement ... sometimes”
- Hazel Genn – “Understanding Civil Justice”
- Peace as justice....

How to ensure justice in CADR?

“Design” it into the structures

e.g. Consumer ADR Directive requirements of expertise, independence, impartiality, transparency, effectiveness, fairness, liberty, legality

Provide oversight

Regulatory oversight – give the job to someone else

Competent Authorities in approving ADRs

Competent Authorities in *monitoring ADRs*

Appeal / Review – give the job to the users

Appeal before the courts

Review of the procedures by the courts

Courts as defenders of justice in CADR?

Particular problems with the courts' role in providing oversight

Traditional problems with court access and access to information about the content and procedure of an ADR event.

We may need to do ADR differently to make oversight more possible?

(Eg, Arbitration Act 1979 obliged arbitrators to supply reasoned awards so that Courts on Appeal could review what was done at arbitration)

The job of ensuring justice in ADR is one that may be difficult to carry through for the users.

Conversely, providing liberty to leave ADR does not guarantee justice in ADR – on the contrary, it recognises that ADR can be perceived as unjust.

The background of the slide features three large, clear ice cubes melting on a white surface. The ice cubes are arranged in a cluster, with one in the foreground and two behind it. Water droplets are visible on the surfaces of the ice cubes and on the surface they are melting on. The overall aesthetic is clean and minimalist.

Thank You

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