
Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR

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Abstract

The presumption that courts are the principal forum for dispute resolution continues to be eroded. Alternative forms of dispute resolution (ADR), including agreement-based ADR (such as mediation and conciliation) and adjudicative ADR (such as arbitration), continue to proliferate and are increasingly institutionalized, leading to their characterization as ‘appropriate’ or ‘proportionate’ dispute resolution. Interestingly, despite these developments, the position of international human rights law (IHRL) on two key questions regarding ADR and proportionate dispute resolution (PDR) is unclear. These questions are, first, the standards of justice expected of ADR/PDR (whether entered into voluntarily or mandatorily). Second, the permissible circumstances in which parties to a dispute can be required to use ADR/PDR instead of, or before, accessing courts. The attributes and challenges with ADR/PDR have been discussed extensively in socio-legal studies, feminist literature and the dedicated ADR/PDR literature. This article seeks to bring this vast theory on the diversification and institutionalization of dispute resolution into IHRL. Through the lens of the European Court of Human Rights, this article examines the types of tests that supranational bodies currently employ and advances a framework for assessing the choice, design and implementation of ADR/PDR in the future.

1 Introduction

In 1975, the European Court of Human Rights (ECtHR) held that ‘one can scarcely conceive of the rule of law without there being a possibility of having

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access to the courts'.¹ Yet the presumption that courts are the principal forum for dispute resolution continues to be eroded through the proliferation of alternative forms of dispute resolution (ADR), both agreement based (such as mediation and conciliation) and adjudicative (such as arbitration). ADR is integrated within national court systems and enjoys support at the international level. For example, the European Union has adopted a series of resolutions on mediation,² and its Fundamental Rights Agency is exploring the role of non-judicial processes under the theme of 'justice in austerity'.³ With the increasing institutionalization of dispute resolution processes, many commentators refer to 'appropriate' or 'proportionate' dispute resolution⁴ (ADR/PDR) rather than ADR. Such reframing posits that the 'means and costs of resolving disputes should be proportionate to the importance and nature of the issues at stake'⁵ rather than presuming that courts are the preferred form of dispute resolution. In this article, I refer to 'ADR/PDR' to capture this reframing.

Interestingly, despite these developments, the position of international human rights law (IHRL) on two key questions regarding ADR/PDR is unclear. These questions are, first, the standards of justice expected of ADR/PDR (whether entered into voluntarily or mandatorily) and, second, the permissible circumstances in which parties to a dispute can be required to use ADR/PDR as a precondition to access a court⁶ or cost penalties threatened or imposed in order to motivate parties to use ADR/PDR rather than litigate. For example, in England and Wales, the High Court can impose cost penalties where parties fail to consider mediation prior to trial if they are directed to do so on the grounds that 'litigation should be a last resort'.⁷

¹ ECtHR, *Golder v. United Kingdom*, Appl. no. 4451/70, Judgment of 21 February 1975, para. 34.

² Commission Directive 2000/43, OJ 2000 L180/22; Commission Directive 2009/52, OJ 2009 L136/3.

³ 'Justice in Austerity: Challenges and Opportunities for Access to Justice' Fundamental Rights Conference 2012, December 2012, available at fra.europa.eu/en/event/2012/fundamental-rights-conference-2012-0?tab=programme (last visited 12 July 2015).

⁴ Susan Blake, Julie Browne and Stuart Sime, *A Practical Approach to Alternative Dispute Resolution* (2012), at 5.

⁵ Elliot and Thomas, 'Tribunal Justice and Proportionate Dispute Resolution', 71(2) *Cambridge Law Journal* (2012) 297, at 299. See also, Adler, 'Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice', 69 *Modern Law Review* (MLR) (2006) 958.

⁶ This is already a practice in some states and may increase further as a means of enhancing the use of mediation in particular. See Giuseppe de Palo *et al.*, Directorate General for Internal Policies, 'Rebooting' the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU (2014), at 152.

⁷ Pre-action protocols specific to the type of dispute, available at www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic (last visited 12 July 2015). See also compulsory mediation schemes in states such as Austria, Canada, Germany, Italy and Norway in Klaus Hopt and Felix Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (2013); Hess and Pelzer, 'Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System', in Felix Steffek and Hannes Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (2013) 209, at 217; Genn, 'What Is Civil Justice For? Reform, ADR and Access to Justice', 24 *Yale Journal of Law and Humanities* (2012) 397.

While the two questions of the standards of justice expected of ADR/PDR and when parties can be required to use ADR/PDR have not been adequately addressed by IHRL, they are dealt with in detail in socio-legal studies, feminist literature and the dedicated ADR/PDR literature that amassed in the USA but has expanded into comparative studies in Europe and elsewhere.⁸ This article seeks to bring this vast theory into IHRL. An IHRL perspective on these questions is important since, notwithstanding the projected strengths of ADR/PDR such as increased party autonomy, empowerment and creative and tailored remedies, critiques of ADR/PDR have challenged the diversion of disputes away from courts as public bodies as well as the risk of exposure of the parties to power imbalances and inequality of arms in the resolution of the dispute. In advancing an IHRL perspective, this article examines the types of tests that supranational bodies currently employ, and should employ in the future, to determine the compatibility of a particular dispute resolution process with the right of access to justice.

This article considers these questions through the lens of the ECtHR's jurisprudence. It does not predict that the bulk of litigation will take place before the ECtHR (although increased applications on these issues should be expected). However, it is likely that, in assessing complaints, national courts and the Court of Justice of the European Union (CJEU) will look to the ECtHR for guidance on the IHRL position. In the absence of specific jurisprudence on ADR/PDR, these courts are likely to interpret the ECtHR's wider jurisprudence on the right to access a court to determine the compatibility of the ADR/PDR measure with IHRL. The Court's influence on interpretations of access to a court and national remedies is likely to reach beyond Europe as the ECtHR has the most developed jurisprudence in this area of the dedicated international human rights dispute resolution bodies within the African, Inter-American and UN systems. These bodies have also not addressed ADR/PDR specifically, thus increasing the likelihood that the ECtHR's jurisprudence will be influential since cross-fertilization of jurisprudence tends to be most acute when new questions for IHRL arise. Thus, clarity on the ECtHR's position on ADR/PDR is particularly important in light of the key role it is likely to play in the development of IHRL in this area. This article therefore proposes a methodology for the development of the ECtHR's jurisprudence that would also be capable of replication or modification by other supranational courts.⁹

The second part of this article considers the vast and diverse literatures on ADR/PDR to provide a flavour of the typologies of justice that shape the receptiveness or resistance to the diversion of disputes from the courts and the standards of justice that are provided and that are possible through ADR/PDR. The third part addresses the standards of justice required of ADR/PDR when entered into voluntarily or mandatorily. At first sight, the ECtHR's jurisprudence and own friendly settlement process

⁸ E.g., Hopf and Steffek, *supra* note 7; Giuseppe de Palo and Mary Trevor, *EU Mediation: Law and Practice* (2012).

⁹ Brems and Lavyrens, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights', 35 *Human Rights Quarterly* (2013) 176, at 186 (noting that the 'Court should have an eye for stakeholders who may not be among the formal parties in the case').

does not appear to provide any answers. However, I argue that it is possible to identify minimum standards of justice focused on equality of arms and participation within the Court's existing toolbox that would address the critiques of ADR/PDR identified earlier in the article while respecting the autonomy of the parties. The fourth part of the article turns to formal diversions of disputes from the courts to ADR/PDR. Again, the Court has not advanced clear jurisprudence on formal diversion. However, I identify existing interpretative approaches that could be applied to ADR/PDR and suggest ways in which to build on some, but not all, of these methodologies in the future. In doing so, I argue that the Court needs to approach diversion within a framework of strict scrutiny that fully articulates the value and essence of judicial remedies and shifts the burden to the state to demonstrate that none of these values will be lost in the diversion. In this respect, I argue that strict scrutiny is needed as the defining principles of autonomy and self-empowerment are lessened when ADR/PDR is driven by the interests of the state instead of by party consent.

2 The Theoretical Framework for ADR/PDR

To answer the two questions – first, what are the permissible circumstances in which parties to a dispute can be required to use ADR/PDR and, second, what are the standards of justice expected of such processes – one must understand the role and possibilities of ADR/PDR processes and their relationship to the courts. Debates on whether or not access to courts can be made conditional on a prior consideration of ADR/PDR and the general standards required of ADR/PDR often gather momentum in moments of ‘crises’ of ‘congestion, delay and expense’¹⁰ in the national judicial system.¹¹ As most cases are settled, proponents argue that a focus on making ADR/PDR more effective ‘has an enormous potential for reducing caseloads’.¹² A purely instrumentalist view of ADR/PDR, however, conceals deeper discussions on whether ADR/PDR carries public value to the same extent as courts and whether it can and should offer similar standards of justice to those presumed to be inherent in courts.¹³

A The Public Value of Courts versus the Public Value of ADR/PDR

Through his seminal article, ‘Against Settlement’, Owen Fiss became synonymous with a rejection of what he calls the ‘dispute-resolution story’ on the grounds that it could not substitute for the public value of adjudication.¹⁴ He argues that

¹⁰ Twining, ‘Alternative to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics’, 56 *MLR* (1993) 380, at 380.

¹¹ Genn, ‘Tribunals and Informal Justice’, 56 *MLR* (1993) 393, at 396, 668.

¹² Edwards, ‘Alternative Dispute Resolution: Panacea or Anathema?’, 99 *Harvard Law Review* (1985) 668, at 673 (not necessarily advancing this view but acknowledging it as one).

¹³ McThenia and Shaffer, ‘For Reconciliation’, 94 *Yale Law Journal* (*YLJ*) (1984) 1660, at 1660.

¹⁴ Fiss, ‘Against Settlement’, 93 *YLJ* (1984) 1073, at 1085. See also Genn, *supra* note 7, at 398; Cappelletti, ‘Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement’, 56 *MLR* (1993) 282, at 291.

adjudication is founded 'on principles of social justice, rather than individual consent' and that it upholds 'the social premises of the welfare state' and 'reflects and reinforces public rather than private values'.¹⁵ He argues that it is not possible to draw a bright line between suits amenable to settlement and those that should be adjudicated since the 'problems of settlement are not tied to the subject matter of the suit, but instead stem from factors that are harder to identify, such as the wealth of the parties, the likely post-judgment history of the suit, or the need for authoritative interpretation of law'.¹⁶ Around the same time, Harry Edwards also expressed concern that the development of the law in key areas such as civil rights may be 'stifled' by formal diversion to ADR/PDR, particularly if 'difficult issues of public law' are 'hidden' in 'seemingly private disputes'.¹⁷

While Fiss focused on agreement-based ADR/PDR, similar critiques have been made of arbitration, used commercially, in international sport,¹⁸ bilateral investments and in consumer and employment contracts in states such as the USA.¹⁹ Arbitration is characterized as a 'privatized justice system' that does not necessarily comply with the standards of justice expected of courts.²⁰ This critique is advanced on procedural grounds – for example, a lack of transparency,²¹ a lack of written decisions in some types of arbitration and, in some arbitrations, a lack of, or very limited, judicial review.²² Rebecca Hollander-Blumoff and Tom Tyler submit that 'the protections for parties in arbitration offer a nod in the direction of rule of law, but fail to promote rule of law values in the same way as courts'.²³ Substantive critiques of arbitration tend to focus on the 'private-commercial aspects of disputes' to the exclusion of public policy concerns²⁴ as well as the potential for extra-legal information and policy to play a much more significant role in the arbitration decision and for arbitrators to appear to be following the law but deviating from it in nuanced ways.²⁵

¹⁵ Cohen, 'Against Settlement: Twenty-Five Years Later Revisiting against Settlement: Some Reflections on Dispute Resolution and Public Values', 78 *Fordham Law Review* (2009) 1143, at 1151.

¹⁶ Fiss, *supra* note 14, at 1087–1088.

¹⁷ Edwards, *supra* note 12, at 679.

¹⁸ Haas, 'Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures', No. 3 *International Sports Law Review* (2012) 43, at 52.

¹⁹ Menkel-Meadow, 'Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the "Semi-Formal"', in Steffek and Unberath, *supra* note 7419 at 439; Sternlight, 'Creeping Mandatory Arbitration: Is It Just?', 57 *Stanford Law Review* (2005) 1631.

²⁰ Francioni, 'Access to Justice, Denial of Justice and International Investment Law', in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2010) 63, at 70 (discussing investor–state arbitration).

²¹ Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry', *Journal of Legal Studies* (1992) 115, at 124.

²² Werner, 'Limits of Commercial Investor-State Arbitration: The Need for Appellate Review', in Dupuy, Francioni and Petersmann, *supra* note 20, at 115 (discussing investor–state arbitration).

²³ Hollander-Blumoff and Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution', 1 *Journal of Dispute Resolution* (2011) 1, at 14.

²⁴ Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths', in Dupuy, Francioni and Petersmann, *supra* note 20, at 112.

²⁵ Main, 'ADR: The New Equity', 74 *University of Cincinnati Law Review* (2005) 329, at 367.

Thus, the ‘public value’ critique can apply equally to agreement-based and adjudicative ADR/PDR.

Fiss’ article has triggered a swathe of responses²⁶ that have criticized him and others for being ‘litigation romanticists’²⁷ and for providing a ‘flat’ view of dispute resolution that is abstracted and ‘caricature[d]’,²⁸ that assumes that ADR/PDR does not use legal principles; that is unaffected by precedent and that is incapable of offering justice.²⁹ Many respondents focus on the public value of ADR/PDR and contend that ‘law and justice are [not] synonymous’,³⁰ pointing to characteristics of ADR/PDR such as ‘consent, participation, empowerment, dignity, respect, empathy and emotional catharsis, privacy, efficiency, quality solutions, equity, access, and yes, even justice’.³¹ ADR/PDR is championed on grounds that it advances self-determination and autonomy³² and empowers parties to ‘control the outcome’.³³ On this justification, the major critiques of arbitration – for example, its privacy and confidentiality – are seen as advantages to party choice and control of the dispute.

Commentators emphasize that courts are not necessarily the optimal forum for all disputes and that not every dispute has to have a public value.³⁴ This argument has a fiscal dimension of matching the ‘forum to the fuss’, and, as Michael Moffitt points out ‘litigation fulfills its public function best if it is not called upon as the method of resolving every kind of dispute.’³⁵ It also has a substantive angle in that ADR/PDR increases the chances of preserving continuing relationships (Cappelletti’s ‘mending justice’)³⁶ both personal and commercial as well as protecting reputations.³⁷ Related to this, ADR/PDR is promoted as a means of achieving creative remedies, particularly non-financial, which are suited to the needs of the parties that are more wide-ranging than those typically ordered by a court.³⁸ Finally, the projected informalism of agreement-based ADR/PDR is highlighted as a response to the ‘excesses of adversarialism and formalism’ of legal processes.³⁹

²⁶ Cohen, *supra* note 15 (for a detailed discussion of the extensive responses to Fiss).

²⁷ Menkel-Meadow, ‘Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)’, 83 *Georgetown Law Journal* (1995) 2663, at 2629.

²⁸ McThenia and Shaffer, *supra* note 13, at 1663.

²⁹ Menkel-Meadow, *supra* note 27, at 2681.

³⁰ McThenia and Shaffer, *supra* note 13, at 1664.

³¹ Menkel-Meadow, *supra* note 27, at 2669.

³² Gunning, ‘Diversity Issues in Mediation: Controlling Negative Cultural Myths’, *Journal of Dispute Resolution* (1995) 55.

³³ Allen, ‘Against Settlement? Owen Fiss, ADR and Australian Discrimination Law’, 10 *International Journal of Discrimination and the Law* (2009) 191, at 195.

³⁴ Sternlight, *supra* note 19.

³⁵ Moffitt, ‘Three Things to Be Against (“Settlement” Not Included)’, 78 *Fordham Law Review* (2009) 1203, at 1212.

³⁶ Cappelletti, *supra* note 14, at 289; Luban, ‘Quality of Justice’, 66 *Denver University Law Review* (1988) 381, at 402.

³⁷ Bernstein, ‘Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs’, 141 *University of Pennsylvania Law Review* (1993) 2169.

³⁸ Moffitt, *supra* note 35, at 1212; Bernstein, *supra* note 37, at 2239

³⁹ Main, *supra* note 25, at 359.

Equally, empirical studies of ADR/PDR indicate that there is not yet sufficient evidence to assess whether these claims are borne out in practice.⁴⁰ The increasing standardization of agreement and adjudicative ADR/PDR, including court-annexed processes, may undermine the strength of arguments about creativity, particularly where engagement is mandatory and not voluntary.⁴¹ For example, Leonard Riskin and Nancy Welsh have argued that the institutionalization of mediation has diminished some of its 'expansive potential',⁴² such as self-determination and participation due to the dominance of lawyers⁴³ and 'repeat players'⁴⁴ who tend to narrow the settlement options to assessments of the cost-benefits of settling over risking litigation.⁴⁵ Similar arguments have been made in relation to arbitration with Lisa Bernstein noting that part of the reason for the success of ADR/PDR is the consent of the parties 'to their use' and that the more institutionalized the process becomes the more likely it is to 'become increasingly formal and complex'.⁴⁶ Bernstein therefore cautions against using evidence of the success of the voluntary use of ADR/PDR as a reason to require its use, particularly as an attachment to court proceedings.⁴⁷

B *The Debate on the Standards of Justice within ADR/PDR*

Beyond the debates around the public values of courts and ADR/PDR, a further line of analysis focuses on the nature and standards of justice and the existence of safeguards to parties within ADR/PDR. Nancy Welsh argues that '[c]ourts are supposed to resolve disputes, of course, but *they are also supposed to provide something special in how they resolve those disputes.*'⁴⁸ Whether courts actually deliver a positive experience of justice can, of course, be challenged. However, Welsh's point highlights the expectation of a particular standard and 'experience' of justice through the courts.

Some commentators have argued that agreement-based ADR/PDR risks power imbalances and a lack of equality of arms as parties are rarely equal. This is particularly true if there is an absence of legal representation, which is typical in forms of dispute resolution that are less formal than those of traditional courts on the premise that simplified processes facilitate self-representation even if the other side can afford

⁴⁰ Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (2009), at 4.

⁴¹ Menkel-Meadow, 'Dispute Resolution', in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (2010) 596, at 607, 610 (discussing such studies).

⁴² Relis, *supra* note 40.

⁴³ Welsh, 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories', 54 *Journal of Legal Education* (2004) 49, at 51.

⁴⁴ Riskin and Welsh, 'Is That All There Is?: "The Problem" in Court-Orientated Mediation', 15 *George Mason Law Review* (2008) 863. Although see Menkel-Meadow, *supra* note 41, at 603 (on the 'mixed and contested' results of empirical studies on the 'repeat player effect').

⁴⁵ *Ibid.*, at 866. See also Relis, *supra* note 40, at 12 (discussing the tendency for legal actors to 'disregard ... litigants' empowerment and underlying needs during the process').

⁴⁶ Bernstein, *supra* note 37, at 2241.

⁴⁷ *Ibid.*, at 2251.

⁴⁸ Welsh, 'The Current State of Court-Connected ADR: (Caught In/Living through/Hoping for the End of the Ugly Duckling Phase)', 95 *Marquette Law Review* (2012) 873, at 884 (emphasis in the original).

and instructs a lawyer.⁴⁹ Commentators observe that a party may feel pressurized to settle on less favourable terms than the case merits because of financial need, the leveraging of access to children and/or a lack of resources to proceed to litigation where legal aid is unavailable.⁵⁰ Pre-existing power imbalances between the parties as well as a history of domestic violence may also feed into the more deserving party agreeing to less.⁵¹ Beyond the dynamics between the parties, the role of the mediator is significant. This role varies between ‘facilitative, evaluative, transformative, narrative, and “understanding” ... [and] each ... places different values on how active the mediator is in the substantive resolution of a dispute and how the mediator conducts the mediation session’.⁵² Thus, the more the mediator is substantively involved in the resolution of the dispute as well as the environment in which the mediation takes place, including the threats of a cost-penalty for a failure to reach agreement, may result in a party feeling pressured to settle.⁵³ According to this view, a lack of procedural safeguards and the risk of ‘unregulated coercion and manipulation’ inheres the process.⁵⁴

Much of this line of critique has focused on agreement-based dispute resolution processes, with the exception of an analysis of the impact of repeat players in arbitration on the outcome of the case.⁵⁵ It is difficult to gauge such an impact because in adjudicative processes such as arbitration, the proceedings are often private and, as Carrie Menkel-Meadow notes, consequently ‘difficult to study empirically’.⁵⁶ Analogies to specialized tribunals might be made (notwithstanding that they are often part of the formal legal system) as they bear different characteristics to ‘ordinary’ courts in that they are presented as procedurally more simple, thereby dispensing with the need for legal representation and, by extension, legal aid. Hazel Genn exposes the contradiction between the specialist nature of tribunals and the introduction of simplified processes by pointing out that the small value of a claim does not necessarily equate to a ‘legally and factually simple case’ and that ‘none of the procedural informality of tribunals can overcome or alter the need for applicants to bring their cases within the regulations or statute, and prove their factual situation with evidence’.⁵⁷ She submits that these features can affect comprehension and the

⁴⁹ Cappelletti, *supra* note 14, at 290.

⁵⁰ Fiss, *supra* note 14, at 1076.

⁵¹ Semple, ‘Mandatory Family Mediation and the Settlement Mission: A Feminist Critique’, 24 *Canadian Journal of Women and the Law* (2012) 207; Lerman, ‘Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women’, 7 *Harvard Women’s Law Journal* (1984) 57; Alberstein, ‘The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations’, 11 *Cardozo Journal of Conflict Resolution* (2009) 1; Maxwell, ‘The Feminist Dilemma in Mediation’, 4 *International Review of Comparative Public Policy* 67 (1992).

⁵² Menkel-Meadow, *supra* note 41, at 609.

⁵³ See also Genn, *supra* note 7, at 404.

⁵⁴ Roberts, ‘Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship’, 56 *MLR* (1993) 452, at 462 (citing Abel and Auerbach and Freeman).

⁵⁵ Sternlight, *supra* note 19.

⁵⁶ Menkel Meadow, *supra* note 41, at 603.

⁵⁷ Genn, *supra* note 7, at 401. See also Corby and Latreille, ‘Employment Tribunals and the Civil Courts: Isomorphism Exemplified’, 41 *Industrial Law Journal* (2012) 387.

ability to participate effectively in proceedings with the result that cases ‘may not be properly ventilated, the law may not be accurately applied, and ultimately justice may not be done’.⁵⁸ By implication, these theories suggest that the ‘ordinary’ courts provide more predictable and consistent procedural protections.

C *An Either/Or Position?*

The foregoing could imply the need for stark choices between ADR/PDR and courts. I would suggest that a better response is to articulate the values and characteristics of courts in more detail and to assess the circumstances in which other forms of dispute resolution might be appropriate and whether their use is conditional on the transfer of some or all of the values and characteristics of courts. This is particularly the case given the developments in the forms of ADR/PDR beyond the traditional models of conciliation, mediation and arbitration that include hybrid models and the many variants within each model,⁵⁹ including whether engagement is voluntary or mandatory; whether the ‘outcome is consensual or commanded’; how formal the process is and whether it is integrated into the judicial system; whether the decisions reached are binding; whether the process is public or private and how involved ‘repeat players’ are.⁶⁰ These factors challenge generalized assumptions about ADR/PDR, with Menkel-Meadow noting that ‘the truth is that the landscape of disputing has indeed become more and more complex, with predictions of outcomes, costs and strategies harder and harder to produce with any degree of accuracy’.⁶¹

Indeed, in a reinterpretation of Fiss, Amy Cohen argues that the majority of responses to his seminal article assume that he ‘indicted extrajudicial institutions as intrinsically incapable of promoting public values’. However, she reads Fiss as ‘assemb[ling] a historical and, in fact, provisional critique of settlement ideologies’.⁶² Her reading of Fiss acknowledges the public values that can be attributed to courts as well as the risks posed by a diversion to ADR/PDR but, conceptually and empirically, contests the proposition that ADR/PDR cannot also offer public value.⁶³ In doing so, she offers an alternative reading of Fiss that does not position courts against ADR/PDR but, rather, focuses on the risks of privatization that could ‘accommodate broader social efforts to replace the law with markets as a primary means of resolving conflict, and replace the state with citizens as the agents primarily responsible for social well-being’.⁶⁴ Therefore, she argues for the need to ‘continuously reevaluate the social contexts within which we labor’.⁶⁵ She can be read to encourage scrutiny of the reasons and justification for resort to ADR/PDR and the standards these processes adhere to rather than a blanket rejection of their use. Further, while it is

⁵⁸ Genn, *supra* note 14, at 398.

⁵⁹ Menkel-Meadow, *supra* note 19, at 419.

⁶⁰ Menkel-Meadow, *supra* note 41, at 601–603.

⁶¹ Menkel-Meadow, *supra* note 19, at 446.

⁶² Cohen, *supra* note 15, at 1145.

⁶³ *Ibid.*, at 1146.

⁶⁴ *Ibid.*, at 1150.

⁶⁵ *Ibid.*, at 1168.

possible to critique ADR/PDR processes on procedural grounds, similar critiques can be made of judicial processes. Tamara Relis points out that while the critiques of informality may stand in many circumstances, we ‘must not lead our critique of informality to end in glorification of the formal justice system, as that too is shown to be just as defective’.⁶⁶

Moreover, it may be possible to identify ways in which to strengthen particular ADR/PDR processes in order to overcome such critiques, provided the baseline of expected standards are identified. For example, Dominique Allen argues that the confidential conciliation process used in Australia for discrimination complaints confirms Fiss’ concerns about settlement by preventing future parties from learning about the process or accessing examples of past settlements (which are not based on legal principles)⁶⁷ and the positional vulnerability of many complainants within society who are unrepresented.⁶⁸ However, she also acknowledges the causal connection between the proliferation of ADR and the ‘problems with courts including delays, costs, and complex rules and procedures’.⁶⁹ She thus proposes modifications to the ADR model to become a ‘voluntary rather than mandatory “rights-based”’ process with settlements binding and presumptively a matter of the public record and the conciliator trained in discrimination law and able to ensure that ‘settlements do not breach the law’.⁷⁰

These examples suggest that a clear dichotomy between ADR/PDR and adjudication cannot be drawn. Rather, the literature encourages critical thinking on the value and meaning of a court; on whether these values must be capable of transfer to ADR/PDR or whether alternative values are sufficient and on the need to evaluate the context in which ADR/PDR takes place, particularly whether it should be voluntary or mandatory. As Moffitt points out, ‘[s]ettlement – like litigation – has the potential to contribute far more than the mere resolution of disputes. Settlement – like litigation – also has the potential to undermine public and private interests’.⁷¹ He thus makes the point that it is not ADR/PDR *per se* that is problematic but, rather, the way in which it is conducted and potentially the choice over when and for what it should be used.

IHRL has yet to fully confront these difficult questions. In the following sections, I offer a methodology for the ECtHR and other supranational courts to use when assessing the voluntary and mandatory use of ADR/PDR. This methodology would engage with some of the harder questions and challenges raised in this section in order to contribute to the positive development of ADR/PDR and minimize its challenges.⁷² However, the Court is unlikely to develop a clearer approach in the abstract as it can only respond to the cases it receives. It is not clear why cases of this nature have not yet been presented to the Court, but challenges should be expected in the future, particularly with the increased

⁶⁶ Relis, *supra* note 40, at 14

⁶⁷ Allen, *supra* note 33, at 196.

⁶⁸ *Ibid.*, at 192.

⁶⁹ *Ibid.*, at 200, 201.

⁷⁰ *Ibid.*, at 201. See also Riskin and Welsh, *supra* note 44.

⁷¹ Moffitt, *supra* note 35, at 4. See also Menkel-Meadow, *supra* note 27, at 2693.

⁷² ECtHR, *García Ruiz v. Spain*, Appl. no. 30544/96, Judgment of 21 January 1996, para. 28. All ECtHR decisions are available online at <http://hudoc.echr.coe.int/> (last visited 12 July 2015).

promotion of ADR/PDR by national and regional stakeholders. Equally, unless cases raise issues relating to a 'structural or endemic situation that the Court has not yet examined [under the] pilot-judgment procedure', a challenge under Article 6(1) or 13 of the European Convention on Human Rights (ECHR) will not receive priority under the ECtHR's priority policy and, thus, may not be heard by the Court very quickly.⁷³ Certain cases may also face admissibility challenges. For example, in cases of voluntary or mandatory engagement with agreement-based ADR/PDR or non-binding arbitration resulting in a settlement agreement, the ECtHR may deem the case inadmissible on the basis that the party is no longer a victim.⁷⁴ Where the case concerns adjudicative ADR/PDR, the case is more likely to pass the admissibility stage, provided any domestic remedies such as an appeal process have been exhausted, unless the Court deems that the waiver of access to a court is so clear-cut that it renders the application manifestly ill-founded. Equally, there is a risk that the Court will find that the appeal process has cured an original defect. As will be discussed in the following sections, therefore, much will turn on how open the Court is to addressing the critiques of ADR/PDR within its existing doctrines such as victim-status, waiver and the role of appeal courts. Finally, notwithstanding wider debates on whether the Court should act in an advisory capacity to national judiciaries, on the particular point of the nature of national remedies and the compatibility of non-judicial remedies with Articles 6(1) and 13, there may be merit in considering the adoption of an advisory route for national stakeholders (not just judiciaries) and the CJEU in this area.⁷⁵

3 The Voluntary Initiation of ADR/PDR and the ECtHR

Since one of the main justifications for the use of ADR/PDR is the autonomy and empowerment of the parties to resolve their disputes, IHRL should generally avoid over-prescription whenever ADR/PDR is initiated by the parties. In a study of the regulation of ADR/PDR, Felix Steffek and his colleagues argue that the greater control parties have at each point in the dispute resolution process (from initiation to the effect of the result), the less heavily the state should regulate the process (and the converse).⁷⁶ The ECtHR appears to take a similar approach. As noted below, it may find that an applicant no longer has victim status if settlement has been agreed. It also accepts that the right of access to a court under Article 6(1) can be waived, provided there is no coercion or constraint,⁷⁷ the waiver is unequivocal⁷⁸ and it is

⁷³ European Court of Human Rights' 'Priority Policy', available at echr.coe.int/Documents/Priority_policy_ENG.pdf (last visited 12 July 2015).

⁷⁴ ECtHR, *Calvelli and Ciglo v. Italy*, Appl. no. 32967/96, Judgment of 17 January 2002; ECtHR, *Murillo Saldias and Ors v. Spain*, Appl. no. 76973/01, Judgment of 28 November 2006.

⁷⁵ Protocol 16 of the ECHR.

⁷⁶ Steffek *et al.*, 'Guide for Regulating Dispute Resolution (GRDR): Principles and Comments', in Steffek and Unberath, *supra* note 7, 3, at 16.

⁷⁷ ECtHR, *Deweert v. Belgium*, Appl. no. 6903/75, Judgment of 27 February 1980, para. 49.

⁷⁸ ECtHR, *Oberschlick v. Austria*, Appl. no. 11662/85, Judgment of 21 May 1991; ECtHR, *Pfeifer and Plankl v. Austria*, Appl. no. 10802/84, Judgment of 25 February 1992; ECtHR, *Poitrimol v. France*, Appl. no. 14032/88, Judgment of 23 November 1993.

'attended by minimum safeguards commensurate to its importance',⁷⁹ although the Court has also suggested that it may not be possible to waive all aspects of Article 6(1) – for example, the right to an impartial tribunal.⁸⁰ The Court has already applied these principles to cases involving arbitration,⁸¹ thus suggesting that the Court is unlikely to overly regulate voluntary engagement with ADR/PDR.

Equally, the critiques of ADR/PDR discussed earlier in this article may, in certain cases, question the voluntariness of a waiver of the right of access to a court or agreement to settle – for example, in adhesion contracts⁸² or if the party did not foresee that the ADR/PDR process would mean a lack of full participation or did not foresee or fully understand that the waiver implied the renouncement of protection under Article 6(1) of the ECHR.⁸³ What the Court means by constraint or coercion has not been defined. In *Stretford v. the Football Association*, the English Court of Appeal acknowledged the lack of definition but assumed that it must include the common law principles of duress, undue influence or mistake and that 'onerous and unusual terms must be brought to the attention of the proferee'.⁸⁴ The Court has not yet considered whether the critiques of ADR/PDR set out earlier would fall within its definition of coercion or constraint or if effective participation in a dispute is an aspect of Article 6(1) that cannot be waived. Similarly, it has not addressed these issues within its own friendly settlement process. In this part of the article, I suggest that the doctrine of equality of arms could provide the basis for addressing the critiques and, thus, counter claims of a loss of victim status and the validity of a waiver without overly regulating voluntary engagement with ADR/PDR. The doctrine of equality of arms 'requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent'.⁸⁵ The doctrine would appear particularly well placed to respond to some of the critiques of ADR/PDR by focusing on the ability to participate in the process. In applying the doctrine, two key principles – procedural justice and legal accompaniment and representation – could provide a framework for assessing the voluntary nature of such engagement.⁸⁶

⁷⁹ ECtHR, *Osmo Suovaniemi and others v. Finland*, Appl. no. 31737/96, Judgment of 23 February 1999.

⁸⁰ See Shipman, 'Waiver: Canute against the Tide', 32 *Civil Justice Quarterly* (2013) 470 (citing *Pfeifer*, *supra* note 78).

⁸¹ *Suovaniemi*, *supra* note 79; ECtHR, *Suda v. Czech Republic*, Appl. no. 1643/06, Judgment of 28 January 2010.

⁸² See communicated case of ECtHR, *Pechstein v. Switzerland*, Appl. no. 67474/10, Judgment of February 2013, on the waiver in international sports arbitration contracts.

⁸³ Luban, *supra* note 36, at 405.

⁸⁴ [2007] EWCA Civ 238, at 53. Shipman, 'Compulsory Mediation: The Elephant in the Room', *Civil Justice Quarterly* (2011) 163; Blake, *supra* note 6, at 505.

⁸⁵ ECtHR, *Kress v. France*, Appl. no. 39594/98, Judgment of 7 June 2001, para. 72.

⁸⁶ Meier, 'Regulation of Dispute Resolution in Switzerland: Mediation, Conciliation and Other Forms of ADR in Switzerland', in Steffek and Unberath, *supra* note 7, 363, at 396 (discussing the application of 'right to equal treatment, the right to be heard, the right to legal aid and principles of fairness' to conciliation in Switzerland).

A The Court's Approach to Friendly Settlement

Once a case reaches Strasbourg, the Court's position on friendly settlement seems to have changed from passive to active promotion. It can facilitate settlement at any point in the adjudication of a case.⁸⁷ In theory, this provides the state with one last opportunity to resolve the case and avoid international litigation. For the applicant, a settlement could provide quicker justice,⁸⁸ particularly in the case of the ECtHR, which tends not to prescribe the remedies required and the securement of more expansive forms of reparation.⁸⁹ Balanced against these advantages is the apparent risk that applicants are exposed to a significant power imbalance within the negotiation due to the resources available to states and their position as 'repeat players' (although the representatives of the applicant may also be 'repeat players'). There are also more implicit pressures to agree to settle given how long international litigation typically takes and the risk that even if the eventual decision is in favour of the applicant, the state may fail wholly or partly to comply with it or delay its implementation.

In practice, however, these theories have little relevance. This is because in cases involving clear jurisprudence the Registry often presents parties with a draft settlement to which they either agree or reject without negotiation (what Helen Keller, Magdalena Forowicz and Lorenz Engi, calls 'routine friendly settlements' or 'fast track judgments'⁹⁰) or the state acknowledges the violation and proposes a settlement that the Court deems satisfactory and strikes the case off its list, even if the party rejects it.⁹¹ In these circumstances, settlements become a 'case management tool'⁹² rather than a participatory process bearing any of the hallmarks (positive or negative) of agreement-based ADR/PDR identified in the first part of the article. Keller, Forowicz and Engi surmise that '[r]ecent trends indicate that the individual, who was originally at the heart of the Court's pre-occupations, may have been left somewhere behind amidst other more pressing issues relating to the good functioning of the Court'.⁹³

There are fewer instances in which settlements (properly so-called) are negotiated. Little is known about how they are conducted,⁹⁴ and the Court has not provided guidance in this respect, including whether it requires or provides any safeguards to the process, leading Keller, Forowicz and Engi to note that '[t]he legal framework of friendly settlements is minimal'.⁹⁵ Article 37(1) of the ECHR requires the Court to reject a friendly settlement reached between the parties 'if the respect of human rights in the Convention and the protocols thereto so requires'. Keller, Forowicz and

⁸⁷ Article 39 ECHR.

⁸⁸ H. Keller, M. Forowicz and L. Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (2010), at 10.

⁸⁹ *Ibid.*, at 11 (observing the difference between the theory and practice in this regard in relation to individual measures).

⁹⁰ *Ibid.*, at 67.

⁹¹ Article 37(1) ECHR; Keller, Forowicz and Engi, *supra* note 88, at 61.

⁹² Keller, Forowicz and Engi, *supra* note 88, at 10.

⁹³ *Ibid.*, at 136–137.

⁹⁴ ECtHR, *Domel v. Germany*, Appl. no. 31828/03, Judgment of 9 May 2007.

⁹⁵ Keller, Forowicz and Engi, *supra* note 88, at 8.

Engi note that ‘it is rare for the Court not to endorse a settlement proposal’, although they also acknowledge that the confidentiality surrounding the friendly settlement practice may mean that it has not endorsed friendly settlement agreements reached between the parties.⁹⁶ Thus, the Court’s own practice fails to respond to the critiques identified earlier in this article, and I would argue that they should be revisited along the same lines as those suggested for national practice below. Instruction also cannot be gleaned from other systems. For example, the Inter-American Commission on Human Rights now actively promotes friendly settlements and mediation but, again, without specifying how the risks of mediation and settlement might be dealt with.⁹⁷

B Procedural Justice

Procedural justice attends to the fairness with which a dispute is dealt, which may – but does not necessarily – feed into the outcome of the case. Using the work of Allen Lind and Tom Tyler, Eva Brems and Laurens Lavrysen identify four principles of procedural justice: substantive participation, neutrality, respect (in particular, that people ‘must also infer that [their views are] being considered’ and that they and their concerns are taken seriously by the legal system⁹⁸) and trust.⁹⁹ Geneva Richardson and Hazel Genn echo the importance of ‘trust in the decision-maker’ as ‘the primary factor in shaping evaluations of procedural fairness’.¹⁰⁰ Welsh also points to Lind’s theory on procedural justice that ‘people use their perceptions of procedures’ fairness as a heuristic, or mental shortcut, to determine whether they received substantive justice’.¹⁰¹

The ECtHR is yet to develop a full approach to procedural justice. Article 6(1) of the ECHR provides a vehicle through which to integrate procedural justice into the right to fair trial by explicitly referring to ‘fairness’ as a criterion of access to justice. Equally, the integration of procedural justice into the fairness criterion in Article 6(1) may face challenges. In the USA, Welsh has argued that the Supreme Court has taken a narrow view on what constitutes fairness, finding that ‘procedural safeguards matter only to the extent that they contribute to achieving reasonably accurate and just decisions’ rather than providing an ‘opportunity for voice’ even in the absence of the ability to influence the outcome.¹⁰² If the ECtHR was to take such an approach, it would be difficult to address some of the major concerns with ADR/PDR through IHRL. However, Brems and Lavrysen have identified movements in the

⁹⁶ *Ibid.*, at 38–39.

⁹⁷ Inter-American Commission on Human Rights, Resolution 1/2013 on Reform of the Rules of Procedure, Policies and Practices, Revised Rules of Procedure (2013), at VI; Inter-American Commission on Human Rights, *Impact of the Friendly Settlement Procedure* (2013).

⁹⁸ Brems and Lavrysen, *supra* note 9, at 181.

⁹⁹ *Ibid.*, at 176. See also Tyler, ‘What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures’, 22 *Law and Society Review* (1988) 103, at 129.

¹⁰⁰ Richardson and Genn, ‘Tribunals in Transition: Resolution or Adjudication?’ *Public Law* (2007) 116, at 131.

¹⁰¹ Welsh, *supra* note 43, at 53.

¹⁰² *Ibid.*, at 53.

Court's jurisprudence towards the integration of procedural justice into its decisions in other areas, including 'scrutiniz[ing] the process of domestic decision-making by highlighting procedural justice concerns'.¹⁰³ The general movement in this direction may therefore provide openings to a wider reading of Article 6(1) to address some of the major critiques of ADR/PDR identified earlier in this article.

C Legal Representation and Costs

Connected to procedural justice is the question of the impact of the (absence of) legal accompaniment, representation and aid. As noted at the outset, an instrumentalist view of ADR/PDR might assume that the need for legal representation is dispensed with due to simplified procedures. However, the Court has already developed jurisprudence that indicates that it does not automatically equate simplified processes with a lack of need for legal representation.¹⁰⁴ This jurisprudence could be read as being supportive of the argument that legal representation may, in certain cases, be of greater, rather than lesser, importance in an ADR/PDR setting because of its impact on the ability to participate, even if not stating this directly.¹⁰⁵ A similar position may be taken on costs, as the Court tends to take a strict approach to the impact of costs on the right of access to justice.¹⁰⁶ Thus, while parties will typically bear their own costs in voluntary and particularly mandatory ADR/PDR contexts, it may be possible to argue that legal aid is required or that costs should not be imposed or reduced, particularly if the imposition of costs for some parties would 'effectively shut off access to a court even to meritorious claims'¹⁰⁷ or would otherwise exclude parties interested in using the ADR/PDR process that is encouraged or required by the state.

Even if self-representation is deemed possible, individuals in a position of vulnerability may require greater assistance in order to enable them to participate effectively. For example, this argument might apply where a process aims to facilitate self-representation, but, for particular individuals or groups, the lack of representation puts them in an unequal position and adversely impacts on the quality, process or outcome of the case. Nicole Busby and Morag McDermont's pilot study on employment tribunals, in which they found that vulnerable workers (defined as 'someone working in an environment where the risk of being denied employment rights is high'; 'who does not have the capacity or means to protect themselves from that abuse' and who is 'unable to afford legal representation and who have no access to trade union representation') experience employment tribunals as 'barriers

¹⁰³ *Ibid.*, at 195.

¹⁰⁴ ECtHR, *Steel and Morris v. United Kingdom*, Appl. no. 68416/01, Judgment of 15 February 2005.

¹⁰⁵ Shipman, *supra* note 84 (similarly arguing that legal advice may provide an important safeguard to waiver but noting the lack of clarity in the jurisprudence on this point, citing ECtHR *Zu Leiningen v. Germany*, Appl. no. 59624/00, Judgment of 17 November 2005).

¹⁰⁶ ECtHR, *Kreuz v. Poland*, Appl. no. 28249/95, Judgment of 19 June 2001, para. 66; ECtHR, *Ait-Mouhoub v. France*, Appl. no. 103/1997/887/1099, Judgment of 28 October 1998; ECtHR, *Apostol v. Georgia*, Appl. no. 40765/02, Judgment of 28 November 2006, para. 65.

¹⁰⁷ Golann, 'Making Alternative Dispute Resolution Mandatory: The Constitutional Issues', 68 *Oregon Law Review* (1989) 489, at 501.

to justice'.¹⁰⁸ In contrast to other largely positive studies about self-representation within tribunals, they describe a 'feeling of powerlessness' felt by the respondents in their study, which they attributed to 'not just the medium of language through which power differentials between claimant and employer are established' but also 'the social spaces in which these encounters take place'.¹⁰⁹

The Court's developing jurisprudence on vulnerability may prove instructive in addressing the right to participate within ADR/PDR settings. Alexandra Timmer illustrates the increasing range of cases in which the Court employs the concept of vulnerability, including under Article 6(3)(c) of the ECHR in *Salduz v. Turkey*.¹¹⁰ She observes that the majority of cases in which the Court has used a concept of vulnerability in the determination of the case relate to particular group identities such as children, persons with disabilities, persons detained and victims of domestic violence as well as cases of 'compounded vulnerability' such as detained children.¹¹¹ Lourdes Peroni and Timmer also point to indicators such as (historical) prejudice and stigma that influence the Court's use of the language of vulnerability.¹¹² While cases falling within those domains may sit more clearly with the Court's current approach to vulnerability, there is no principled reason that it could not extend the concept to the ADR/PDR setting, particularly as a means of matching vulnerability to agency and participation.¹¹³ This is especially the case given the Court's emphasis in certain cases on the 'particular' position of vulnerability of individuals or groups of individuals; the relational nature of vulnerability, which is dependent on social context that 'originates or sustains' the vulnerability of the group, and the emergence of indicators such as 'social disadvantage'.¹¹⁴

Accordingly, while the Court can still respect the principles of autonomy and self-determination when ADR/PDR is engaged voluntarily, it can contribute to the development and institutionalization of such processes by advancing minimum standards of justice that emphasize participation and equality of arms for all forms of dispute resolution in order to safeguard against the risks identified in the socio-legal, feminist and dedicated ADR/PDR literatures.

4 The Mandatory Initiation of ADR/PDR and the ECtHR

Turning to formal diversion to ADR/PDR, the issues for consideration are not only those related to equality of arms addressed in the third part of this article but also

¹⁰⁸ Busby and McDermond, 'Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings', 41 *Industrial Law Journal* (2012) 166, at 167.

¹⁰⁹ *Ibid.*, at 176.

¹¹⁰ Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (2013) 147 (citing *Salduz v. Turkey*, Appl. no. 36391/02, Judgment of 27 November 2008).

¹¹¹ *Ibid.*, at 152–162 (what she calls 'thematization').

¹¹² Peroni and Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', 11 *International Journal of Constitutional Law* (2013) 1056.

¹¹³ Timmer, *supra* note 110, at 153.

¹¹⁴ Peroni and Timmer, *supra* note 112, at 1064–1065.

the legitimacy and proportionality of restricting access to a court. In the landmark decision of *Golder v. United Kingdom*, the ECtHR read a right of access to a court into Article 6(1) of the ECHR when determining civil rights and obligations treating the right as one of the universally “recognised” fundamental principles of law.¹¹⁵ While the right of access to a court is not absolute and can be limited (as discussed below), where it does apply, the Article 6(1) text and the Court’s jurisprudence has fleshed out its content to include a public hearing¹¹⁶ and an independent and impartial tribunal¹¹⁷ that delivers justice in a reasonable time and fair manner.¹¹⁸ In other cases, the Court has found that the right must be practical and effective and not theoretical or illusory.¹¹⁹

Given the value it appears to place on judicial remedies, one might expect the Court to take a strict approach to formal diversion of disputes to ADR/PDR. Such an approach appears warranted since the autonomy and self-determination driving the justifications for developing ADR/PDR as public values will be diminished in the absence of a party’s consent. A different standard of scrutiny and judicial review should therefore be expected where the motivation for diversion arises from the state’s assessment of the need for ADR/PDR rather than from party choice and one that should become stricter where the party has no choice not only in the initiation of the process but also in its outcome such as in binding arbitration.¹²⁰

This section first addresses how the ECtHR might approach mandatory engagement with agreement-based ADR/PDR and non-binding adjudicative ADR/PDR before identifying three possible interpretative approaches within its current jurisprudence that could be applied to formal diversion of disputes to binding adjudicative ADR/PDR. For both agreement-based and adjudicative ADR/PDR, it proposes a framework to analyse formal diversion composed, first, of a fuller account of the value of courts and the meaning of the ‘essence of judicial remedies’ and, second, of a burden of proof that has shifted to the state to justify why formal diversion is necessary and how the right to fair trial would be protected. As argued by David Schwartz, a standard of strict scrutiny is justified, particularly in relation to mandatory arbitration. He points to the tendency to suggest that the lack of evidence to support the claim that litigation is more effective than arbitration should result in the acceptance of mandatory arbitration. By contrast, he argues that the lack of evidence should encourage us to be more circumspect about the diversion and place the burden on

¹¹⁵ *Golder*, *supra* note 1, para. 35.

¹¹⁶ ECtHR, *Fredin v. Sweden* (No. 2), Appl. no. 18928/91, Judgment of 23 February 1994, paras. 20–22.

¹¹⁷ There is a vast jurisprudence on independence and impartiality. See ECtHR, *Brudnicka and others v. Poland*, Appl. no. 54723/00, Judgment of 3 March 2005; ECtHR, *DN v. Switzerland*, Appl. no. 27154/95, Judgment of 9 March 2001; ECtHR, *McGonnell v. UK*, Appl. no. 28488/95, Judgment of 8 February 2000; ECtHR, *Daktaras v. Lithuania*, Appl. no. 42905/98, Judgment of 10 October 2000; ECtHR, *Sander v. UK*, Appl. no. 34129/96, Judgment of 9 May 2000.

¹¹⁸ ECtHR, *Robins v. United Kingdom*, Appl. no. 118/1996/737/936, Judgment of 23 September 1997.

¹¹⁹ E.g., ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, Judgment of 9 October 1979; Case 394/11, *Valeri Hariev Belov v. ChEZ Elektro Bulgaria AD and others*, Judgment of the Court (Fourth Chamber) 31 January 2013), para. 38 (discussing similar criteria by the CJEU).

¹²⁰ Steffek and Unberath, *supra* note 7, at 27.

the proponents rather than on the opponents (who defend the status quo) to demonstrate that nothing will be lost in the process.¹²¹

A Mandatory Engagement with Agreement-Based and Non-Binding Adjudicative ADR/PDR: The ‘Admissibility’ Approach

The ECtHR has not yet been presented with a case of mandatory engagement with agreement-based ADR/PDR. However, in *Rosalba Alassini v. Italia Telecom*, the CJEU decided a case on point. The case concerned the compatibility of a requirement to attempt to reach an out-of-court settlement over a 30-day period before the national courts could consider the dispute with Article 47 of the Charter of Fundamental Rights of the European Union.¹²² The admissibility requirement had been introduced in national law as a means of complying with the Universal Service Directive, which requires the availability of ‘transparent, simple and inexpensive out-of-court procedures’ for dealing with consumer disputes.¹²³ The CJEU drew upon general principles on when access to a court can be limited, as set out in ‘*Doktor and Others* [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgment of the ECHR in *Fogarty v United Kingdom*’.¹²⁴ It noted that in interpreting Article 6(1) of the ECHR, the ECtHR had found that ‘fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measures in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed’.¹²⁵ On the facts of the case, it reasoned that it was legitimate for the state to develop ‘quicker and less expensive settlement of disputes relating to electronic communications and lightening of the burden on the court system’. It emphasized the remaining possibility of bringing the case before a court, that access to a court was only delayed by 30 days and that no fees were incurred.¹²⁶

Implicitly, therefore, the Court appears to be suggesting that the key factors on whether mandatory engagement with agreement-based ADR/PDR violates Article 6(1) turns on the length process;¹²⁷ on the requirement to pay fees¹²⁸ (which is particularly relevant if it means that the parties cannot advance their claim to a court where agreement fails)¹²⁹ and on whether the party can subsequently lodge a case in

¹²¹ Schwartz, ‘Mandatory Arbitration and Fairness’, 84 *Notre Dame Law Review* (2009) 1248, at 1259.

¹²² Case 317/08, *Rosalba Alassini v. Telecom Italia SpA; Filomena Califano v. Wind SpA and Lucia Anna Giorgia Iacono v. Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA*, [2010] ECR I-2213, para. 37. Charter of Fundamental Rights of the European Union, OJ 2000/C L 364/01

¹²³ Article 34(1) ECHR. Commission Directive 2002/22, OJ 2002L 108/51.

¹²⁴ *Rosalba Alassini*, *supra* note 122, para. 64.

¹²⁵ *Ibid.*, para 63.

¹²⁶ *Ibid.*, para. 52–65.

¹²⁷ This aligns with the ECtHR’s approach to reasonable time, which applies to the whole procedure, see, e.g., *Robins*, *supra* note 118.

¹²⁸ See section 3(C) earlier in this article.

¹²⁹ Shipman, *supra* note 84, at 9.

the national courts where the process has failed.¹³⁰ The Court has also not heard a case involving mandatory non-binding arbitration aimed at encouraging parties to settle as has been documented in the USA.¹³¹ If faced with such a case, the approach of the Court could be similar to *Rosalba Alassini*, if not stricter due to the involvement of a third-party decision maker (which Dwight Golann notes the ‘very prospect of ... stimulates the parties to settle’ in some cases¹³²), with the additional important factor of whether, and, if so, how, a later court would use the decision of the arbitrator.¹³³ In such a case, mandatory non-binding arbitration would come closer to the ‘curative’ approach discussed below on mandatory adjudicative ADR/PDR than mandatory agreement-based ADR/PDR.

B The ‘Substantive Distinction’ Test (Agreement and Adjudicative ADR/PDR)

For mandatory engagement with both agreement-based and adjudicative ADR/PDR (binding and non-binding), a second approach of the ECtHR could be read as prohibiting formal diversion to ADR/PDR based on the subject matter of the dispute. Article 13 of the ECHR does not start from the presumption of courts as a remedy. Rather, the Court has confirmed that remedies ‘need not be judicial’¹³⁴ as states are afforded a margin of appreciation in determining the form of national remedies for alleged violations of the Convention.¹³⁵ Like under Article 6(1) of the ECHR, it generally assesses compliance with Article 13 against a set of formal criteria as: independence of the ‘competent authority’; capacity to award compensation, where applicable; speed of decision making and enforceability of decisions.¹³⁶ Equally, in a smaller number of cases, the ECtHR has indicated that it may not be open to the form the remedy takes due to the underlying nature of the dispute. In the case of *Ramirez Sanchez v. France*, for example, the applicant sought to challenge his solitary confinement. In an oft-cited paragraph of the judgment, the Court employed resolute language to find that the gravity of the violations required a judicial remedy due to ‘the serious repercussions which solitary confinement has on the conditions of detention’.¹³⁷ In this case, the Court therefore appeared to be drawing a bright line between cases deserving of a judicial remedy based on the subject matter of the underlying

¹³⁰ This is an important criteria compared to jurisdictions such as the USA where some disputes cannot be adjudicated where ADR is unsuccessful. See Golann, *supra* note 107, at 495.

¹³¹ *Ibid.*, at 499.

¹³² *Ibid.*

¹³³ Golann, *supra* note 107, at 514, 540.

¹³⁴ See, e.g., ECtHR, *Conka v. Belgium*, Appl. no. 51564/99, Judgment of 2 May 2002, para. 75. ECtHR, *Silver v. United Kingdom*, Appl. nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, Judgment of 25 March 1983, para. 113(b).

¹³⁵ ECtHR, *Chahal v. United Kingdom*, Appl. no. 22414/93, Judgment of 15 November 2006, para. 99.

¹³⁶ ECtHR, *Ciz v. Slovakia*, Appl. no. 66142/01, Judgment of 14 October 2003, para. 75; ECtHR, *Khan v. UK*, Appl. no. 35394/97, Judgment of 12 May 2000; ECtHR, *Kudla v. Poland*, Appl. no. 30210/96, Judgment of 26 October 2000; ECtHR, *Peck v. UK*, Appl. no. 44647/98, Judgment of 28 January 2003.

¹³⁷ ECtHR, *Ramirez Sanchez v. France*, Appl. no. 59450/00, Judgment of 4 July 2006, para. 165. See also ECtHR, *Al-Nashif v. Bulgaria*, Appl. no. 50963/99, Judgment of 20 June 2002, para. 123.

dispute. However, other than inferring from the case that the continued detention of the applicant and the imposition of solitary confinement rendered a judicial remedy appropriate, it is difficult to understand the wider implications of the judgment and to identify exactly where and why the Court has drawn a line as it did not contextualize its decision with reasoning on why the facts of the case rendered a judicial remedy necessary. Moreover, in its own friendly settlement procedures, it has also departed from the proposition that the ‘core’ human rights cannot be subject to encouraged settlement.¹³⁸

C Three Approaches to Formal Diversion to Adjudicative ADR/PDR

In addition to the ‘substantive distinction’ approach already discussed, three possible approaches to a formal diversion to binding adjudicative ADR/PDR within the ECtHR’s current approach can be cast, including the ‘curative’ approach; the ‘conforming’ approach and the ‘reasonable alternative means’ approach.

1 Curative Approach: The Availability of Appeal

The first line of cases confirms that at least in relation to administrative claims, the ECtHR has previously accepted that the initial decision-making body does not have to conform to the requirements of Article 6(1) of the ECHR provided the applicant has the possibility of appealing the decision to a court of law.¹³⁹ On the one hand, the appeal route plays a protective role in keeping ADR/PDR under the supervision of the judiciary.¹⁴⁰ However, the nature of the review will determine the extent of the cure. While the ECtHR has clarified that the appeal body must be able to review both the facts and the law and substitute its own decision for the administrative body, if necessary,¹⁴¹ in cases such as *Bryan v. United Kingdom*,¹⁴² the Court validated a very high threshold for appeal on the grounds that the administrative body reached a ‘perverse or irrational’ decision.¹⁴² It also accepted the argument that the appeal body might defer to the administrative body (non-compliant with Article 6(1)) because of its specialist knowledge,¹⁴³ regardless of the quality of decision making or the level of argumentation by the parties to the dispute, particularly when they are representing themselves.¹⁴⁴ Using the Court’s jurisprudence in this way appears to protect adjudicative ADR/PDR from full Article 6 scrutiny.

¹³⁸ This is also the case in the inter-American system. See Inter-American Commission on Human Rights, *supra* note 97, at 11.

¹³⁹ ECtHR, *Albert and Le Compte v. Belgium*, Appl. no. 7299/75; 7496/76, Judgment of 10 February 1983, para. 29.

¹⁴⁰ Edwards, *supra* note 12, at 671.

¹⁴¹ ECtHR, *Kingsley v. United Kingdom*, Appl. no. 35605/97, Judgment of 28 May 2002, para. 58; ECtHR, *Schmautzer v. Austria*, Appl. no. 15523/89, Judgment of 23 October 1995, para. 36.

¹⁴² ECtHR, *Bryan v. United Kingdom*, Appl. no. 19178/91, Judgment of 24 November 1995, paras 44–47.

¹⁴³ *Ibid.*, at 47. On this point, see Carnwath, ‘Tribunal Justice: A New Start’, *Public Law* (2009) 48 (making a similar argument in relation to the review of specialized tribunals).

¹⁴⁴ Elliot and Thomas, *supra* note 5, at 306–316 (discussing the high threshold for judicial review of tribunal decisions); Sunkin, ‘What Is Happening to Applications for Judicial Review?’, 50 *MLR* (1987) 432; Main, *supra* note 25, at 368.

2 The 'Conforming' Approach

In the second approach, the Court has found that where arbitration is 'required by law' it becomes a tribunal for the purposes of Article 6(1) since a tribunal is not necessarily 'understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country'.¹⁴⁵ This suggests that where a state formally diverts a dispute to arbitration, it would have to comply with the standards of Article 6(1), including an impartial tribunal and public hearing,¹⁴⁶ meaning that it would not be a diversion but, rather, part of the state dispute resolution apparatus. This reading would appear to put significant constraints on the possibility of formally diverting disputes to adjudicative ADR/PDR models, such as arbitration that often does not have public hearings and where impartiality is sometimes questioned unless some of its main characteristics are dispensed with.¹⁴⁷

3 The 'Essence of Judicial Remedies' and the 'Reasonable Alternative Means' Approach

Finally, the ECtHR might take an 'equivalence' approach, whereby it assesses an ADR/PDR process for its equivalence to the standards required by Article 6(1). In the decisions that have followed *Golder*, the Court has developed a three-part test that permits restrictions to access to a court where the restriction does not undermine the 'essence' of the right of access to a court; pursues a legitimate aim and is proportionate to that aim. The value-driven approach of the *Golder* Court might suggest that the ECtHR would take a stringent approach to the satisfaction of the three-part test such that access could only be restricted on exceptional grounds. However, the Court tends to take a deferential approach to the legitimacy of the restriction, thus providing, for example, space for states to pursue restrictions to access to a court on fiscal grounds.¹⁴⁸ The Court rarely goes into detail on what the 'essence' of judicial remedies entail or how to test whether that 'essence' has been undermined giving rise to the potential for subjectivity and inconsistency in application.¹⁴⁹

In determining proportionality, the Court appears to have been persuaded by the existence of another form of dispute resolution without testing whether or not it complies with Article 6(1). This issue has mainly arisen in cases involving the immunity of international organizations. For example, in the case of *Waite and Kennedy v. Germany*, the ECtHR found that 'whether the applicants had available to them reasonable alternative means to protect effectively their rights under

¹⁴⁵ ECtHR, *Lithgow v. United Kingdom*, Appl. nos 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment of 8 July 1986, para. 201; *Suda*, *supra* note 81.

¹⁴⁶ Although a public hearing can be limited under exceptional circumstances in Article 6(1) ECHR, see ECtHR, *B and P v. UK*, Appl. nos 36337/97 and 35974/97, Judgment of 24 April 2001.

¹⁴⁷ Sternlight, *supra* note 19 (noting the prohibition of mandatory arbitration in a number of European states for consumer disputes).

¹⁴⁸ ECtHR, *Brualla Gómez de la Torre v. Spain*, Appl. no. 155/1996/774/975, Judgment of 19 December 1997, para. 36.

¹⁴⁹ ECtHR, *Khalifaoui v. France*, Appl. no. 34791/97, Judgment of 14 December 1999, para. 36. See also Shipman, *supra* note 84, at 177.

the Convention' was a 'material factor' in determining whether an immunity was a permissible limitation on access to a court.¹⁵⁰ Similarly, in *Beer and Regan v. Germany*, the applicants argued that they had been denied access to justice as the international organization enjoyed immunity before national courts in employment disputes. The Court reiterated that the essence of the right of access to a court must not be impaired without explaining its meaning.¹⁵¹ Rather, it focused on the availability of the internal appeals board within the international organization as an alternative means of dispute resolution. Through an examination of the board's regulations that stated that it was independent and competent to hear disputes between the employer and the employee, the ECtHR was satisfied with the alternative without any consideration of the rule-of-law implications or any potential fair trial issues with the alternative process.¹⁵² Cedric Ryngaert critiques this line of jurisprudence on the grounds that 'it is not so much a question of *whether* a "reasonable alternative means" test ought to be performed, but rather of *how* this test should actually be conducted'.¹⁵³

Domestic courts have gone on to develop this test further. For example, the Belgium Supreme Court in *Western European Union v. Siedler* examined 'the qualitative due process criteria' of the internal dispute resolution, focusing in particular on the criterion of independence¹⁵⁴ and finding that it 'cannot be considered independent, as it is composed of members designated by the WEU's intergovernmental committee and they serve terms of only two years'.¹⁵⁵ However, in *Stichting v. the Netherlands*, the ECtHR found that in cases involving the United Nations (UN) specifically, the existence of an alternative means of access to justice is not a material factor since the immunity of the UN overrides the right of access to justice.¹⁵⁶ It is not clear if this decision is confined to cases against the UN specifically¹⁵⁷ or to all non-employment or private law claims against international organizations more broadly.¹⁵⁸ Even if the test is waning in relation to some or all claims against international organizations, it may be a transferable test to determine the compatibility of any formal diversion of disputes to ADR/PDR.

¹⁵⁰ ECtHR, *Waite and Kennedy v. Germany*, Appl. no. 26083/94, Judgment of 18 February 1999, para. 68.

¹⁵¹ ECtHR, *Beer and Regan v. Germany*, Appl. no. 28934/95, Judgment of 18 February 1999, para. 49.

¹⁵² *Ibid.*, para. 59.

¹⁵³ Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends', 7(1) *International Organizations Law Review* (2010) 121 (emphasis in the original).

¹⁵⁴ Wouters, Ryngaert and Schmitt, '*Western European Union v. Siedler; General Secretariat of the ACP Group v. Lutchmaya; General Secretariat of the ACP v. BD*', 105 *American Journal of International Law* (2011) 560, at 564. For a full discussion of national cases using the reasonable alternative means test, see Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals', 7 *Chinese Journal of International Law* (2008) 285.

¹⁵⁵ *Ibid.*, at 565.

¹⁵⁶ ECtHR, *Stichting (Mothers of Srebrenica and Others) v. the Netherlands*, Appl. no. 65542/12, Judgment of 11 June 2013, para. 163.

¹⁵⁷ *Ibid.*, para. 165 (distinguishing *Stichting* from previous cases).

¹⁵⁸ See also Wouters, Ryngaert and Schmitt, *supra* note 154, at 564 (discussing distinctions between private law claims and peacekeeping operations).

D An Evaluation and Reframing of the Tests

The 'curative' approach does not offer many prospects of redressing deficiencies in the ADR/PDR process. However, the 'admissibility' (for agreement-based ADR/PDR and possibly non-binding adjudicative ADR/PDR), the 'substantive' distinction test, the 'conformist' and the 'reasonable alternative means' tests, if modified and developed to require more of the ADR/PDR process, as discussed later in this article, may provide a more predictable baseline for assessing the permissibility of formal diversion to ADR/PDR, provided they are set within a framework of strict scrutiny. Such scrutiny will necessarily be higher where the diversion is to adjudicative, rather than agreement-based, ADR/PDR due to the loss of control of the outcome, although for agreement-based ADR/PDR, the scrutiny should still remain high for the reasons already discussed.

1 Starting with a Framework of Strict Scrutiny

In assessing formal diversion, the starting point I propose focuses on the motivation for any formal diversion in order to assess whether it is proposed on its own merits (a substantive approach) or for fiscal or efficiency reasons alone (an instrumental approach). A structural tool in this regard would be to reflect on why courts are presumed to have inherent value in dispute resolution as suggested, but not followed through on, in *Golder*. This would involve the recognition that courts play a symbolic and legitimizing role and are trusted by parties and the public to administer justice as well as distilling what is meant by the 'essence' of judicial remedies. In considering these attributes, the ECtHR would have to consider whether these characteristics are exclusive to courts and the extent to which they are replaceable or easily transposed to other ADR/PDR processes, even if they are adjudicative.¹⁵⁹ (although, in some states, trust in the judicial system may be so depleted that this argument may not carry weight in practice without substantial law reform). Thus, as Thomas Main has noted, the assessment of ADR/PDR may generate and 'revitalize discussion about the goals, norms, methods, and results of contemporary adjudication'.¹⁶⁰

Assessing formal diversion against a fully constructed understanding of the value of courts does not mean that diversion to ADR/PDR would be negated. A fuller explanation of the normative value of courts would, however, provide benchmarks and an analytical framework under which to assess formal diversion of disputes to ADR/PDR and would play an equilibrating role in refocusing stakeholders on the attributes of judicial decision making and, thus, counter tendencies to present ADR/PDR as the solution to deficiencies in the judicial process rather than as being independently valuable.¹⁶¹ The burden would therefore shift to the state to convince the ECtHR that none of the core values are lost to the applicant or society in the process and that ADR/PDR is justified on the basis of its own social values, thus encouraging

¹⁵⁹ Richardson and Genn, *supra* note 101, at 131.

¹⁶⁰ Main, *supra* note 25, at 391.

¹⁶¹ Edwards, *supra* note 12, at 669. See also Genn, *supra* note 7, at 409.

a shift away from a pragmatic mindset that ‘some justice is better than none’.¹⁶² The state should be able to provide such information through initial impact assessments of the likely effect of the change and ongoing monitoring. Such an approach would serve to enrich discussions on ADR/PDR and engage more actively with the benefits and public values it offers as set out in the first section of this article through a substantive proportionate dispute resolution rather than through a purely fiscal analysis. While, in litigation, assessments would have to be made through the lens of a particular case and, thus, on a case-by-case basis in order to assess the impact on the right to access to a court, the ECtHR would necessarily have to look at the wider context in which the case has arisen.

This approach goes some way to addressing Fiss’ challenge, as interpreted by Cohen, for social context and the purpose of diversion to be evaluated in order to ensure that ADR/PDR is introduced on its own merits. This may result in at least some questioning of the legitimacy of the state’s aim in circumscribing access to a court in the first place, particularly with regard to large-scale diversions from judicial remedies under Article 6(1) of the ECHR. For example, the Court might at least question how the state reached the view that specific problems in the judicial system merited diversions from it rather than resolution within the judicial system.¹⁶³ It would require assessment of the state of the legal system in general since much of the writing on ADR/PDR supports the proposition that resort to non-judicial dispute resolution is only effective ‘in the shadow of the law’¹⁶⁴ and with the ‘backdrop of a court system that operates to protect rights’,¹⁶⁵ following a failed ADR/PDR attempt, as a challenge to that process or to enforce the decision.

It would also provide room for claims that formal diversion would result in a second-class form of justice, particularly in relation to small-value claims that are most likely to be the types of disputes subject to formal diversion. On this point, the literature critiquing the experience of dispute resolution within specialized tribunals is instructive to the assessment of ADR/PDR processes. The types of disputes traditionally and increasingly covered by specialized tribunals and/or ADR/PDR relate to areas such as employment, family and housing. Pascoe Pleasence and Nigel Balmer have observed that times of austerity, such as the present, tend to increase the number of legal disputes into which persons financially unable to instruct a lawyer have to enter – for example, disputes relating to the loss of employment, housing and divorce and

¹⁶² Luban, *supra* note 36, at 387, 400 (terming this as the ‘baseline problem’ in that the choice is between measuring ADR against judicial processes or measuring ADR against ‘unmediated settlement’, given that the majority of cases are settled out of court).

¹⁶³ Edwards, *supra* note 12, at 669.

¹⁶⁴ Mnookin and Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’, 88 *Yale Law Journal* (1979) 950; Christopher Hodges, Iris Benohr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (2012), at 418 (it is the continued existence of courts that provides an incentive for both the establishing and the ongoing use of consumer ADR systems. There is both an element of competition here and a ‘shadow of the law’ phenomenon).

¹⁶⁵ Kupfer Schneider, ‘The Intersection of Dispute System Design and Transitional Justice’, 14 *Harvard Negotiation Law Review* (2009) 289.

custody arrangements.¹⁶⁶ On the one hand, it may be argued that the introduction of procedurally simplified tribunals or ADR/PDR in areas such as housing, employment and family law facilitates access to justice, particularly for those who would otherwise be unable to afford to fund their dispute in the absence of legal aid. However, if in practice, parties experience a second-class form of justice (which should not be automatically assumed when parties are required to use ADR/PDR processes), they may be able to argue that they have suffered indirect discrimination in violation of Article 14, read together with Article 6(1) or 13 of the ECHR. This could be argued by demonstrating that, in the introduction of procedurally simplified tribunals or ADR/PDR in a particular area of law, the state should have been aware that a particular sector of society would be the major users of the process. If it could be demonstrated that these processes only offered a second-class form of justice, the affected sector of society may be able to argue that it disproportionately affected them even if the policy or law was neutral on its face. By placing the burden on the state to demonstrate that nothing is lost through formal diversion, parties would have the possibility of arguing that a lower standard of justice resulted from the diversion.

In order to avoid generalizations about ADR/PDR processes, however, the Court might consider, in addition to the arguments advanced by the parties, integrating questions relating to the operation of the dispute resolution process in practice, including any impact assessments conducted by the state, into the statement of facts. Beyond the information the parties are able to obtain, the Court should be open to the use of qualitative studies prepared by third parties into the operation of the particular process in practice. In other areas, the Court has started to grapple with its reliance on non-traditional forms of evidence such as non-governmental organization reports to provide context and should therefore be able to make similar assessments in ADR/PDR cases.¹⁶⁷ It is particularly critical in areas such as ADR/PDR that the Court fully engages with the practical particularities and complexities of the process since the general principles in such a disparate area of practice will make very little inroads into the quality and experience of justice provided without detailed and close scrutiny.

2 Building on the Existing Toolbox

When set within this framework, the four approaches (the ‘admissibility’; the ‘substantive distinctive’; the ‘conformist’ and the ‘reasonable alternative means’) have much more potential to make a meaningful contribution to formal diversions to ADR/PDR at the national level. On the ‘admissibility test’ for agreement-based and non-binding adjudicative ADR/PDR, the CJEU emphasized in *Allassini* the short time period of 30 days during which the parties have to attempt to reach an agreement through mediation, after which the possibility of litigation remains. On its face, this point may appear reasonable and proportionate since the parties are only compelled

¹⁶⁶ Pleasence and Balmer, ‘The Audacity of Justice: Recession, Redundancy, Rights and Legal Aid’, 9 *Social Policy and Society* (2010) 475.

¹⁶⁷ ECtHR, *DH v. Czech Republic*, Appl. no. 57325/00, Judgment of 13 November 2007, para. 134.

into an agreement-based process for a short period of time but are not compelled in the mediation process itself or excluded from the judicial system entirely.¹⁶⁸ The introduction of stronger standards on effective participation discussed in the third part of this article may mitigate many of the dangers associated with agreement-based ADR/PDR, particularly as the empirical studies that are available suggest that there are no significant differences between parties experience of procedural justice when mediation, for example, is voluntary or mandatory.¹⁶⁹ Thus, in some ways, mandatory mediation for a short period of time may be less problematic than diversion of disputes to adjudicative ADR/PDR processes as the parties regain control over the result of the dispute and can still go on to litigate after the period of time is exhausted.¹⁷⁰

In the same way, however, short time limits (the parameters of which the Court will have to define) may be insufficient if, in practice, the parties feel compelled to reach agreement through mediation.¹⁷¹ Genn's caution about the methods used by mediators to encourage parties to settle are significant here.¹⁷² These critiques of the practice of mediation suggest the need for more stringent regulation of mediators in mandatory agreement-based ADR/PDR. Cost penalties or the denial of legal aid for unwillingness to participate in mediation on the basis of 'frivolity'¹⁷³ will also require close assessment in these circumstances, even if they are not actually implemented due to their potential to adversely impact the right of access to a court through parties feeling compelled to reach agreement. Pressures to settle have not been studied in depth but are an area in which further conceptual and empirical study is required.¹⁷⁴

On the 'substantive test', distinctions based on subject matter are supported at the national level with Steffek and his colleagues finding that '[s]ome legal systems have prohibited mandatory ADR procedures for certain classes of cases, eg constitutional challenges to laws'.¹⁷⁵ Thus, it may be that some cases can never be diverted to ADR/PDR even if the parties are willing to engage with them voluntarily. However, as demonstrated earlier, where the line is drawn is unclear in terms of whether it only relates to certain claims because of their severity and public importance or to all claims against the state and its institutions. A clearer understanding of why judicial remedies are valued should sharpen how this test is used and how it is developed by articulating the underpinning rationale for requiring certain disputes to be litigated

¹⁶⁸ Wissler, 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts', 33 *Willamette Law Review* (1997) 565, at 565.

¹⁶⁹ Relis, *supra* note 40; McAdoo, Welsh and Wissler, 'Institutionalization: What Do Empirical Studies Tell Us About Mediation?', *Dispute Resolution Magazine* (Winter 2003).

¹⁷⁰ Steffek and Unberath, *supra* note 7, at 41.

¹⁷¹ Wissler, *supra* note 168, at 572.

¹⁷² See section 1(B) earlier in this article.

¹⁷³ Hess and Pelzer, 'Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System', in Steffek and Unberath, *supra* note 7, 209, at 217.

¹⁷⁴ Ellger, 'Mediation in Canada: One Goal – Different Approaches to Mediation in a State with Federal and Provincial Jurisdictions', in Hopt and Steffek, *supra* note 7, 909, at 910.

¹⁷⁵ Steffek and Unberath, *supra* note 7, at 22.

in court. Even if the ECtHR can provide greater clarity, this test alone will be insufficient and lack comprehensiveness since it cannot cover all cases.

The 'conformist' and 'reasonable alternative means' tests present the strongest tests as they aim to be equivalent with Article 6(1) of the ECHR. However, they also indicate shortcomings in the measures required of Article 6(1) and the meaning of a 'tribunal' when applied in this way. First, in assessing core values such as independence, the ECtHR should take a much stricter approach than it has in the past – for example, in *Beer and Regan* – where it accepted the claim of independence of an internal employment appeals tribunal without actually assessing whether it was independent. In their analysis of the judicialization of tribunals in England and Wales, Richardson and Genn note that 'the requirement of independence in relation to tribunals is closely linked to their location within the judicial [rather than administrative] branch of government'.¹⁷⁶ It may therefore be that it is much harder to establish independence outside of the judicial system. This concern is echoed in some writings on arbitration in which potential bias towards 'repeat players' has been raised.¹⁷⁷

Second, even if arbitration complied with Article 6(1) of the ECHR through the 'conformist' test, including independent arbitrators and public hearings and findings, it would not necessarily address some of the critiques of arbitration outlined in the second part of this article such as the law and procedure applied and the role of public policy and extra-legal information. Similarly, the 'reasonable alternative means' test is currently difficult to apply until the ECtHR clarifies the meaning of the 'essence' of judicial remedies and whether it comprises a set of core characteristics that transcend particular institutions of dispute resolution such as courts or whether they are a lesser standard of fair trial under Article 6(1). Thus, if the test is to become practicable, the first task for the Court is to fully articulate what it means by the 'essence of judicial remedies' test. As argued earlier, both the 'conformist' and 'reasonable alternative means' tests should extend beyond the characteristics often identified by the Court, such as independence and enforceability, to include a more fully worked out concept of the right to participation (including procedural justice, legal accompaniment, legal representation and legal aid) in order to provide minimum standards of justice for all forms of dispute resolution. Attention is also necessary on how the appeals process would work in order to avoid the risk that the 'curative' approach would result in limited judicial review, thus leaving these wider issues untouched.¹⁷⁸

The approach outlined in this section does not propose any new methodologies unfamiliar to the ECtHR. Rather, it promotes a refinement of a range of tools within the Court's existing toolkit that would deepen its approach to access to justice and provide clearer guidance to stakeholders on when diversion to ADR/PDR would be permissible and within what parameters. As discussed at the outset, it is particularly important that the Court operates with a consciousness of the wider impact its

¹⁷⁶ Richardson and Genn, *supra* note 100, at 120.

¹⁷⁷ Pittman, 'Mandatory Arbitration: Due Process and Other Constitutional Concerns', 39 *Capital University Law Review* (2011) 853, at 868.

¹⁷⁸ Golann, *supra* note 107, at 498.

jurisprudence on access to justice generally, and ADR/PDR specifically, will have not only within Europe but also internationally in informing the development of IHRL.

5 Conclusion

This article has sought to contribute to the growing developments in the field of ADR/PDR by examining the ways in which supranational human rights courts might examine the standards required of ADR/PDR, whether they are engaged voluntarily or mandatorily and given the permissibility of formal diversions from the courts to ADR/PDR. The CJEU and national and regional stakeholders often refer to Article 6(1) of the ECHR as a key benchmark for determining whether or not ADR/PDR is permissible. However, as discussed in this article, straight references to the general standards on waiver and restrictions on access to a court are insufficient in this context, although a more careful reading of the Convention and its jurisprudence reveals that methodologies are available that can more effectively respond to the contributions as well as challenges posed by ADR/PDR. Using the ECtHR's existing toolbox, this article provides a more engaged framework for assessing the choice, design and implementation of ADR/PDR that could apply to IHRL more generally. However, in order to give full weight to such a framework, much greater research is required into the impact of ADR/PDR on individual litigants and society, and this research then needs to be acted upon by lawyers through challenges using the Convention principles and IHRL more generally. While IHRL has lagged behind other disciplines in the field of dispute resolution, the framework suggested in this article, while not comprehensive, is aimed at placing it squarely and critically on the human rights agenda by generating discussion and collaboration among and between academics and practitioners with the goal of an emergent human rights' approach to ADR/PDR.