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Dispute Resolution, Alternative

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Across the common law world during the last two decades of the twentieth century, a shared, distinctive feature has been a growing rhetoric in support of “settlement” over the whole spectrum of civil and criminal dispute institutions. Quickly realized in widespread projects of institutional design, this transformation followed upon a long period during which, as the nation-state solidified, courts had acquired an apparently secure dominance as authoritative agents of thirdparty decision and lawyers had successfully presented themselves as indispensable partisan advisers and champions in the pursuit of adversarial litigation. Yet over an astonishingly short period, the traditional identities of “court” and “lawyer” came into question, and the “mediator” reemerged as a major if ill-defined figure. Much of the action associated with this seismic shift advanced under the burgeoning leitmotiv of alternative dispute resolution (ADR).

This extraordinary and largely unexpected turn of events has been, in an immediate sense, realized through a complex of closely linked developments. First, there has been the growth of an increasingly managerial culture within the common law judiciary. In most jurisdictions, local and largely informal judicial initiatives to deflect litigation have quickly given way to central initiatives toward procedural reform. Second, just as important have been responsive, defensive movements of recovery on the part of lawyers. These responses have involved overtly less combative approaches to lawyer negotiation as well as a welter of novel technical procedures (the “mini trial,” the “executive tribunal,” early neutral evaluation [ENE], and so on) largely directed toward restoration of client confidence in lawyering practices.

Third, new “professionals” have arrived in dispute resolution. These new specialist groups have offered mediatory and facilitatory services that compete—even if only indirectly—with those provided by lawyers. While the new professionals initially promoted mediation as promising a “third way” between external, hierarchically imposed decision and representation by legal specialists, the contemporary prominence of ADR is largely attributable to vigorous initiatives within the courts and the legal profession. ADR is very much something that lawyers do.

ADR Precursors

Despite the apparent novelty and unexpected character of the “ADR movement,” we should not underestimate the importance of some long-standing “precursors” to **[p. 422 ↓]** ADR. Nor should we overlook that in all jurisdictions many perceived injustices are “lumped” (tolerated) because of lack of knowledge, fear of alienating others, and so on, or that negotiation in the past and the present is by far the most common form of resolving disputes, even when litigation has been commenced. Thus, for example, J. M. Kelly shows that even in the early years of the developing Roman legal system, settlement in the course of litigation was both recognized by the authorities and common in practice.

In addition, we can identify several impulses that encourage people to resolve their disputes by extrajudicial or informal methods. As Jerold Auerbach has emphasized, the rejection of formal legal processes as an appropriate mode of decision making in the context of disputes is often part of an attempt to develop or retain a sense of community—“how to resolve conflict, inversely stated, is how (or whether) to preserve community” (1983: 4). This impulse may manifest itself in a variety of specific contexts —religious, political, territorial, ethnic, and occupational seem to be the most important of such settings. These values often constitute a countertradition to legalism, what Boaventura de Sousa Santos has labeled the “neoclassical model” of law (in Abel 1982: 256).

Simon Roberts and Michael Palmer detail the importance of dispute resolution mechanisms that may include one or more of the following characteristics.

- 1. Non-bureaucratic in structure and relatively undifferentiated from society, relying on small, local fora that—unlike large legal bureaucracies—can deal with the social relationships of the parties;
- 2. Local in nature and, for example, relying on local rather than professional or official language;
- 3. Accessible to ordinary people, and not dependent on the services of (“expensive”) legal professionals;

- 4. Reliant on lay people as third-party interveners, perhaps with some—but not a great deal—of training, and who are preferably unpaid;
- 5. Outside the immediate scope of official law, and reliant instead on local standards of conduct and common sense thinking;
- 6. Based on substantive and procedural "rules" that are vague, unwritten, flexible, and good common sense—so that "the law" does not stand in the way of achieving substantive justice in the "instant" case; and
- 7. Intent on promoting harmony between the parties and within local communities, in part because they get to the "real" underlying cause of the problem(s), in part because they search for outcomes mutually acceptable to the parties rather than the strict application of legal rules, and in part because they carry an ethic of treatment.

The immediate origins of the "modern" ADR movement derive from the late 1960s and early 1970s. In Europe, a key development was the "access to justice" movement in which leading civil proceduralists such as Mauro Cappalletti (1927–2004) proposed expansion of legal aid, simplification of court procedures, and other ways of enhancing the ability of poorer, disadvantaged people to engage in civil litigation. These reforms were advocated in the light of criticisms about the expense and delay for parties and the overloading of the civil courts—problems that in the United States led to the 1976 Pound conference on civil justice reform. Earlier in the century, the famous Harvard legal scholar and educator Roscoe Pound (1870–1964) had pointed to such problems when he attacked the "sporting theory" of justice. Lingering respect for that critique helped to inspire academic lawyers and legal practitioners to convene the Pound conference to make proposals for radically reforming the system of civil justice. Other factors encouraging change included a desire to promote racial harmony through new methods of resolving disputes and other differences and, most important, the growing belief that mediation generally offered a better approach to resolving disputes than did adjudication.

An important inspiration for this new thinking on mediation was the spread of knowledge about the ideals and practices of dispute resolution in the non-Western world. As Richard Abel shows, interest grew in the "warmer" ways of disputing apparently found in informal tribal "moots" and community-led mediation in non-Western societies. Inspired by this new knowledge, Sally Merry and Neal Milner demonstrated that greater use

of mediation and other informal processes of dispute resolution would encourage a stronger sense of local community and produce outcomes better suited to the parties' real interests and needs. Moreover, they would minimize the involvement of lawyers and the application of law; enhance **[p. 423 ↓]** long-term relationships, which if subjected to adjudication might be irreparably damaged; and better take into account the interests of children and other parties not necessarily directly involved in a dispute.

A key symbol in the emerging ADR movement is what Frank Sander called the "multidoor" courthouse, in which the court would become a dispute resolution center with a screening clerk who would assist a party to choose the process most appropriate to her or his case. The new type of court would contain a number of rooms or centers: Mediation, Arbitration, Fact-Finding, Malpractice Screening Panel, Superior Court, and Ombudsperson. Seen more broadly, this may be regarded as an argument for "process pluralism," and to have also had its origins in the thinking of Lon Fuller (1902–1978)—in many ways, the intellectual founding father of ADR, even though the term was not coined until after his death. Fuller took the view that it is the job of the legal system to provide the right forum for settling a dispute: the "forum should fit the fuss." In particular, the process of adjudication, based on reasoned argument and the application of rules, is unsuited to the resolution of polycentric disputes (such as family cases) in which there are often varied and complicated patterns of tension.

Criticism and Change

The growth and institutionalization of ADR in North America, parts of Europe, Australia, New Zealand, and other areas of the world has itself generated conflict and debate. Both from the jurisprudential "right" and the jurisprudential "left," there have been protests and resistance to the growth of informalism. Among the most prominent of the practitioners of the former category of criticism is the distinguished American constitutional lawyer Owen Fiss. He argued "against settlement" and criticized the increasing tendency of the legal system to promote the resolution of disputes through private agreement between the parties, thereby undermining key public values. The role of the court is not to maximize the ends of private parties, nor merely to secure the peace. Instead, the purpose of court-based adjudication is to expound and give force to the values embedded in key normative statements such as statutes and, above all, the

United States Constitution. When parties settle, the courts are denied the opportunity to interpret those core values and to "bring reality in accord with them."

Although subjected to critique for an exalted view of the role of courts in society, and a diminution of the value of settlement (and consequently of processes such as mediation auxiliary to that goal), these arguments are still being made in modified form by David Luban. He argued that, just as a legal system in which all disputes are resolved by extrajudicial processes of settlement through negotiation and mediation is undesirable, so a legal system in which court-based adjudication handled all disputes would be impossible. As society becomes larger and more complex, there is an inherent tendency for litigation rates to expand rapidly, so that the judicial system is overwhelmed. The question is not "settlement" or "no settlement," but how much settlement and how better to regulate settlement. Luban's proposed solution is to make settlements publicly available, and to accept that settlements will vastly outnumber adjudications.

Trenchant criticisms from the political left are in the writings of Marc Galanter, Abel, Lisa Lerman, Tino Grillo, Laura Nader, and Peter Fitzpatrick. For Galanter, it was not clear that the United States needed reform because it was by no means certain that it was really experiencing a "litigation crisis," as many proponents of ADR claimed. Abel and several colleagues reporting in his edited volume on informal justice, such as de Sousa Santos, Christine Harrington, and Richard Delgado, condemned informalism as withholding justice from the poor and marginal in society rather than increasing access.

Recent critiques point to an incompatibility between informal justice and human rights standards. For Lerman and Grillo, the problems of ADR exist in the disadvantaged position in which ADR—especially mediation—tends to place women. Mediation is a forum in which women who had been caring for the home, rather than pursuing a career, had perhaps lost the interactional skills important for the expression of one's case and interests. Women in general have been more inclined than men to listen to the appeals for compromise and to see the "other side's" point of view. Nader's argument centers on her concept of "harmony ideology." Like Galanter, she doubts that in the late **[p. 424 ↓]** twentieth century there was a litigation crisis, and she has argued that the ADR movement is an example of "harmony ideology," in which vested groups in society promote a spirit of consensus and compromise to stop the disaffected from seeking to correct through the courts the injustices that they have suffered.

Fitzpatrick took the view that the ideals of the ADR movement are unrealistic and unattainable. For ADR as a form of “popular justice” necessarily changes—in particular, compromising many of its essential values—through the process of institutionalization from a radical set of ideas to an ongoing practical system for delivering civil justice. Overall, ADR skeptics doubted that the reforms advocated by the ADR movement would compensate for the negative effects that greater use of ADR processes might well have on the system of civil justice.

Such criticisms notwithstanding, the ADR movement has grown, radically transforming styles of litigation and adjudication. From the mid-1990s on, we have been in a period of institutionalized ADR rather than experimentation. In the United States, Congress enacted in 1998 an Alternative Dispute Resolution Act, 28 U.S.C. § 651 (2000), requiring every federal district court to establish its own ADR program and obliging parties involved in litigation to consider at an appropriate stage in proceedings the use of ADR.

In England, the ADR movement has encouraged a major reform of the civil justice system under the guiding hand of Lord Woolf, a senior member of the judiciary. Building on pioneering work by the Commercial Court in the Queen's Bench Division of the High Court, the two reports by Lord Woolf resulted in the introduction of new Civil Procedure Rules in 1998 (in force in 1999). These rules are grounded in the principle of active judicial “case management” with an overall purpose identified—“to encourage settlement of disputes at the earliest appropriate stage; and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited duration” (Woolf 1996: II.5.16). This new regime of civil procedure has two radical and novel features. First, an explicit attempt is made to construct a prelitigation phase in which the conduct of the respective legal teams is proscribed and potentially enforced through cost sanctions. The shape of the prelitigation phase appears in Pre-action Protocols. Second, in providing a strict regime of case management once plaintiffs initiate litigation, the rules explicitly prioritize “settlement” as the primary objective of civil justice.

Outside courts, strong, institutionalized growth has occurred in the fields of family, community, and commercial mediation, as well as in the sphere of restorative justice. Many disputes appear to divert into another rapidly growing field: that of the

ombudsperson. The ombudsperson is a neutral decision maker who is appointed by an institution to investigate complaints within the institution and either prevent disputes or facilitate their resolution. The ombudsperson relies on various ADR mechanisms, such as fact-finding or mediation, in the process of resolving disputes.

Current Debates

In the reformed world of civil justice in North American and Europe, there remain strong advocates of litigation and adjudication and continuing criticisms of the ADR movement. However, at the same time, the success of ADR, and its incorporation into the court system in the United States, England, Australia, and some parts of Europe, means that there is a whole range of issues that excite controversy and debate as legal practitioners and others consider the specific impacts of new ideas and practices.

If we confine our attention to mediation alone, there is controversy over the key issue of “mandation,” whether or not a court should be able to order mediation, either directly, or through the award of costs against a party who refuses to contemplate mediation. Alongside this central question, a range of other issues is debated. Should mediation be primarily “facilitative” or mainly “evaluative” (in the latter form, the mediator assumes an active posture, giving advice to the parties on the legal strengths and weaknesses of their respective positions, even predicting the probable outcome if the case was to go to trial)? What is the legal status of mediation agreements? What about confidentiality? Should there be regulation of mediation (especially by the introduction of professional codes of **[p. 425 ↓]** conduct)? Should community mediation, for example, be used to try to repair family relationships so that the homeless young are less of a burden on society? How should power imbalances between the parties involved in mediation be managed? What is the place of mediation in family disputes involving an international element (including child abduction)? What is the role of mediation in criminal cases (the use of “victimoffender” interventions, underpinned by principles of “restorative justice”)? What about the emergence of online mediation, and so on?

The Commission of the European Communities considered some of these issues in 2002, as well as a sustained argument in favor of greater use of ADR throughout Europe, in an important Green Paper. Entitled “On Alternative Dispute Resolution in

Civil and Commercial Law," this statement recommends much greater use of mediation in civil and commercial cases. On the other hand, there is continuing debate on the relationship between ADR and human rights, especially the right to a fair trial, as set out in article 6 of the United Kingdom Human Rights Act (following the same article in the European Convention on Human Rights). A related question underlying litigation and the right to a fair trial is that of legal aid provision.

Looking to the Future

Over three short decades, what scholars tentatively proposed in the 1970s, and what appeared in the 1980s as marginal novelties, have become established features of the disputing scene. Alternative dispute resolution, with its objective in "settlement" and its principal institutional realization in "mediation," is now a virtually unremarkable feature of disputing cultures almost anywhere we look.

One can describe this transformation in the common law world as the replacement of a historic "procedural anarchy" by a "new formalism." For many generations it had been up to the disputing parties to choose which route to resolution they took, what mode of achieving an outcome they tried first. There was no need to negotiate directly or resort to the "good offices" of a nonaligned third party before issuing a writ. However, that is now no longer the case. In England, for example, the proper procedural path is now marked with absolute clarity. The three primary processes—negotiation, mediation, and third-party determination—now represent a virtually obligatory sequence.

Pre-action Protocols warn potential litigants to attempt negotiation first on pain of potential costs penalties. Once litigation is initiated, reference out to appropriate ADR procedures as a precondition to trial is built into the early stages of civil process. Only as a last resort are the parties reluctantly conceded the right to proceed to trial and judgment. In this respect, one early forecast—that the courts might take on increasingly a diagnostic role ("multidoor courthouse") and themselves provide a filter, directing litigants along different procedural streams—has not been realized. Rather, the courts provide a fixed procedural sequence. Is this approach sustainable in the longer term? More generally, will courts in the foreseeable future return to a narrower adjudicative role?

At the beginning of the 1990s, ADR appeared to be evolving in two distinct directions: as a forecasting device that enabled the parties and their legal teams to examine their positions against a predicted judicial determination and as an intervention that directly facilitated negotiations. Within the first category fell technical procedures like the “mini-trial” or “executive tribunal” and “early neutral evaluation” (ENE). While the latter—composed of mediation in its manifold forms—has gone from strength to strength, the former do not seem to have realized early promise. Are they likely to move even further away from the center of the action?

Again, there is the question of the “new professionals” themselves—the mediators. Early on, there was every sign that mediation would develop as a new, relatively autonomous profession. Nevertheless, very rapidly, lawyers began to colonize and co-opt these new skills. For the moment, mediation seems set to develop as a recognized department of lawyering, rather than as an autonomous profession. Will maintenance of the dual persona involved prove to be sustainable in the long term?

Finally, there is the question of ADR's “general remit.” As the label states, this has evolved primarily **[p. 426 ↓]** as a procedure directed toward “dispute resolution.” However, one school of thought, Katharine Rosenberry argues, visible in both community and commercial spheres, is that ADR techniques will in the future be turned to expansively, beyond the sphere of dispute, as “creative problem solving” and in “transaction management” generally.

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See also

- Access to Justice
- Civil Court Procedures, Doctrinal Issues in
- Conflict
- Consensual Penal Resolution
- Court Caseload Statistics
- Courts
- Courts, Lawmaking by
- Dispute Avoidance

- Dispute Resolution, Psychology of
- Human Rights, International
- Lawyers
- Mediation
- Ombudsperson
- Professions, Developments in Legal
- Restorative Justice
- Settlement

Further Readings

Abel, Richard L., ed. The Politics of Informal Justice, 2 vols. New York: Academic Press (deSousa Santos chap . 1 (1982). 249–66

Auerbach, Jerold S. (1983). Justice without Law? Resolving Disputes without Lawyers . Oxford: Oxford University Press.

Cappalletti, Mauro, ed. , and Bryant G. Garth, eds. (1978). Access to Justice , 4 vols. Alphen ann den Rijn, Netherlands: Sijthoff and Noordhoff.

Commission of the European Communities (COM) . (2002). On Alternative Dispute Resolution in Civil and Commercial Law (April 19) . Brussels: COM.

Fiss, Owen. M. “Against Settlement.” Yale Law Journal 93 (1984). 1073–90. http://dx.doi.org/10.2307/796205

Fuller, Lon. “The Forms and Limits of Adjudication.” Harvard Law Review 92 (1978). 353–49. http://dx.doi.org/10.2307/1340368

Galanter, Marc. “Reading the Landscape of Disputes: What We Know, Don't Know (and Think We Know) about Our Allegedly Contentious Society.” UCLA Law Review 31 (1993). 4–71.

Grillo, Tino. “The Mediation Alternative: Process Dangers for Women.” Yale Law Journal 100 (1991). 1545–1610. http://dx.doi.org/10.2307/796781

Kelly, J. M. (1966). Roman Litigation . Oxford: Clarendon Press.

Lerman, Lisa G. “Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women.” Harvard Women's Law Journal 7 (1984). 57–113.

Luban, David. “Settlements and the Public Realm.” Georgetown Law Journal 83 (1995). 2619–62.

Menkel-Meadow, Carrie J., Lela PorterLove, Andrea KupferSchneider, and Jean R.Sternlight. (2005). Dispute Resolution: Beyond the Adversarial Model . New York: Aspen.

Merry, Sally Engle, ed. , and Neal Milner, eds. (1993). The Possibility of Popular Justice: A Case Study of Community Mediation in the United States . Ann Arbor: University of Michigan Press (Fitzpatrick chap., 453–74).

Nader, Laura. “Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Ideology.” Ohio State Journal on Dispute Resolution 9 (1993). 1–25.

Roberts, Simon, and MichaelPalmer. (2005). Dispute Processes: ADR and the Primary Forms of Decision Making . Cambridge: Cambridge University Press.

Rosenberry, Katharine. “Organizational Barriers to Creativity in Law Schools and the Legal Profession.” California Western Law Review 41 (2005). 423–57.

Sander, Frank E. A. “Varieties of Dispute Processing.” Federal Rules Decisions 70 (1976). 111–34.

Woolf, Lord. (1996). Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales . London: HMSO (Interim Report 1995).