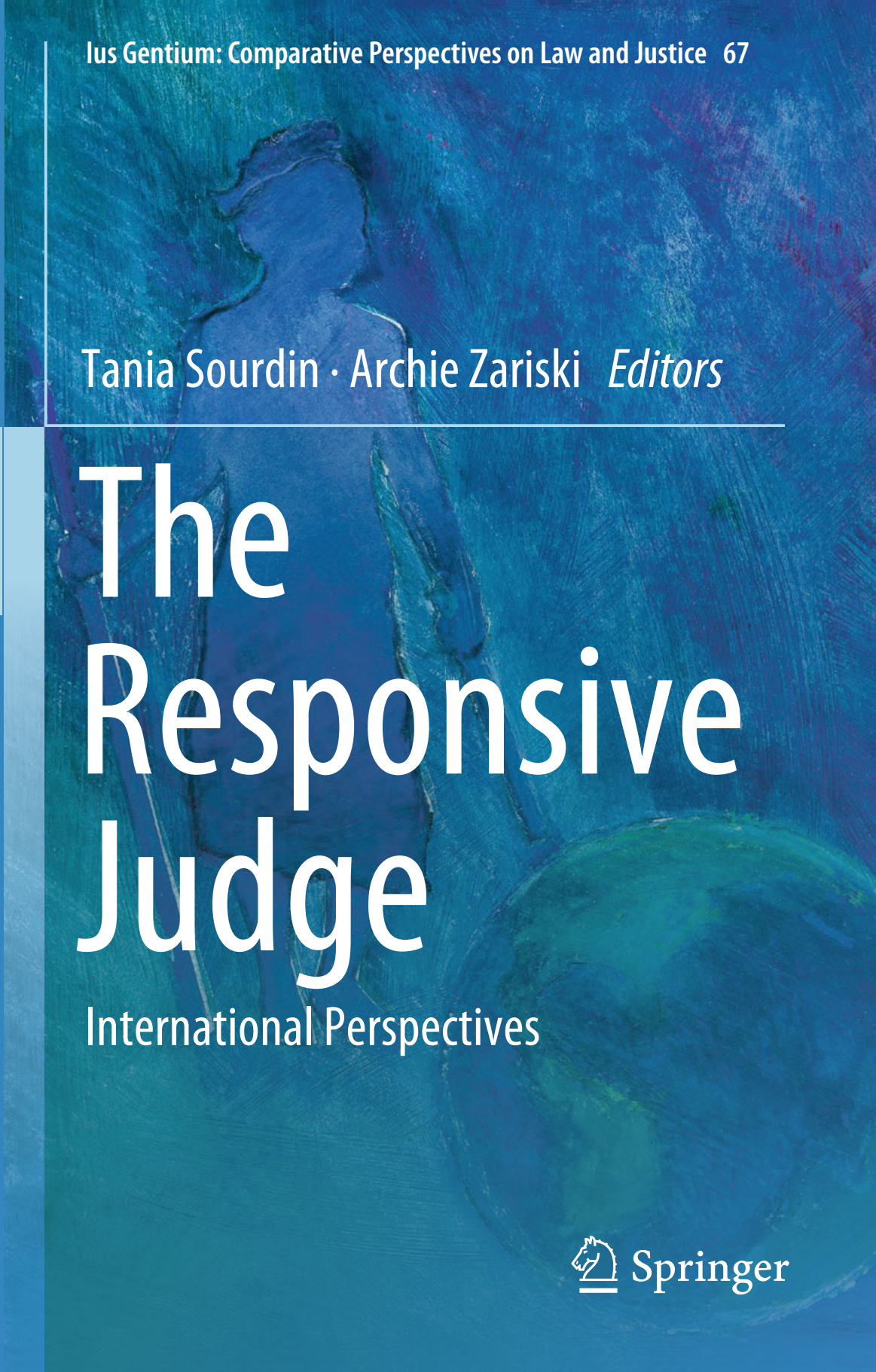
Ius Gentium: Comparative Perspectives on Law and Justice 67



Tania Sourdin · Archie Zariski *Editors*

The Responsive Judge

International Perspectives

Springer

Ius Gentium: Comparative Perspectives on Law and Justice

Volume 67

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The Responsive Judge

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To all judges who aspire to respond to the hope and trust placed in them by the people they serve.

Foreword

How one becomes a judge differs among countries. In some countries, becoming a judge is a career path. In others, becoming a judge is a mid-career or even end-of-career job change. Some places have a vigorous vetting process and some places elect judges. So what binds this disparate group into becoming effective judges? There are some countries which have quite similar rules of procedure albeit the nomenclature is different. And there are places which have radically different rules of procedure. Are there values or approaches to being a judge that transcend these differences that define how to be a very good judge?

Former US Congresswoman Barbara Jordan once said, "What the people want is simple. They want an America as good as its promise." The same can be said of what the people want of their courts and judges. They want a judiciary as good as its promise. A judiciary that is as good as its promise is known not just for speed and efficiency (heaven knows many judges are good at that) but also for other less quantifiable aspects of justice—things like fairness and respect, attention to human equality, a focus on careful listening, and a demand that people leave our courts understanding our orders. Judges cannot be satisfied with being quick nor complacent about being slow. Nor can we be satisfied with being clever. We must strive to be fully just towards every person who enters the courthouse. The volume of work makes undivided attention to justice seem at times to be an unattractive goal, and so too often we rest on measuring our speed or casting blame on others for the faults of our justice system.

With the mantle of leadership that is given to those who get to become a judge comes the responsibility to deliver—or in the words of this book, to be responsive. Throughout the world there are challenges to judges. Some of these challenges are threats to judicial independence. Some are threats driven by the public's misunderstanding or lack of understanding about what it is to be a judge. Enhancing the public's understanding of what judges do and why begins with attention to the details of doing well with those that appear before us. The high volume of cases can be seen as a strength, not a weakness, of the judiciary. We need to confront the notion that although judges at every level must be neutral, neutrality does not mean that we mask that we care. The people who come into our courthouses and the

community that we serve must know that judges care about them as individuals. And to achieve that, insight into what it means to be a responsive judge is the perfect starting point.

Judges go through stages of development. A new judge may have doubts and uncertainties. As time goes by, judges begin to experience their own limitations as well as a sense of the professional self. How they handle both the limits and strengths of their own abilities defines a professional "judicial self." Judges learn in this stage of their career how they are like and different from other judges. The job of being a judge feels less and less as though it is "coming at" him or her. For most judges at this stage of their careers, judicial job stress feels under control or at least bearable. However, failure at this stage of judicial development leads to chronic feelings of inferiority, vulnerability, and defensiveness.

There is a point in most judges' careers where they settle in terms of who they are, who they know, what they are known for, and what they enjoy about the job. As judges begin for the first time to view retirement on the horizon, they see their career as finite and many begin to reflect on it anew. Hopefully, they view their career as gratifying and experience satisfaction, fulfillment, and a sense of ownership of their identity. Some, though, may see their ambitions not fulfilled and the opportunities not taken, and will become disheartened as they experience regret and possibly despair.

Why do some judges discover new vitality and creativity towards the end of their days, while others go to seed long before? We have all known judges who run out of steam before they reach their career's halfway mark. There are judges who stop learning or growing because they have adopted the fixed attitudes and opinions that all too often come with the passing of years. Stages of development are not limited to judges. All of us have the capacity to run out of steam at the halfway mark. To avoid that you should read this book. Understanding systems different than ours not only enriches us but it gives us an opportunity to think about how to make the system we work in better.

It is not trite to say that judges play an indispensable role in preserving freedom. We most definitely do. Although you can go through an entire career and not decide any case of historical significance, each case a judge decides is a critical human event. Taken together, the decisions judges make day in and day out have the potential to affirm the public's faith in the strength and decency of our courts—or to shake that faith. What the people want is simple. They want a court system—they want its judges—as good as its promise.

Minneapolis, USA

Judge Kevin S. Burke
Hennepin County District Court

Preface

In the second decade of the twenty-first-century judges, courts, and legal systems face a new existential challenge—that of remaining relevant to the public they are entrusted to serve. The crisis of access to justice has become so endemic and permanent in many countries that, with few exceptions, today only large corporations can make effective and full use of traditional civil legal systems and a civil trial. Individuals and smaller corporate entities seeking justice are instead participating in alternative dispute resolution ("ADR") processes, private dispute resolution systems which have attained the force of law, utilizing complaint and Ombuds procedures, and undertaking social media action. Increasingly, justice is being "crowdsourced" through viral social media appeals which enlist public opinion and consumer action to achieve redress. Some such campaigns descend into dangerous vigilantism, but new "social law" based upon mores and norms shared online together with online processes that can span borders may soon overshadow both established domestic common and civil law trial processes.

This latest crisis to impact legal systems is largely unrelated to historic concerns about maintaining the legitimacy of judges and courts. Judges in most countries continue to be treated with respect and trusted for their honesty and impartiality. But the public never see them at work because the courts can be perceived to be inaccessible, and thus their perceived connection with justice in practical terms can also be perceived to be weak. Judges, of course, have been concerned with the resistant problem of access to justice from the beginning. However, the initiatives they and others have taken to provide initially, access to lawyers, and next, access to courts, have not had a significant impact. Some jurisdictions have started to report declines in the number of civil cases being filed, signaling a shift in public perception away from viewing courts as being the principal sources of justice. In this environment, many judges are beginning to recognize that the only remaining tool left to them with which to reclaim for the courts their historic role of providers of justice is themselves. Access to justice today must therefore include an important focus on "access to judges".

Traditionally, judges have tended to distance themselves from the public they serve to preserve both the substance and appearance of their independence and impartiality. Many modern civil litigation systems were similarly designed with lawyers in mind as expert intermediaries between disputants and judges. Today, however, the cost of legal representation has, at times, removed this mediating element, leaving litigants (when they manage to appear) and judges face to face. Further, judges must convince those who are skeptical of the value of the courts that judges are accessible and amenable to closer contact and interaction in the joint pursuit of justice. In such situations, judges have been searching for a new understanding of their role in achieving justice and the skills and techniques to implement it. This new role calls for a "responsive judge".

We are once again writing a Preface to a book that considers judicial innovation and the role of judges as we travel across different countries to engage with and learn more about how judges work and respond to people across the globe. This is a privilege and we thank all those who have engaged with us, in this work and in our other practice areas that have caused us to reflect and consider how disputes can be effectively resolved by judges in a responsive manner. Our respective work in this field has led us to deeply appreciate the different approaches and perspectives that judges bring to their work, the extent that it is shaped by social and political domestic cultures and we hope that this book will enable some challenging, important and at times innovative judicial approaches to be considered by a wider audience.

Systems of justice vary from place to place, and in this work, how judges work in a responsive way is explored from the perspective of judges, scholars, and thinkers. This approach has led to the book presenting a smorgasbord of comparative and diverse processes related to the theme of responsiveness. We have been conscious to ensure that our view of these developments is not constrained by an Anglo-American focus and we hope that this will provide the reader with a different view about how judicial responsiveness can reflect the cultural nuances of different societies.

In considering innovations in judging and particularly judicial responsiveness, it is both challenging and fruitful to gather together expert commentators to discuss such developments because so often there are somewhat idiosyncratic approaches in different cultures. For that reason, we are particularly grateful to the Law and Society Association who sponsored our International Research Collaborative (IRC) in relation to judicial responsiveness. Through a grant program, the Law and Society Association and the United States National Science Foundation provided some financial support for the conference attendance of several authors to enable them to meet and confer with our collaborative research network (CRN) at a Conference held in Mexico City in June 2017.

This work is a collaborative effort, and we have greatly relied on the expertise of others to bring these writings together and to support the development of the book. This was achieved largely through our contributing authors who enthusiastically engaged with the theme, discussed, developed, and created this joint work. The book would also not have been possible without the wise guidance, magnificent

editing, and tireless work of Jacqueline Meredith, a Senior Researcher at the University of Newcastle, Australia. We also appreciate the initial hard work done by Stanley Mak, another wonderful researcher from the University of Newcastle, Australia, who helped to bring the beginnings of the book together.

We now understand far more about judicial responsiveness and are indebted to those who have contributed to this book. We are hopeful that these perspectives will enable readers to think about and consider these trends and the issues presented in differing jurisdictions. In this regard, we are particularly grateful for the perceptive and thoughtful Foreword written by Judge Kevin Burke who is a leader in judicial education which provides an insightful perspective of the range of views that exist about judicial responsiveness.

As with any new work we also wish to thank the pioneers in this field, judges, scholars, and legal practitioners, many of whom are referred to throughout this book. Their groundwork in identifying theoretical constructs, practical measures, questions, issues, and processes is invaluable in the context of future developments in this field.

Our families and friends have also aided us, and we thank them for unfailingly supporting our efforts particularly as we may have been less than responsive while working on this book!

Lastly, we wish to thank our universities for their support and encouragement—Tania, the University of Newcastle, Australia and Archie, Athabasca University, Canada particularly for providing research and study leave.

Kuala Lumpur, Malaysia
March 2018

Tania Sourdin
Archie Zariski

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What Is Responsive Judging?

Tania Sourdin and Archie Zariski

Abstract In this chapter the Editors introduce the concept of responsive judging, examine its historical roots, and explore some of its manifestations in courts and judiciaries today. In general terms, judicial responsiveness is an acknowledgement by judges that the law is not an autonomous field of activity answerable only to its own norms, but is rather a semi-autonomous practice embedded in society which answers to the desire for justice of members of that society. Such a conception of responsiveness is compared to more traditional jurisprudential analyses of law and a view of law as intersecting and interacting with society is preferred. Some elements of responsiveness are explored including accountability, concern for consequences of decisions and the experiences of litigants, as well as the need for open communication with the public. Critiques of responsive judging are examined and answered. The chapter concludes with an overview of the aspirations and examples of responsive judging which appear in the following chapters.

1 Introduction

Judges in both Western judicial traditions, the civil and the common law, have always been responsive in several crucial respects.[1] They: (1) finalise all disputes brought before them; (2) consider the submissions of litigants concerning a dispute or case; (3) use those submissions in making decisions; and (4) explain and justify their decisions in relation to the submissions. This may be called the "classic" or "passive" model of responsive judging which has historically predominated in Western legal systems.

[1] The following description of "classic" responsive judging is largely based on Fuller (1978) and Eisenberg (1978).

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This book is concerned with an expanded or enhanced mode of responsive judging, observed in the work of exemplary judges of the past and present. We consider such an approach to be a "progressive" or "active" form of judicial responsiveness which incorporates the classic elements described above plus one or more of the following: (1) responsiveness to accountability for public investment in the legal system and the demand for justice; (2) responsiveness to the problems of interdependent, network society; (3) responsiveness to litigants' experiences of the legal system and courts; and (4) active responsiveness in the context of public attention. In the words of one contemporary responsive judge, these features present a contrast between "the passive and the passionate models of adjudication" (Weinstein 1995, 102). Some of these practices of responsive judging are associated more with courts than individual judges, but we point to the intimate interrelation between the two: responsive judges support responsive courts, and responsive courts encourage responsive judging.

Thus, today's fully responsive judge, in addition to adhering to the essential principles of fidelity to law, impartiality, and integrity, is also:

- a cost-conscious manager of litigation with a concern for ensuring access to justice
- a quick learner with the curiosity and patience to inquire into the foreseeable consequences of her decisions
- a student of human nature who values and works at establishing respectful relations with litigants and colleagues
- a public figure comfortable in the roles of ambassador for justice and public legal educator.

These key elements of progressive, active responsive judging will be examined in more detail below. From here on we will simply use the term *responsive judging* as meaning this expanded or enhanced mode of judging.

Responsive judging as a description of, and normative model for, the work of judges, has a history going back to the late nineteenth century. We would describe the distinguished American jurist Oliver Wendell Holmes Jr. as the "grandfather" of the modern era of responsive judging (Goldberg 2015). Holmes observed that the core activity of legal systems is judicial decision making and admonished judges doing that work to be concerned about, and take into consideration, the foreseeable effects on society of their decisions. As he put it, "… judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious …" (Holmes 1897, 467). Following in his footsteps the American Realist scholars and jurists promoted a pragmatic, results-oriented view of legal decision making. Felix Cohen described this as the functional approach and admonished judges to deal frankly with "the social forces which mold the law and the social ideals by which the law is to be judged" (Cohen 1935, 812). Llewellyn (1930) highlighted judges' freedom of action in applying law to achieve social goals, describing what we consider to be a responsive judge as one "… who loves creativeness, who can without loss of sleep combine risk-taking with responsibility, who sees and feels institutions as things built and to be

built to serve functions, and who sees the functions as vital and law as a tool to be eternally reoriented to justice and to general welfare." (Llewellyn 1950, 397). Jerome Frank brought to public awareness the common humanity of judges (Frank 1930) and opened the way to a more realistic view of the judiciary than that reflected in traditional judicial roles.

Responsive judging became more common in America later in the twentieth century during the era of the civil rights movement, and the deep involvement of the judiciary in helping to desegregate schools and reform other institutions. Chayes described a new role for judges as "the dominant figure in organizing and guiding the case" and as "the creator and manager of complex forms of ongoing relief" (Chayes 1976, 1284). During the 1970s the so-called "litigation explosion" triggered public concern for the viability of legal systems and the need to manage courts more efficiently (Burger 1976). The ADR movement contemporaneously promised both to help lift the case load burden on judges by diverting parties to alternative processes, and at the same time to provide litigants with better solutions to their problems (Sander 1976). "Access to justice" became a global concern as the cost of hiring lawyers rose and triggered new approaches to the design of justice systems and court processes. Later, the research and scholarship of "procedural justice" (Thibaut and Walker 1975) led to re-envisioning the relations between litigants, courts and judges. In all of these developments judges have been both champions and skeptics, although the prevailing trend has been change in judicial roles and practices. Together, these changes have resulted in modern responsive judging.

In diverse ways many judges today are actively responsive to the parties before them, to wider communities of interest, and to societies which require much of their judges in a complex interconnected world. We examine each of these developments in the practices of judging in more detail below.

2 Responsiveness and the Jurisprudence of Judging

Clearly the concept of responsive judging is multi-faceted and includes the notion that Judges may consider matters beyond a strict or existing legal rationale in order to determine or resolve a dispute (de Hoon and Verberk 2013). It requires that, as part of this work, a judge may attend to and explore human relationships between individual disputants and organizations and within society more generally, and consider the impact of a decision in the context of the development of the whole legal system (see Zariski later in this work). A responsive judge, therefore may, from time to time, be appropriately engaged in issues that relate to public policy. As Stępień has noted:

> More precisely, the responsive ruling may result from an analysis of the future situation of the parties involved in the particular case (individual responsiveness), take into account the anticipated impact of the decision on the whole legal system (intrinsic legal responsiveness) or even involve the consideration of the macro-economic and macro-societal consequences of arriving at the particular decision (social responsiveness). (Stępień 2013, 140–1)

At this same time, judicial responsiveness is not only concerned with a judicial ruling and adjudicated outcome. It requires that a judge consider the perspective of participants in a legal dispute as well as others when dealing with a dispute, and incorporates the notion that a responsive Judge reshape the processes used within a court by recognising that the dignity, participation and voice of a participant in a legal dispute and that such factors relevant in determining and resolving disputes. Judicial responsiveness can also be linked to how a Judge supports those who are in dispute. It may require an understanding of support structures and referral opportunities, collaboration with those who may not necessarily be involved in a dispute (such as drug and alcohol counsellors in a criminal matter) as well as a developed understanding about referral to alternative dispute resolution processes or other processes that may enable disputants to achieve better or lasting outcomes.

The concept of a responsive judge does not necessarily challenge important notions relating to jurisprudence of judging if jurisprudence is explored in the context of its most narrow and literal definition. This is partly because the essence of jurisprudence is the study, knowledge and science of the law and responsive judges are arguably engaged in this unrelenting quest and consider that social and other sciences can inform them in this task and in the judicial processes that they adopt. However, there exists some significant jurisprudential debate about responsiveness in general and the extent to which judges should be socially or legally responsive. Whilst, in the past formalists (such as Dworkin) would suggest that judges should treat law as a logical discipline or science, realists (such as Roscoe Pound) suggest that judges use a process of inductive reasoning which may permit either creativity or a consideration of broader societal well-being (Posner 1990, 73).

Naturally, jurisprudential debate involves an additional range of varying schools of theory including the naturalists (who might assume that objective morality can exist and that law should be just) and positivists who have continued to challenge formalist perspectives. In recent years, however, it appears to have been accepted that the dominant jurisprudential approaches can be framed within realist or positivist theoretical schools of thought (Tamanaha 2015) (see further discussion below). To some, both realist and positivist jurisprudential approaches support responsive judging:

> ‘Over the past century, the Legal Process school of law, as well as many realists and pragmatists, promoted a notion of decision-making in law based on purposive interpretation… Judges under this perception mediate social goals when they apply rules’. (Sinai and Alberstein 2016, 237–8)

However, regardless of the jurisprudential theory adopted or developed, responsive judging has the capacity to reignite debates in jurisprudence between realists and positivists in part because the role of the judge must necessarily extend beyond determination or adjudication. Although, as discussed further below, a third and arguably compelling theory—the social jurisprudential theory—arguably tethers both realist

and positivist theoretical elements (Tamanaha 2015) and is supportive of responsive judging (see below). From a pragmatic perspective, as Sourdin and Cornes note in their Chapter later in this work, there are good reasons to reject previously ascendant theoretical approaches as more formalist and even realist and positivist approaches may ignore the broader work undertaken by judges (which includes managing cases, contributing to education and debate and facilitating settlements). In respect of adjudication, an acceptance of, for example, more formalist jurisprudential approaches, arguably raises the prospect of potential judicial redundancy as Judge Artificial Intelligence (AI) becomes more feasible.

As some commentators have noted, the responsive judge concept may signal the continuing ascendancy of the realist jurisprudential approaches or may, as Tamanaha has suggested, support a third theoretical approach (Tamanaha 2015) (see below). At its simplest, however, responsive judging could be regarded as an essentially pragmatic approach to judging, that requires judicial consideration of matters beyond those who are in dispute and requires consideration of a broader societal impact. As noted by Aldisert:

> I believe that judges today do consider the pragmatic effects of alternative courses of decision. In their declarations of public policy, they attempt to accommodate the social needs of all who would be affected **by** their decisions, irrespective of whether those affected were the litigants before them…They consider economic forces, scientific developments, and identifiable expressions of public opinion. To be sure, this decisional process has deontological as well as axiological overtones. It bears a remarkable resemblance to classic natural law. (Aldisert 2009, 245)

A responsive judge must reject, rather than adhere to the Latin phrase: *Fiat justicia pereat mundus* (let there be justice, though the world may perish) as the responsive judge must accept that there is a judicial responsibility "to society and its values" (The Art of Justice 2012, 13). Whilst judges remain conscious of and bound by the law, responsive judges may go further and consider how the law is applied, developed (with a conscious consideration of societal wellbeing and operation) and how engagement with litigants and others takes place (see Kouroutakis 2014).

The potential difficulties that can surface in respect of responsive judging are mainly related to a separation of powers concern regarding political structures: essentially that judges should not interfere with the making of law which is intended to remain in most societies within the executive arm of government (often an assembly of some description). Coupled with this is a fear concerning "judge made law" which underpins much jurisprudential squabbling. In this regard, it is clear that judges within a court structure play an integral role in the government of democratic societies. Judges and courts are intended to provide an open forum to which citizens may come to assert or establish legal rights and to receive an enforceable determination of these rights. The process is subject to review through public scrutiny and a hierarchy of appellate courts. Judges therefore provide a medium through which law is created, explained and applied. From this perspective, responsive judging processes

and proceedings could be seen as "threatening the essential role of judges which is 'not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to values embodied in authoritative texts such as the Constitution and statutes'" (Australian Law Reform Commission 1997, referring to Fiss 1984) partly because there might be a suggestion that responsive judges might depart from previously authoritative approaches.

However, it must be noted that responsive judging need not involve any rejection of these values or indeed a focus on private interests at the cost of important public interests. Rather, responsive judging invites a consideration of the judicial function and role in the context of societal values and assumes that judges, and those they deal with, are human beings who vary, and have "messy" problems where simple solutions may be unattainable. As responsive judging processes may be diverse and include facilitative and other components, there is, however, a risk that a focus on the needs of an individual may obscure a focus on broader societal values (discussed further below). However, responsive judging may incorporate the need for broader enquiry about the impact of decisions and actions. In addition, judicial activity, in terms of engagement and empathy, rather than passivity, does not equate to a shift to a primary focus on individual needs. For example, responsive judges may use facilitative processes when encouraging settlement in civil disputes—these may vary from a discussion of the "issues" and a suggestion that settlement be attempted to judges providing a preliminary view (an evaluation) on issues that have been raised and the evidence that may be required. Other responsive judges may use facilitative processes and techniques of summary and reframing when conducting concurrent evidence ("hot tub") processes or when involved in specialist "problem solving" courts. Others may use therapeutic jurisprudence techniques to support offenders in a more collaborative court environment. Whilst the dominant characteristic or feature of these responsive judging interactions involves judicial activity rather than passivity, the responsive Judge retains an overarching focus on the application of the written law together with an appreciation of societal impact.

A fear relating to "judge made law" may drive some confusion and concern about the nature and approach of a responsive judge. It must be made clear, however, that a responsive judge, remains quite properly constrained by law. As Colby has noted, a responsive judge is appropriately and properly supportive of legal doctrine as:

> In brief, legal doctrine, at both the constitutional and subconstitutional level, is permeated with reasonableness and balancing tests and other doctrinal mechanisms that can- not possibly be employed effectively unless judges are able to gain an empathic appreciation of the case from the perspective of all of the litigants. A judge can neither craft nor employ legal doctrine competently if she is not willing and able to understand the perspectives of, and the burdens upon, all of the parties. (Colby 2012, 1946)

This perception, or view of responsive judging resonates with what has been described as the third branch of jurisprudential theory. Tamanaha has suggested

that the conventional jurisprudential narrative has been described (roughly speaking) as the debate between natural lawyers and legal positivists (Tamanaha 2015). In proposing a social legal approach to jurisprudence, a wide and diverse range of social theories can be used to support jurisprudential approaches and two propositions are critical: That "…law is social in nature and is best understood through an empirically-focused lens" (Tamanaha 2015, 32). It is this acknowledgment of the social interaction and social aspect of judging that is central to an exploration of responsive judging. In addition, a social legal jurisprudential approach can accommodate both positivist and natural law approaches, whilst providing more insights into how and why responsive judging can work.

Exploring key aspects of responsive judging with a social theory jurisprudential lens enables a consideration of how interactions take place and provides support for the development of empirical approaches to examine those interactions. As authors in later Chapters in this book have noted, there can be key areas of difference in terms of responsive judging in the context of impartiality, transparency and overarching objectives that have so far received little empirical attention. Given the diversity of approaches adopted by judges, some relevant issue areas have been summarized below.

2.1 Norms of Judging: Impartiality

In most jurisdictions, it is expected that a judge will be impartial. There are, however, fundamental differences within and between jurisdictions about what this may mean. In some jurisdictions, for example, impartiality may be linked to bias whilst in others it may be equated to indifference in the context of an outcome. In some jurisdictions it may be accepted that a judge will act "without fear of favour", whilst in others, it is expected that a judge may uphold the political belief system that may or may not be clearly articulated. There are also significant differences in the context of what a responsive judge may do.

During a hearing the processes used by a responsive judge can vary according to the circumstances and could involve a decision-maker adopting a facilitative stance and using many of the techniques of introduction, understanding and questioning more commonly regarded as therapeutic or ADR techniques. The timing of questions can be an important issue in determinative processes. Such an approach must also be balanced with natural justice requirements.[2] The rules in relation to natural justice impact upon the way in which material can be presented to a decision-maker, and also impact upon the nature and communication of decisions. Recently, natural justice and bias concerns have been re-examined as judges and others have become increasingly involved in case management processes and intervention at trial (Moore 2003).

[2]For judicial pronouncements on the rule against bias, see R v Watson (1976), Livesey v New South Wales Bar Association (1983), Vakauta v Kelly (1989).

In addition, at hearing, the identification of issues can also be crafted by a responsive judge in a neutral way, as would be the case in a facilitative process, however, the issues will often also be determined by some external criteria such as legislation (that defines the legal rights). For example, issues that relate to future relationships or communication may not be dealt with in the substance of the decision (clearly such matters will be of central importance in relation to some decisions). Such an approach may not raise issues about bias, however, it could be suggested that in some jurisdictions this somewhat managerial approach is contrary to adversarialism (see Thornburg 2010; Hughes and Bryden 2017).

At the end stages of hearing a dispute, responsive process approaches may also be useful in assisting to identify and express issues. For example, the analytical stage in adjudication will clearly involve a weighing up of relevant material. Unlike facilitative processes, this focus will usually be upon materials that are relevant to the determination of legal rights rather than needs or interests. However, the broader needs and interests can be considered to ensure that the decision that is made is crafted to ensure that the parties understand and appreciate that they have been heard.

In terms of the delivery and composition of a decision, responsive techniques can be useful in ensuring that the decision is conveyed in a sensitive, serious and appropriate manner. The extent to which the decision refers to evidence or material put by various parties can also assist to determine the extent to which the parties accept the decision. These issues have been largely unexplored in any research about judicial decision-making. Perceptions of litigants, for example, as well as their future actions, may in part be formed by the quality of the decision and the manner in which it is rendered. Other factors may relate to the personal attributes of the decision-maker or adviser and the way in which the decision is rendered. The degree of eye contact, the pitch and tone of the voice, and whether the decision is rendered in person or 'on paper' may all be relevant factors in determining whether or not the decision will be accepted or complied with.

Essentially, the responsive judge, insofar as an individual dispute is concerned, may use a blend of skills to communicate, manage and determine a dispute. One area where blending the functions has been more actively developed is within the context of "problem solving courts" (Phelan 2004). In this context, it is expected that a judge will adopt responsive skills in order to "hear" a dispute and explore options and community concerns. Problem solving courts have been defined in policy framework as "specialist tribunals established to deal with specific problems, often involving individuals who need social, mental health, and/or substance abuse treatment services" (Courts and Programs Development Unit 2006). In recent years, problem solving courts have emerged in a number of jurisdictions. Seventeen countries now have a problem solving court of some description and in the United States (where problem solving courts were created) there are over seven hundred problem solving courts in operation.[update] Australia has also piloted and implemented a number of specialist courts for disadvantaged or specified members of the community. In the last two decades, Indigenous courts, domestic (or family) violence courts and sexual offences courts have been introduced and operate around Australia.

Problem solving courts have been defined as courts that:

> … use their authority to forge new responses to chronic social, human and legal problems. They seek to broaden the focus of legal proceedings from adjudicating past facts and legal issues to changing the future behavior of litigants and ensuring the future of well-being of communities. (Berman and Feinblatt 2004, 126)

Problem solving courts aim to use the legal process to create and advance the opportunities for treatment and rehabilitation of offenders (Indermaur and Roberts 2003; Wexler 1995). The key element of a problem solving court, as opposed to specialist courts which employ therapeutic jurisprudence practices, is that problem solving court judges are responsible for post-adjudication services, including the creation, development and monitoring of treatment for participants (Belenko 1998).

As with all applications of therapeutic jurisprudence, the criticisms of problem solving courts center around breaches of constitutional barriers relating to the separation of powers and judicial independence, ex parte communications with defendants, impartiality and natural justice (Hoffman 2000; Freiberg 2001). As Richard Cappalli notes, relevant to problem solving courts is the question of whether offenders are coerced into participation and thus, whether they are truly consenting to their involvement (Berman 2000). This is of particular concern as the length of the program an offender enters into is often undefined at the outset and participants may be asked to sign a waiver, which requires their involvement in the program for an indeterminate period (Nolan 2003). Moreover, the presiding judge is responsible for setting treatment goals and boundaries for program participants. This requires an awareness of cultural and other background influences which may affect the person's participation in the program, and although this is done in consultation with a court team,[3] ultimately it is the judge's decision as to what limitations and expectations are set (King and Wager 2005). The broader social responsiveness that is required is a hallmark of judicial responsiveness practice in that it applies beyond the individuals involved in a dispute.

2.2 Norms of Judging: Independence and Transparency

Whilst some responsive judging approaches will raise issues about impartiality, others may raise issues about independence and transparency. As noted above, such issues may be more pronounced where some responsive functions are concerned. Judicial mediation, for example, that does not take place within an open court may legitimately raise both issues (Sourdin 2014). Where a judge is collaborating with others, for example in a problem solving or therapeutic court context, to ensure that services are aligned, available and supportive, questions might also be raised about judicial independence if a responsive judge fails to separate and focus on general process rather than individual matters which can be dealt with in open court.

[3] A court team usually consists of a variety of professionals from different backgrounds including defense lawyers, community support agents and treatment providers such as psychologists, social workers etc.

In terms of communication skills that take place within an open court, one question is whether open communication or the use of empathy might suggest that a judge is no longer independent. As Colby has noted:

> the argument here is neither grounded in extralegal, touchy-feely notions of humanity and compassion nor based on some sort of radical vision of wealth redistribution through activist courts. Nor, for that matter, does it spring from a post-Realist rejection of "law" as a legitimate constraining force on judges. Quite to the contrary, the argument is grounded in a firm commitment to the rule of law and a deep-seated appreciation of—rather than rejection of—legal doctrine. In brief, legal doctrine, at both the constitutional and subconstitutional level, is permeated with reasonableness and balancing tests and other doctrinal mechanisms that can- not possibly be employed effectively unless judges are able to gain an empathic appreciation of the case from the perspective of all of the litigants. A judge can neither craft nor employ legal doctrine competently if she is not willing and able to understand the perspectives of, and the burdens upon, all of the parties. (Colby 2012, 1946)

The central task of the responsive judge and the requirement of independence are not necessarily at odds. As Colby has also noted:

> But the law is not mechanical; judging requires judgment. And judgment requires empathy. To understand why, we must explore the nature of the legal doctrine that judges are called upon to apply. (Colby 2012, 1965)
>
> A judge who believes in the popular portrait of judges as umpires, and who rejects as illegitimate calls for judicial empathy, will "call 'em like he sees'em"—applying the law as he understands it to the facts as he perceives them. What he will fail to realize is that he is seeing the case from a particular perspective—his own—and is mistaking that perspective for an unbiased, neutral one. What he views as the disinterested, "correct" answer will in fact in many close cases just be the contingent answer that he arrives at after unintentionally privileging his own perspective—subconsciously empathizing with those whose experiences he shares, whose perspective comes naturally to him, and whose plight strikes a chord with him. (Colby 2012, 1992)

Some writers draw a distinction in terms of empathy and independence between determining what the law is and the application of law within the courtroom. As Chin (2012) has noted:

> "Empathy, of course, should play no role in a judge's determination of *what* the law is…Nonetheless, there is a place within the law for empathy and emotion. In my view, empathy is an essential characteristic for a judge" (1563–4) and "emotion—some emotion, emotion both ways, emotion not alone but in combination with the law, logic, and reason—helps judges get it right". (1580–81)

The consideration of the distinction between process, substantive law and outcome highlights the more humane approach taken by responsive judges. It involves considering and applying the law:

> Judges are not totally free, nor are they totally bound. They are trained in law and legal argument, they influence and are influenced by legal materials and legal culture. Judges would not be judges, and lawyers would not be lawyers, if they did not acknowledge or consider the laws, doctrines, and principles that are the very nature of their enterprise. But perhaps they can listen to and use the materials more effectively and more humanely, if they do not try to take refuge in the pretension of "pure reason" alone. (Henderson 1988, 147–8)

Again, some theorists note that this approach is central to a consideration of the jurisprudence of judging and critical in terms of a consideration of responsive judging. Brennan has noted that this may involve a judicial internal dialogue of "reason and passion" that may not necessarily be translated into courtroom interventions or approaches but which may result in a responsive decision:

> By "passion" I mean the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason. Two hundred years ago, these responses would have been called the responses of the heart rather than the head…An appreciation for the dialogue between head and heart is precisely what was missing from the formalist conception of judging. (Brennan 1988, 9)

2.3 Civil and Common Law Traditions and Objectives

The development of responsive judging can also be viewed from the perspective of the development of justice objectives. The evolution of justice objectives has according to many commentators undergone a rapid development over the past two decades (Sourdin 2016a) so that justice objectives are no longer perceived to only apply to courts and judicial processes. These shifts have enabled in part the development of more socially responsive justice objectives. There is also often a distinction made between civil and criminal justice objectives. In the criminal sphere, past justice objectives might be both utilitarian, and focused on reducing and preventing crime, and non-utilitarian, where justice serves to articulate and enunciate what is right or wrong behavior. In contrast, in the civil sphere, justice objectives have included resolving or limiting disputes, rule-making and providing outcomes that are consistent with law and social policy, articulating and enouncing the law and, in recent years, a greater focus on doing so efficiently and fairly (Sourdin 2016b).

In the context of responsive judging, a greater consideration of "wellness" as well as social impact has emerged that supports a broader range of processes and outcomes. There are a number of examples of this changing focus. From Australia, Draft Civil Justice Objectives (2012) state:

> Draft Objectives for the Australian Civil Justice System
>
> The Australian civil justice system contributes to the well-being of the Australian community and fosters social stability and economic growth.
>
> 1. People[4] are empowered and have the capacity to solve their problems before they become disputes
> 2. People can expediently resolve disputes at the earliest opportunity
> 3. People are treated fairly and have access to legal processes that are just
> 4. People can resolve their disputes at a reasonable cost

[4]The term 'People' in this context is understood as including any legal entity which may use services provided by the civil justice system including corporations, incorporated associations etc.

5. People have equitable access to the civil justice system irrespective of their personal, social or economic characteristics or background
6. People benefit from a civil justice system that contributes to the well-being of those who use it
7. People can be confident that the civil justice system is built on and continuously informed by a solid evidence base.

Such objectives with a focus on well-being at both an individual and societal level may support responsive judging practices. As Stępień has noted:

> According to the responsive model one could weigh and anticipate the consequences of a certain choice by considering the level of legitimisation, public trust in the court system, or a specific measure of social prosperity such as increase in satisfaction, social utility, welfare or Gross Domestic Index…Responsive adjudication guarantees a larger extent of flexibility and a better adjustment of the decision to the specific circumstances and context. (Stępień 2013, 140–1)

In addition, a focus on "access" over the past three decades imports a broader discussion as access might not only involve the removal of barriers and consideration of the cost of justice, but may also include considering whether people understand justice processes and outcomes, thus supporting more responsive judicial practices that incorporate social understanding, communication skills and knowledge beyond the law.

Similarly, efficiency may require a broader societal perspective. The Australian Law Reform Commission (ALRC) (1997, [3.14]) has noted:

> Efficiency can be viewed from a number of perspectives including
>
> - the need to ensure appropriate public funding of courts and dispute resolution processes that avoid waste
> - the need to reduce litigation costs and avoid repetitive or unnecessary activities in case preparation and presentation
> - the need to consider the interests of other parties waiting to make use of the court or other dispute resolution process.

Efficiency can also refer to long-term gains, rates of compliance, and the broader costs of unresolved conflict. Using these broader notions of efficiency, responsive processes might arguably meet efficiency objectives more readily than conventional litigation or non-integrative processes. In addition, some of the possible benefits of responsive judging are difficult to measure. For example, the increased use of responsive judging may lead to a decrease in litigious or adversarial behaviour,[5] foster better relationships between parties to disputes, or result in higher levels of compliance with outcomes.

[5] It has been suggested that those exposed to cooperative dispute resolution processes develop more constructive communication patterns and less obstructive behaviour: Wanger (1994).

The ALRC (1998, 27) has also noted that:

> Effectiveness implies that
>
> - the process should ensure, or at least, encourage a high degree of compliance with the outcome
> - at the conclusion of the process, there should be no need to resort to another forum or process in order to finalise the dispute
> - the process should promote certainty in the law.

In terms of responsive judging and effectiveness, the extent to which the process can or should promote satisfaction is relevant. Satisfaction could be a criterion to be considered when determining whether or not a process is effective. For example, can a process be regarded as effective if all concerned with the process are unsatisfied?

Effectiveness as an objective can also be considered in the context of the debate about the role of courts and their objectives has also occurred in the context of problem solving courts and notions of integrated therapeutic justice. As Phelan has noted, the emergence of problem solving courts has:

> … challeng[ed] the nature of courts and represent[ed] something of a revolution in the way that courts might operate in modern, democratic societies. Problem solving courts are examples of courts working in partnership with other agencies, both inside and out of conventional justice fields and with "the community" to produce better social outcomes. (Phelan 2004, 137)

Arguably responsive judges are already grappling with an expanded perspective of the objectives of the litigation system designed to promote more satisfying, party and future focussed outcomes which may challenge more traditional perspectives of judicial and court functions.

3 Elements of Responsiveness

The rationale for an increasing judicial focus on responsiveness can partly be explained by societal, court, justice sector and other factors that are responsible for re-interpreting the judicial role. A modern society increasingly requires that judges respond to factors that were previously less relevant to the judicial role. Core elements of such responsiveness are set out in Table 1 and are discussed in detail in the following section.

3.1 Responding to Accountability

In the 1970s, particularly in America, the public perception arose that an overly litigious society was filling the courts with a volume of civil claims which could not be expeditiously resolved (Church 1982). At the same time, the rights of a criminal

Table 1 Potential responsive judging elements

In court engagement—individual and social responsiveness	Decision making—individual, social and legal system responsiveness	External court engagement—social and legal system responsiveness
Use of empathy and therapeutic jurisprudential approaches	Articulation of decision considering the needs of participants	Engaged in public policy debates and legislative reform
Refined and supportive communication skills	Checking understanding and framing decisions appropriately	Involved in public education
Referral of participants to support services	Considering broader social and legal system impacts including the cost of, and access to justice	Use of social and other media
Settlement functions that could extend to judicial mediation	Drawing attention to shortfalls in policy or legislation	Collaboration in problem solving court environments
Robust engagement with the social factors that led to offending or the dispute	Developing and articulating legal theory	Awareness and collaboration with drug, alcohol and mental health services
Consideration of those not present in court	Analysis and reasoning that incorporates a wider social view	Articulating an agenda for reform

accused to stand trial within a reasonable time had to be given preference. Consequently, the courts were seen to be overburdened and the legal system to be in need of reforming which was the preferred response to simply appointing more judges (Burger 1976). Courts were challenged to become more efficient and effective in resolving cases with a view to maintaining "proportionality" between the costs and benefits of litigation (Uzelac 2014).

One of the court reforms pursued as a result of these critiques was to empower judges to take a more active role in managing the pretrial phase of civil litigation (Baicker-McKee 2015; Federal Rules 2017). Through amendments to court rules judges were given the authority to control processes such as disclosure and exchange of documents and information ("discovery" in the common law tradition), and to initiate and promote settlement activity (Brazil 1985; Elliott 1986; Rabinovich-Einy and Sagy 2016; Zimmerman 2017). Some commentators have noted that the development in common law courts of judicial management of litigation can be described as actual or potential convergence of expectations of the judicial role in common law and civil law systems (Hazard and Dondi 2006; Rowe 2007; Dodson and Klebba 2011; Emerson 2015). Particularly when judges were assigned a case from start to finish ("individual calendaring") this resulted in judges becoming intimately acquainted with the litigation before them at an early point, and to a depth that was unprecedented, at least in the common law world.

Also as part of the drive for efficiency in court operations judicial performance indicators and evaluation systems were also introduced together with new technologies that enabled continuous scrutiny (Fix-Fierro 2003). Judges could manage more easily the pace of litigation on their calendars, and Chief Judges could monitor the resolution rate of claims maintained by individual judges in their courts (Kourlis and Singer 2007, 2010). Consequently, rather than waiting for parties to be ready for trial, judges became proactive in moving matters along, and assisting in various ways to enhance the prospects for settlement (Langbein 2012). Judges began to actively shape cases with the likelihood of settlement in mind (Infante 1997). Reforms and changes in judicial practice similar to these in the United States subsequently occurred in most other common law jurisdictions. In civil law systems judges have always been expected to take early control of the trial process, particularly in relation to evidence gathering (Langbein 1985), so such changes were not very pertinent in those jurisdictions, although similar judicial performance evaluation systems were in place there.

Frank Sander's seminal call for a "multi-door courthouse" (Sander 1976) foresaw a place for courts as screening points in the growing movement for alternative dispute resolution (ADR), but it did not envision a new role for judges. As ADR proliferated in the business world and local communities, however, calls to institutionalize alternative processes in courts were heard and answered. Court-connected mediation and arbitration programs were introduced, usually under the supervision and direction of judges (Kessler and Finkelstein 1988; Kaufman 1990; Stempel 1996; Brazil 1999; French 2009). Eventually, some judges began to offer their services to litigants as mediators or conciliators over and above their role as mere proponents of settlement (Galanter 1986; Colatrella 2000; Alexander 2009). Judges with extensive knowledge of the litigation on their calendars became even more privy to the merits of the cases through acting as mediator or dispute resolver. Such active involvement of judges prior to trial raises ethical questions of impartiality and confidentiality which remain contentious today. However, in many jurisdictions such as Canada and Singapore, the role of judicial mediator is now well established. Judges who embrace this function see it as another way of meeting litigants' needs for resolution through processes that are not win or lose as trial inevitably is. In some civil law jurisdictions, a similar active role in facilitating settlement is expected of judges (Haavisto 2002). Judges providing ADR is another example of responding accountably to the public for the expeditious resolution of disputes with the possible additional benefit of more tailored, flexible solutions to underlying problems, thus combining efficiency with effectiveness.

Accountability of judges may also be seen in some jurisdictions which have vested more management authority over the courts in judicial officers (Forde 2001). In many cases as well, courts and judges have embraced advanced technologies such as online filing of documents, videoconferencing of hearings, and digitally enhanced trials as responses to the demand for cost-effective proceedings.

Judicial responses to the call for access to justice have become even more urgent in recent times as large numbers of litigants enter courts without lawyers. Access to justice originally meant access to legal representation, but has grown to include many