Chapter 16
Access to Justice: Is ADR a Help or Hindrance?

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Abstract The Access to Justice movement and the Alternative Dispute Resolution movement have shaped the way we perceive the role and functioning of courts in society. Both movements have criticised the courts for failing to provide precise, real and achievable justice for citizens. The third "wave" of the Access to Justice movement has emphasised ADR as a tool for providing better dispute resolution processes resulting in better outcomes. Court-connected mediation has been presented as a key solution, but it has mainly failed its promises, sometimes even reducing real access to justice. In this text, the reasons why ADR in general and court-connected mediation in particular has failed its task are discussed. Then the main conditions for ADR providing increased rather than decreased access to justice are discussed. The need for understanding that ADR consists of a range of different types of dispute resolution mechanisms, the need for dispute resolution system design and the need for appropriate regulation for each type of dispute resolution process are highlighted as the most important preconditions for releasing the potential of ADR as a tool to provide access to justice.

16.1 Introduction

Access to Justice and Alternative Dispute Resolution (ADR) movements have influenced both legal thinking of civil procedure and policymaking on the functioning and role of the courts. Both movements have uncovered weaknesses and malfunctions of the traditional court system and civil procedure, and both have offered solutions to improve and develop the systems. The two movements were born in the late 1960s and early 1970s. They both offer a criticism of civil procedure based on practical, ideological and academic knowledge and insights.

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In this text, the relationship between Access to Justice and ADR will be explored. To start, the two movements will be introduced. Both movements argue that settlements and procedures outside of the courts might be a solution under some circumstances. Then a short presentation of the discussion on the advantages and disadvantages of settlements and different methods of dispute resolution in both movements follows. The ideas of the ADR movement have been partly embraced and implemented by the legislator. The legislators have, however, only taken some limited parts of the ideas of the ADR movement; therefore, the way court-connected ADR is practised is often far from the original ideas and ideals. After the general discussion on the developments of the two movements, the way ADR can both enhance and hinder access to justice is discussed. Finally, the way ADR can be used to increase access to justice will be analysed.

16.2 Access to Justice and Alternative Dispute Resolution Movements

16.2.1 Access to Justice

The Access to Justice movement is based on the idea that the civil procedure system and legal rules should be equally accessible to every citizen. The movement has provided insights on how legal and societal structures and institutions influence the function of the courts and how the actual access to justice often is weak for many social groups. A criticism of the traditional purely normative approach to civil procedure is one of the cornerstones of the movement. It is both a reform movement for societal change and a theoretical approach,[1] based on interdisciplinary research, for analysing the problems in civil procedure.

Three "waves" of the movement have been identified: the first wave focused on the cost of litigation and the need for legal aid, the second wave focused on collective and fragmented claims and making use of class or group actions and the third wave focused on using ADR to provide an alternative way to solve disputes.[2] These waves are based on a broad international analysis[3] and do not necessarily fit the Nordic context. In the Nordic countries, consumer protection boards and ombudsmen have been an accessible way to solve disputes,[4] and legal aid has been readily available. However, civil (court-connected) mediation and other forms of civil alternative dispute resolution processes are fairly new in Europe.

[1] Cappelletti (1993), pp. 282–283.

[2] Cappelletti (1993).

[3] Cappelletti and Garth (1978).

[4] Ervasti (2004).

Access to justice refers to any type of hindrances for the citizens to have a practical and usable way to realise their legal rights. The three wave model does not cover all hindrances citizens are facing. There are many other problems than lack of legal aid, backlog of cases, formalistic rules and lack of processes suited for collective interests. The public might not be aware of the legal rights or which procedure to use; the laws are increasingly more inaccessible as they are too detailed, too open or too technical; and there might be overlapping systems of regulation on an international, national or local level.[5] There are also some more fundamental problems with the concept of justice (and fairness), and the legally "correct" solution might not be the preferred or best for the parties. Justice is a complex phenomenon, as there are different kinds of justice: distributive justice, reparative justice, retributive justice, procedural justice, and relational justice. Justice is not merely a question about who pays what but a question of the process and on finding equity.[6] Access to justice can be enhanced by improving processes, thereby giving the participants voice and choice, by enhancing self-determination and empowerment. Also, access to justice might be a question of satisfying non-legal, even non-monetary, interests and needs, and about the labels used, for instance dropping the labels custody and visitation have given many parents a feeling of achieving justice, although the contents of the agreement on parenting are still the same. Consequently, access to justice is much more than legal aid, legally "correct" solutions and the opportunity to have a day in court.[7]

For lawyers, understanding the "additional" problems of access to justice might be difficult. Often, access to justice is understood as access to court, *i.e.*, a possibility to get a judgment within reasonable time and for a reasonable price. However, going to court often means reducing the conflict to the legally relevant parts of it, reducing the problem of the parties to the parts recognised by the legal system as legally relevant. In the same way, solutions are limited to the law. This makes the system potentially highly paternalistic, where lawyers define what the parties need and want, and "squeeze" the parties to the sideline of the dispute resolution process. In a polycentric, principle-based, teleological legal system, only lawyers understand what the law is and can predict the outcome of the case. Therefore, the citizens are increasingly dependent on lawyers in navigating the legal system, and more vulnerable.

The Nordic societies are fairly equal, and based on cooperation rather than confrontation, and Nordic civil procedure far less contentious and confronting than its US American counterpart. Still many problems of access to justice exist: there is often not a procedure offering accessible and appropriate help to solve the legal problems of the citizens.

[5] Rhode (2004), pp. 3–23 and Storskrubb and Ziller (2007), pp. 188–195.

[6] Deutsch (2006).

[7] Cappelletti (1993) and Rhode (2004).

16.2.2 The Alternative Dispute Resolution Movement

The Alternative Dispute Resolution movement is similar to the Access to Justice movement as it, too, is a mixture of ideological criticism, a search for better alternatives to a flawed system and scholarship showing how and why the dominant system is flawed. The ADR movement is built on a twofold criticism of litigation (and arbitration): the process and the results. The results are flawed because litigation is based on competition; distributive (win–lose) agreements limited to monetary issues and a purely legal analysis of the case. The process generally accelerates the negative conflict spiral between parties and usually disempowers and alienates the parties.[8]

The core of the movement has been directed towards developing mediation as a method for dispute resolution. Other strands of the ADR movement have been more focused on involving the parties and the local community, such as the community justice movement and groups developing public mediation initiatives such as regulation–negotiation (reg–neg). Since the 1970s, the ADR field has developed to include many different forms of dispute resolution used in various contexts, a more general theory on different forms of dispute resolution, when to choose what kind of dispute resolution and how to design dispute resolution systems within an institution.[9]

Conflict resolution theories, which the ADR movement are based on, have brought new perspectives to dispute resolution. One of the most important insights is the difference between conflicts and disputes, where the word conflict refers to the underlying set of events, facts and relationships forming the backdrop of a dispute, usually a single event that can be legally defined to form the basis for a claim. The dispute is a reformulation and a part of a conflict as it is defined by a lawyer as legally relevant. The conflict is the background of the dispute and is usually much more complex. By solving the dispute, the underlying conflict is often not solved.

The idea of ADR was to provide not only alternative dispute resolution but also *appropriate* dispute resolution,[10] which means that the process matches the needs of the parties and the kind of dispute at hand. ADR is an integral part of a multi-door courthouse, where disputes are directed into different "rooms", offering different dispute resolution processes.[11] Judges and legislators were also interested in the reduction in conflict levels because a reduction in the conflict level probably reduces the need for further litigation and for the government to take measures to enforce the agreement. Many were also interested in the possibility to achieve a less stressful, less contentious, and less competitive procedure and better results for the

[8] See *inter alia* Menkel-Meadow (2000, 2006) and Zariski (2010).

[9] Menkel-Meadow (2000, 2005).

[10] Menkel-Meadow (2001), p. 979.

[11] See *e.g.* Sander (1976). Frank Sander is considered the father of the idea.

parties.[12] ADR could give citizens more affordable and faster ways of solving their cases than litigation. Especially, small claim mediation and neighbourhood justice centres could contribute towards this aim and would therefore also contribute to access to justice.[13]

The growth of ADR, especially mediation, outside the courts, has been dependent on three concurrent developments: dissatisfaction with the legal process for creating good results, dissatisfaction with cost and delay of court procedures and the increased legislation on arbitration making arbitration more expensive and less flexible. The dissatisfaction with the procedure itself and the results could to some degree, be compared to the limited aspects of justice, namely mostly the distributive, discussed in court, and the limited legal remedies.[14]

As different dispute resolution processes have been developed, ADR today includes theories on different types of dispute resolution and on dispute resolution system design. Different ways of classifying dispute resolution have been developed. One important method of distinguishing between the systems is to look at the role of the third party involved. In *adjudicative processes*, the third party decides the case for the parties (*e.g.*, arbitration); in *non-binding adjudicative processes* the third party decides the case but the decision is not binding for the parties (*e.g.*, non-binding arbitration, summary jury trial); in *evaluative processes*, the third party gives an evaluation of the case, or a recommendation, but does not give a final decision (*e.g.*, Early Neutral Evaluation, Expert Evaluation); in *facilitative processes*, the third party helps the parties find a solution but does not decide or give a recommendation (*e.g.*, mediation, conciliation); and in *non-third party processes*, the parties decide the case without involving a third party (*e.g.*, collaborative law, negotiation). There are also mixed or hybrid processes, combining elements from two or more pure processes (*e.g.*, med-arb, evaluative mediation and mini-trial).[15]

The second way of classifying processes is to look at the use of norms: are the norms used predominantly legal, social or professional; who decides which norms are used, and are (legal/social) roles used as the sole or primary source for the outcome; or can the parties themselves decide if norms are used and which norms are used? The parties can either get help to form norms to solve the conflict (and future interaction between the parties); the parties could be educated about relevant norms, which they could then adapt and apply in their conflict, or the third person could advocate the use of, and a specific understanding of, a certain set of norms, usually legal or technical norms.[16]

[12] These goals are clearly stated in the government bills in the Nordic countries, see the Dansih Report no. 1481/2005 on court-connected mediation, the Finnish Hallituksen esitys HE 284/2010 and the Norwegian NOU 2001:32.

[13] Christie (1977).

[14] See *e.g.* Menkel-Meadow (2006) and Menkel-Meadow (2001).

[15] See *e.g.* Kovach (2004), pp. 6–18 and Moore (2003), pp. 6–14.

[16] Waldman (1997).

The second way is to look at the level of formality in the processes and categorise them as formal, semi-formal and informal.[17] The third way is the most holistic approach as it offers a number of different variables for evaluating the relative formality or informality of any dispute resolution process.

From early on, the ADR movement has faced many challenges, especially within the legal court-connected context. Mediation has become a term used to describe a wide range of processes. This is problematic because the movement is not just about finding alternative but also about finding appropriate dispute resolution and requires that many different processes should be available to find the most appropriate procedure to solve a specific dispute. When ADR is reduced to mediation, the benefit of having a range of processes will disappear.[18]

Moreover, court-connected mediation has been co-opted by lawyers and often reduced to a process resembling judicial settlement conferences. Much of the criticism of dispute resolution within the court system and much of the ideas for offering alternative, more constructive and economically more sound process and outcomes were lost in the process. This development is discussed in more detail below.

Finally, the focus has been on dispute resolution within the court system, as court-connected dispute resolution. ADR often refers to dispute resolution where the court mandates or recommends alternative dispute resolution after the parties have filed the case, has shifted focus away from dispute resolution outside the courts and the narrow legal frame, such as dispute resolution boards and neighbourhood justice.

Consequently, lawyers, policymakers and the legislator often lack an understanding of the idea of ADR as appropriate dispute resolution and of the many different and truly alternative ways to solve disputes. ADR as a synonym for mediation (and sometimes arbitration) is only a small piece of what the movement has to offer for dispute resolution, the society and research and theories on dispute resolution.

16.2.3 Rhetoric and Reality of ADR

Court-connected mediation, the most discussed and visible form of ADR, was introduced to give the parties in disputes an alternative, faster, less stressful, more durable, and more interest-based process. In practice, the most important argument for introducing court-connected ADR, particularly court-connected mediation, seems to be economical. Mediation is considered faster and cheaper, therefore a way to reduce congestion and the backlog of cases and reduce the workload of the judiciary. There are many claims that mediation will result in a cheaper process for the parties. The rhetoric has clearly been adopted from the US American debate. However, there is no evidence from research that mediation is cheaper than litigation for the society, the courts and the parties.[19]

[17] Menkel-Meadow (2012).

[18] Gerencser (1998) and Love and Kovach (2000).

[19] Wissler (2004), pp. 67–68.

Mediation is often presented as a process where the mediator helps the parties to negotiate an interest-based solution, which will be more durable than a traditional judgment. However, when mediation is described in more detail, the less it looks like a facilitative, interest-based, informal and norm-generating process. The main goal seems to be reaching settlement, regardless of its content, as fast as possible.[20] The rules governing mediation are often very general, and mediation is not clearly defined. Mediation is often used as a synonym for ADR, and covers a range of different procedures, without making a distinction between them and how to choose the most appropriate for the individual case.

The rhetoric promises a cheap, fast, facilitative, interest-based process, but reality does not match it. The research available on the practice of court-connected mediation in the Nordic countries, in addition to more anecdotal evidence, shows that mediation is often practised as an evaluation session, where the mediator will give his or her prediction of the probable outcome of a trial. Sometimes the process could be described as a non-binding mini-trial or mini-arbitration: the mediator will recommend a solution, thus setting pressure on the parties to accept a specific solution (with minor changes).[21] Other mediators will be less directive but still use some indirect pressure on the parties to reach a settlement, adopt a certain view on how the case should be solved, or both. Some will be facilitative but define the problem narrowly, and some will be both facilitative and interest based. Mediation has been co-opted and could be described as "litigotiation"[22] or "litimediation".[23]

The practice is not surprising, considering that mediation as a facilitative, interest-based, informal and norm-generating process is very different from the traditional way of legal thinking and what most lawyers have been educated to do. The more formal and adjudicative a process is, the more familiar it is to lawyers (who are trained to decide cases and to give their clients an estimate of the probable outcome in a trial); thus, lawyers seem to design and use processes that are similar to a trial. When lawyers do not understand the theoretical foundations nor have (sufficient) training in the skills needed, they tend to use more familiar processes but might still label the adjudicative or evaluative, formal or semi-formal processes as facilitative, informal processes.

In a lawyer-dominated setting, especially court-connected mediation, the judges, mediators and advocates will resort to more evaluative or even adjudicative, law-based, semi-formal and norm-advocating process. The traditional idea of settlement, without expanding it to the new reasons and justifications, becomes the dominant factor in determining the raîson-d'être for ADR. ADR is therefore often, in reality, an avenue for settlement, not an increased access to justice. Parties

[20] See *e.g.* McAdoo and Hinshaw (2002). See Mykland (2010) for the Norwegian reality of mediation.

[21] Mykland (2010), Adrian (2012) and Knoff (2001).

[22] Galanter (1985), p. 1.

[23] Lande (1997), p. 840.

should settle to save time and money, not participate in ADR, because they might get more or more precise justice in a better process.

16.3 Is Settlement and ADR Better than Litigation?

In most societies, settlement and conciliation is preferred over contentious litigation. Therefore, the current trend to promote settlement is not a new turn but a new twist. The new development is the reasons for preferring settlement are economical rather than social,[24] and the organisation of settlement activities. Many scholars[25] have criticised the current debate for over-emphasising the benefits of settlement, or disregarding the drawbacks of settlement,[26] rather than discussing under which circumstances a settlement can be considered "good".

Both the Access to Justice and the ADR movements have supplied reasons for preferring other types of dispute resolution than litigation (and arbitration): the processes are often cheaper and faster; they are open for more party participation; they allow solutions that are not limited to the distributive, legally defined monetary solutions offered by law; and the outcome is often more satisfactory; therefore, the parties comply to it. Additionally, new procedures often cater to the needs of multiparty cases better than civil litigation does. Finally, conciliation, or non-contentious procedures, is considered less stressful and less harmful for the future relations between the parties.

However, settlement and conciliation might also work against the goals of both movements. In some cases, a precedent is needed or publicity is needed to set an example or to show that a party is a "repeat offender". The organisation and use of ADR might result in "poor justice for the poor"[27] or "discount justice".[28] This means that the procedure is highly settlement oriented, and the third party pressures the parties to settle regardless of the terms of the settlement or whether the parties are willing to accept the settlement. In other cases, ADR becomes a quasi-trial without the legal safeguards of publicity, reasoned decisions, sufficient opportunities for the parties to argue their case or sufficiently adversarial, especially if private meetings are used. The argument of saving time and money might be false if the parties make decisions that are not informed, especially if the parties would never enter into an agreement on such terms when having sufficient information. Also, if the parties do not settle their case, they will have to go through expensive and time-consuming litigation. The more ADR resembles tossing a coin, or an abbreviated

[24] See also Cappelletti (1993), p. 287.

[25] Among others Galanter and Cahill (1994) and Menkel-Meadow (1985).

[26] Fiss (1984).

[27] Cappelletti (1974).

[28] Dalberg-Larsen (2009), pp. 118–121.

trial with (indirect) mediator pressure to settle, the less it fulfils the ideas and goals of both the Access to Justice and the ADR movements.

ADR consists of a range of very different procedures, some of which are appropriate for some conflicts in some contexts, while others are not, and vice versa. Therefore, ADR in general does not promote access to justice in all cases. By offering one or two different ADR processes, good settlements can be promoted in a way that increases access to justice. However, introducing new ADR mechanisms is not enough. The organisation of the programs; funding of them; training of the personnel, particularly the third party neutrals; and the rules and regulations will have an impact on whether a particular dispute resolution process has the capacity to enhance access to justice. Even though a process as such might have the potential of contributing to increased access to justice, funding or regulation might result in the potential not being released and realised. Important factors are the following: which cases should be directed to which kind of dispute resolution program; how are the programs defined, regulated and organised; and what kind of training and experience is required of the third persons?[29] The key question is then not whether ADR can enhance access to justice but under which circumstances.

16.4 ADR as a Hindrance to Access to Justice

Access to Justice and ADR are based partly on the same or similar principles; therefore, ADR seems to be a good solution to increase access to justice. In practice, ADR, or more precisely court-connected mediation, has not contributed significantly to increased access to justice. How can two movements that partly overlap have conflicting results?

ADR is supposed to be a solution to the problem of cost and delay of going to court. One of the most cited reasons for introducing court-connected mediation is saving cost and time. However, there is no evidence that court-connected mediation saves time and money.[30] Many cases are settled before trial without the parties having to resort to mediation. While court-connected mediation provides relatively speedy and cheap dispute resolution for those who settle, in cases where the parties do not settle mediation causes increased delay and costs. Some of the mediated cases would settle before trial without mediation. Research from the US shows that some parties who were pressured into settling their cases will try to overturn the settlement by suing the mediator or by referring to duress or undue pressure or by trying to escape the agreement in other ways.[31] In the Nordic experience, there are

[29] Lande (2007), Oberman (2008), Gerencser (1998), p. 857 ff., Menkel-Meadow (1997) and Fuller (1971).

[30] Wissler (2004).

[31] Nolan-Haley (1999, 2009), Welsh (2001) and Oberman (2008).

some dissatisfied parties,[32] but so far post-settlement litigation has been very rare. One might therefore argue that ADR is introduced to limit the access to courts, as the parties are not only encouraged but also sometimes pressured or mandated to use ADR before filing a case or before trial.[33]

Another hindrance for access to justice is the court procedure and the outcomes of it. Procedural rules, especially rules on evidence, might hinder what can be discussed and which facts the process and the solution can be based on. The adversarial nature of civil procedure encourages competition and focuses on disagreement rather than cooperation, empowerment and relation building. Civil procedure is oriented towards the past problems and injustice made, not future solutions making the wrong right. Legal rules have monetary compensation as the primary, and almost exclusive, remedy. Together, the law and legal practices might hinder access to perceived justice. Although Nordic civil procedure seldom offers a "winner takes it all" justice of the US American system, many parties will walk away from court as losers. The winning party seldom gets the "jackpot": losses are often distributed to both parties as neither party will win on all accounts. Facilitative and interest-based dispute resolution processes could offer an alternative process based on negotiations, dialogue, cooperation and broader interests, and persons and communities normally excluded from the court process could participate. The results could be more satisfactory as a broader range of remedies and solutions could be included, and different forms of justice could be used. However, because the "mediation" process often mimics a trial, and the discussion is based on the legal process and the law, parties do not achieve an alternative process and alternative outcomes.

ADR as appropriate dispute resolution requires that the parties are offered several different processes and that they have information on the processes available. Unless the parties know which processes they might choose from and what each process implies, they will not be able to choose an appropriate process, a process that fits their needs. As ADR often is reduced to mediation, and the rhetoric of the mediation process does not match reality, parties do not have a true choice of dispute resolution process, nor do they get a process that matches the promises. Thus, ADR does not increase access to justice but, on the contrary, reduces it. The mediation process does not match the descriptions given, nor is it fair due to (indirect) mediator pressure. Norway is a good example of how different, but partly overlapping, mediation procedures do not give the parties increased opportunities for appropriate dispute resolution because lack of information and lack of clearly defined processes make informed decision-making very difficult.[34] In spite of the shortcomings of the mediation process in practice, parties tend to be satisfied. The reason might be that they are relieved to be finished with the dispute, to finally be able to go on, or that they feel the process despite its shortcomings is preferable to a more stressful and unpredictable trial.

[32] Adrian (2012), pp. 311–317 and Knoff (2001), p. 1165.

[33] Leipold (2008), p. 78.

[34] See Chap. 6 in this volume.

In the US, mediation has been used as a way to solve small claim cases. However, research shows that mediation often offers "hit-or-miss justice" for unrepresented parties.[35] Unrepresented parties waive their rights and are pressured into settlement without giving their informed consent.[36] The problem is not the mediation process in itself but lack of opportunities to consult a lawyer, pressure to settle, sessions with little mediation and much evaluation. In the Nordic countries, the use of mediation in small claim cases has often been discouraged, as mediation might cause more costs and delays and mediation might be difficult if only one party is represented. In my opinion, ADR could be a tool for small claim cases. The problems with mediation in small claim cases could be solved with careful program design, offering both consultation on legal rights and a broad mediation process. Small claim ADR processes require good knowledge of dispute process design.

ADR has not been used to increase access to justice by providing more opportunities for dispute resolution for new types of cases. One of the great advantages with ADR is that it consists of a range of processes and that the processes can be formed to fit each case. Many of the limitations of traditional civil procedure, such as problems with multiparty processes and disputes involving ongoing relationships, can be overcome by designing and using the proper ADR process. However, ADR has, with few exceptions, been used to expand dispute resolution services or to find more appropriate ways of solving conflicts. The Norwegian National Mediation Service, discussed in Chap. 6 in this volume, is an exception.

ADR is a hindrance to justice when the organisation, funding, legislation, training and general structure of the dispute resolution system are not clear. In order to work properly, each ADR process used should be clearly defined in terms of what the goal of the process is, what the results will be, what the role of the third party is and what the process will be like. Rules governing the specific process should match the process in terms of level of formality of the process, use of norms and over-all goal of the process. The qualifications, training and experience the third person conducting the ADR depends on the process used. For example, mediation requires very different knowledge and skills than litigation, and therefore mediation training should be required for all mediators, whereas non-binding arbitration or a legal evaluation requires other skills. Methods of recourse against the third person and the possible outcome or settlement should be appropriate for the dispute resolution process at hand. Additionally, the organisation of the process should be discussed as it has an impact on the process: should ADR be court conducted, conducted by court-connected mediators; should private dispute resolution professionals be used; or should state or non-state agencies administer ADR?

The rules and regulations for different ADR processes are seldom discussed in-depth. There is a general understanding that general rules of civil procedure are not appropriate for ADR. The use of mediation as a synonym for ADR has made the debate much more difficult. Since all ADR processes are different, all require

[35] Nolan-Haley (1999).

[36] Engler (1999).

different rules. The more formal the process is, the more appropriate the general rules of civil procedure are, and vice versa. Thus, ADR as in giving the parties a "mini-arbitration" with an estimate of the probable court decision needs very different rules, than an evaluative session where the third party makes statements on strengths and weaknesses of the parties cases, and suggest ways to move forward, or in facilitative mediation, or consumer complaint boards. Different procedures require different rules, different organisation and different training of the third party neutrals; they do not deserve to be called mediation but to be recognised for what they are.[37] Today, ADR and court-connected mediation, in particular, are a black box where the mediator is free to do many things, including pressuring the parties and being highly directive, without the parties being able to complain in an effective manner.[38]

16.5 ADR as a Tool to Enhance Access to Justice

16.5.1 Introduction to How ADR Can Be Used

Although the use of ADR has so far not resulted in increased access to justice, it still has unleashed potential as a tool to provide access to justice. This requires political will to extend dispute resolution services to new types of cases and populations, not just trying to save money in the judiciary. Three important elements must be embraced by the legislator and policymakers to make ADR a tool to enhance access to justice. First, ADR is a set of very different processes suitable for different disputes. Second, the ADR processes have unique qualities that should be respected and nourished to reap the fruits of ADR. Third, the greatest potential lies in the facilitative interest-based processes as they offer the biggest alternative to the limitations of traditional civil litigation.

16.5.2 ADR as a Range of Different Procedures

The first insight means that "mediation" can no longer be used as a synonym for ADR, nor can the rules be such that the "mediation" process can be shaped in almost any way, and the "mediator" can do almost anything except exert direct and heavy pressure. Rather, ADR must be defined as a range of procedures. This means recognising that ADR procedures can be adjudicative, evaluative, facilitative or

[37] Menkel-Meadow (2012) and Love and Kovach (2000).

[38] Norwegian Supervisory committee for judges case 21/11 of 14 July 2011, Mykland (2010) and Adrian (2012).

mixing elements from these procedures. Each of the procedures has advantages and disadvantages and can be adapted to different types of cases.[39]

The result should be a multi-door courthouse or, even, a multi-door dispute resolution centre. It allows fitting the forum to the fuss,[40] *i.e.*, choosing the most appropriate process for each case. ADR should be Appropriate Dispute Resolution, where each case would be decided in a process chosen according to the needs of the parties and the type of the case. Knowledge of different forms of dispute resolution and of dispute resolution system design is required to develop an appropriate system. Not all forms of ADR need to be (or can be) included in a system, but in order to make the system an efficient one, knowledge of the basic forms, their adaptations and subforms and of combining different forms is required.

A system using different forms of ADR in the courts also requires an intake "screening", an analysis of the conflict, in order for the agency providing the dispute resolution services to direct cases to the most appropriate process.[41] The neutral third parties working within the system must understand the other forms of processes provided, know how to analyse a conflict to determine if their process is the most appropriate and to redirect the case to another type of process that might turn out to be more appropriate and understand the limits and relative advantages and disadvantages of their own process.

In addition to court-connected ADR processes, community-based ADR processes and different types of complaint boards should also be available. Community-based processes can increase access to justice by offering conflict resolution rather than dispute resolution. This means that the conflict does not have to be defined in legal terms and the parties do not need to engage lawyers or restrict the case to the limitations of the legal system by excluding issues of a more personal nature or by restricting participants in conflict resolution to those defined as parties by law. Legal classifications will not have to be respected; thus, cases involving minor misdemeanours can be included in civil conflict resolution if there is not a need to prosecute for setting an example for others. In community-based programs, the conflict does not have to be defined as a legal problem by the parties, although it can be, nor does the legal system have to define it as a legal problem. The National Mediation Service in Norway, discussed in Chap. 6 in this volume, is an example of a community-based program. The range of conflict resolution programs offered by the National Mediation Service could, however, be increased to offer citizens a better opportunity to solve their conflicts. Community-based programs should also be attractive to small businesses.

A system of community-based dispute resolution and complaint boards requires that citizens, businesses and lawyers have enough information about the service available to them and of their comparative advantages. If the general public knows

[39] See among others Lande (1997), Love and Kovach (2000), Oberman (2008) and Menkel-Meadow (2012).

[40] Sander and Goldberg (1994).

[41] Sander (1976).

when and how to turn to these services, the need for hiring a lawyer and further escalating a conflict can be avoided and the parties can find an early, and therefore cheap and fast, solution to their problems. Lawyers as a group should have more information about these services to be able to direct clients to them. Only when lawyers feel they have sufficient information about the services available and understand the relative advantages can they direct appropriate cases. For the services to be used in more cases, the role of lawyers must be addressed, both to make the conflict resolution process simple and cheap and to prevent it from being poor justice. By involving lawyers in an appropriate way when there is a need, such services will be more attractive for lawyers to recommend to their (potential future) clients.

16.5.3 Well-Defined Procedures with Appropriate Regulation

The second insight is to understand that each process needs its own rules and regulations, its unique definition and training for third party neutrals. Some of the problems are a consequence of the fact that mediation as process, the values and ideas it is built on, has been compromised and "co-opted" by lawyers. Mediation has been seen as a black box where the mediator is free to do almost anything to make the parties settle the case, although settlement as such is not primarily the focus of the mediation process. In some jurisdictions, the result has been to try to regulate mediation by prohibiting mediator pressure or evaluation. Often, however, the result has been less than satisfactory, both because many lawyers do not understand the problems with highly directive mediator behaviour and lack of party self-determination and because using laws to regulate mediation has proven to be a difficult, perhaps even an impossible, task.[42]

The problem is not primarily the way the processes are conducted but the organisation and regulation of the processes. In some cases, offering an evaluation on an issue or the entire case is an appropriate dispute resolution method; in other cases, the parties will benefit more from mediation or a non-binding adjudicative process. Today, many processes are called mediation, although the content and nature of the process is in fact highly evaluative, and sometimes even of a non-binding adjudicative character. This is a problem because finding the right process is difficult when no distinction is made between processes of very different character. Also, the quality of the processes and the third parties conducting them cannot be monitored, and many processes might be dysfunctional due to lack of proper standards and rules. Finally, lack of clear definitions and standards decreases the procedural justice.

The parties should be able to understand what kind of ADR process they are entering, what their rights are and what the results of the process might be. For

[42] Lande (2007) and Menkel-Meadow (2012).

instance, when an ADR process is conducted as an "abbreviated trial", resulting in a recommendation for the solution, or a how the court would decide the case, the parties must be aware of the nature of the process. They should not be promised a party-centred, interest- and discussion-based problem-solving process with a facilitative third party neutral when they are offered a lawyer and a law-driven process mimicking a trial. The "abbreviated trial" model requires that the third party neutral is a lawyer with expertise in the relevant field(s) of law, and the parties usually need legal representation or an understanding of the benefits thereof and the risks of appearing *pro se*. The process might of course be designed to cater self-represented parties, giving the process a more inquisitory and educational turn. An "abbreviated trial" mimics a formal process and is itself a fairly formal process where formal rules are used. Therefore, formal rules are needed to give parties due process. Formal processes should, among other things, be based on the principles of publicity and on documenting the process, party statements and recommendation in writing. In a formal process, private meetings should not be allowed. These requirements does not mean a full public hearing and the same requirements for written statements and "judgments" but use of written documentation of the main arguments and the main reasons for the recommended solution.

In the same token, evaluative processes should be openly evaluative. Depending on the type of evaluation offered, different requirements should be made to the third party neutral used. The rules for the process should be tailored to the type of evaluation offered, and parties should have a clear understanding of the process they are entering. For instance, a process could be designed where parties have the opportunity to give a brief presentation of their cases then get an evaluation on the strengths and weaknesses of their cases and an estimate of possible outcomes. The parties need to understand and, when needed, trace how and why the neutral recommends or suggests a particular solution. Parties also need to be free from pressure to settle, in particular pressure to accept a specific type of solution. Such process requires rules and regulation different from an "abbreviated trial" type of ADR process and from mediation.

Mediation requires quite different skills than formal and semi-formal processes, such as conflict analysis and behaviour, understanding decision-making traps, active listening skills and training in creative problem solving. In a facilitative informal process, the parties need safeguards against mediator pressure, both pressure to settle the case and pressure to accept a certain view on what is important or relevant in the case, including possible solutions. Mediation is, as a process, very different from adjudication; therefore, the rules and regulations should be tailored to fit it as a process.

Some processes might be abbreviated "trials", but they should be so openly and with appropriate rules and regulations. There are many abbreviated processes in the Nordic countries offering the parties cheap, simple and accessible dispute resolution. One important example is the numerous consumer complaint boards, where a panel consisting of representatives for consumer organisations, businesses and neutral parties solve the cases. The costs for using the processes are very low, and the processes are simple to allow for pro se parties. Although many boards have

only the power to give recommendations, not binding solutions, businesses generally accept the decisions as if they were binding. Therefore, a criticism of the current way of offering mediation as an "abbreviated trial" is not about the processes as such but the organisation, regulation and practice of the processes.

16.5.4 The Potential of Facilitative, Interest-Based Processes

The greatest potential in the ADR movement comes from the less formal processes, particularly the ones where the parties are the primary agents, actively engaged in forming the process and the norms used to solve the conflict, and the interests of the parties are used to determine good solutions. Such processes offer new ways of dispute resolution, as the process and the outcomes are quite different from traditional legal processes. These processes also fit new types of cases as multiparty mediation, neighbourhood justice, regulation–negotiation and similar processes are useful methods for involving a greater number of participants with (partly) conflicting interests.

The Norwegian National Mediation Service has had, for more than two decades, had an important role in solving, among other things, conflicts between neighbours. The monetary interest in such conflicts is usually low, but the conflict itself has a profound impact on the quality of life of the parties. By offering a cheap and relatively quick process focused on dialogue and fostering greater understanding, the parties are given access to justice at a reasonable costs, often reducing the likelihood of future conflicts. The reason for success is that mediation is based on clearly defined procedure, the mediators are trained and the organisation of the mediation service minimises the costs and enhances accessibility. These processes may generate more specific justice than traditional legal processes because different forms of justice can be satisfied, not just distributive justice, and because the unique needs, interests and preferences of the parties determine the outcome, not some general rules. When the parties generate their own solutions, they are likely to be more satisfactory and, to a larger extent, cater the needs of the parties. The conflict level is probably reduced, as the parties work with the underlying conflict, not just its legal manifestations, and as the outcome is a result of an informed decision made by the parties, the parties probably feel more bound to it.

Part of the facilitative or even negotiating processes is learning conflict resolution skills, communication skills, problem-solving skills and negotiation skills. The parties learn skills from the third party neutral and even from their own experts and attorneys. This may reduce the need for formal dispute resolution later on.

The collaborative law movement has been an important contribution to increasing access to justice. In collaborative law, the attorneys, and other experts involved in the process, agree that they will not take the case to court if negotiations fail. The parties need to engage new attorneys if they want to go to court. Hence, the respective attorneys will try to collaborate rather than to compete to find a good solution. Collaboration will result in reduced costs for the parties, earlier solution

and potentially better solution.[43] Conflict resolution involving organisations, communities or neighbourhoods might result in designing a system for conflict resolution or solving the problems underlying the conflict.

Facilitative or evaluative processes cannot stand alone as the only processes offered. There will be a solution only if the parties find a mutually agreeable solution. Therefore, other conflict resolution processes must be available, and processes offering binding solutions must be available as a last resort. Although facilitative processes might be a benefit for both the parties and the society at large, binding conflict resolution should be available as an accessible alternative. The door to binding conflict resolution should always be open. Especially if participation in facilitative or evaluative processes is mandatory or almost mandatory (*e.g.*, programs where the parties can opt out of the required program or where parties risk sanctions for failing to attend the program or comply to rules requiring using such programs), the parties should not be forced to use much time and money on facilitative processes. In voluntary processes, the pressure exerted on parties to try ADR should be taken into account when deciding how much time and money the parties are expected to use before trying another type of procedure. Otherwise, the attendance in the ADR program will hinder access to justice because it is more difficult to go to court. The parties might feel pressured to accept an unsatisfactory (or even unlawful) settlement to end the dispute because they do not have, or are not willing to use, the time, money and other resources to use on further dispute resolution. Here resources must be understood broadly, including emotional costs, the costs arising from insecurity of the outcome, etc.

A dispute resolution system consisting of several different types of (ADR) processes should have a clear structure, in order for the parties to decide which type of dispute resolution is most appropriate for them and what the alternatives are. A party in a facilitative process might want to switch to a binding or evaluative dispute resolution mechanism, when it has a comparative advantage in the present case. The parties and the third party neutrals should be able to end processes which turn out to be inappropriate, and turn to more appropriate processes. It is important to recognise that not all cases fit to facilitative processes: sometimes a precedent, setting an example or clarifications of norms is necessary, and even beneficial. Sometimes the opposite is true: cases seemingly inappropriate for facilitative procedures might be a good fit. Many lawyers often assume there is no integrative, creative potential in a dispute, although the opposite might be true. Therefore parties should be given tools to evaluate which process fits their needs best.

[43] See *e.g.* Tesler (2008).

16.6 Conclusions on ADR and Access to Justice

The Access to Justice movement and the ADR movement have partly overlapping, and to a high degree compatible, goals. The most important overlapping goals are making "justice" more accessible by offering processes better suited for types of cases or party needs that are currently underserved or unmet, and by including a wider definition of justice than the narrow distributive, strictly legal view taken in traditional legal processes. By extending the range of dispute resolution processes available, society can, at least in theory, increase access to justice.

However, in practice the introduction of ADR processes has been often done in order to reduce the resources spent on dispute resolution, especially the resources used by the courts. Maximising litigation or the resources used on litigation is not optimal or even desirable, but the problem is when the main argument for introducing ADR seems to be saving of costs, "the production argument", rather than the "quality argument",[44] of directing cases into appropriate, or optimal, dispute resolution processes. Additionally there has been a lack of understanding of the importance of the knowledge and skills required of the third party neutrals in the new processes; the range of ADR processes and variations and adaptations available; training and organisation of third party neutrals; regulation, organisation and funding of the new processes; and of the dispute resolution system design processes needed to make a "multi-door courthouse" or similar system workable. The result is a system where ADR often reduces the access to justice rather than enhances it. In other word, ADR has often been misunderstood and misused as a tool for enhancing access to justice.

There are, however, some examples of the opposite: ADR processes such as the Nordic consumer complaint boards and the Norwegian National Mediation Service are examples of ADR enhancing access to justice. Creating a good dispute resolution system requires both political will to using resources on enhancing access to justice, and having people who have in-depth knowledge, understanding and skills in conflict resolution, in designing systems, organisation of different ADR processes, individual ADR processes and their adaptations and in regulating ADR processes. Today, there are perhaps a handful of people having one or several of the required competencies in the Nordic countries. Thus, making the most of ADR as a tool for enhancing access to justice will take time and requires us to gain expertise in conflict resolution and dispute systems design. Having gained researched-based knowledge, we can create a dispute resolution system for the benefit of society at large. The Nordic countries have potential to become leaders in the field creating a system with multiple ADR processes enhancing access to justice. There are already some experiences with different ADR processes, and there are many scholars with extensive knowledge in the field.

[44] Galanter (1985), pp. 8–12.

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