International Journal of Law in Context (2020), **16**, 103–107
doi:10.1017/S1744552320000087

§

EDITORIAL

Jurisdictional perspectives on alternative dispute resolution and access to justice: introduction

Lola Akin Ojelabi[1]* and Mary Anne Noone[2]

[1]Associate Professor, La Trobe Law School, La Trobe University, Australia and [2]Professor, La Trobe Law School, La Trobe University, Australia
*Corresponding author. E-mail: o.akinojelabi@latrobe.edu.au

In many parts of the world, the adoption of alternative dispute-resolution[1] (ADR) processes was premised on creating better access to justice for citizens, particularly those with lesser means (Woolf, 1996; Access to Justice Advisory Committee, 1994). ADR's foundational link with access to justice is in relation to not only justice as a process for the resolution of disputes, but also justice in relation to equality of access and equitable outcomes. This Special Issue focuses on the relationship between ADR and access to justice in various contexts and jurisdictions, including Australia, China, England and Wales, Scotland and Singapore, and within the family-law system in Australia. The papers engage in a critical discussion of ADR's contribution to access to justice in the resolution of disputes and, in particular, the extent to which ADR has contributed to improved access to justice. In doing this, the papers highlight the role of access-to-justice discourse in the development and growth of ADR; where available, review evaluations of access to justice in relation to ADR initiatives; and, finally, reflect on the future of ADR and access to justice.

Justice is an integral part of any society and is relevant to any dispute-resolution system. Justice institutions and systems are set up to perform many important functions including the resolution of disputes. In many jurisdictions, ADR processes have now become an integral part of the civil justice systems. Often, ADR's exponential growth has been in response to criticisms of the adversarial justice system as inaccessible, costly, unfair and oppressive (King *et al*., 2014). ADR processes, like mediation and conciliation, are considered non-adversarial and are used in various fields including commercial, insurance, family, health, small business, finance, construction and consumer disputes.

Four decades ago, access to justice was defined as 'the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state'. Additionally, 'the system must be equally accessible to all, and second, it must lead to results that are individually and socially just' (Cappelletti and Garth, 1978, p. 6). More recently, it has been noted that there is often confusion as to the meaning of access to justice. Sackville argues that access to justice 'conveys different meanings to different people' (2018, p. 88). It can refer to 'an ideal – "the fundamental principle that all people should enjoy equality before the law" – and a claim that the ideal is achievable' (Sackville, 2018, p. 88) or to 'dispute resolution in the civil justice system' or to reform of the civil justice system, substantive law reform or 'enforcement of legal constraints' or, and more closely related to ADR, 'innovative dispute resolution mechanisms adapted to the needs of poor and disadvantaged people' and could also require 'measures designed to allow for the realisation of economic, social and cultural rights, and to redress the power imbalances created by great inequalities of wealth' (pp. 88, 89). The various understandings of access to justice result in differences in how access to justice and ADR innovations are developed and assessed across jurisdictions and contexts. This Special Issue sheds some light on the approaches taken in different countries and contexts of ADR.

[1]Alternative dispute-resolution processes are processes of dispute resolution other than court or adversarial processes. They include mediation, conciliation and negotiation, to name a few.

Given the several meanings of access to justice, examining the relationship between ADR and access to justice is complex. For instance, if one of the objectives of ADR is to address the justice needs of the poor and disadvantaged, what measures in ADR processes, and in particular mediation, are required to counter the effect of power imbalances on equal participation and outcomes? Questions have been raised about the viability of neutrality and self-determination, and whether the assumption that individuals are always in a position to negotiate the best outcomes for themselves in a dispute-resolution process represents the reality for users of ADR. This has been raised in relation to unrepresented parties, racial minorities, women, the poor and in fields such as family, workplace and consumer protection (Field, 2004; Mack, 1995; Grillo, 1991; Delgado *et al.*, 1985).

It is argued there have been two waves of scepticism relating to the relationship between mediation and justice (Waldman and Akin Ojelabi, 2016).[2] In the 1990s, there were those who took the position that informal justice (ADR) is a 'form of state oppression' intruding into private arenas, individuating conflict (conflict as interpersonal) and diffusing discontent (Waldman and Akin Ojelabi, 2016, p. 401). Then there were those who lamented the lack of focus on public values and public interests, and reinforcement of legal principles that provided normative guidance to society (Fiss, 1984).

While these issues have been debated for several decades (Fiss, 1984), the adoption and expansion of ADR appear to have pushed justice issues into the background (Waldman, 2011). The growth of ADR has generally continued without the formal regulation of processes and practices. In addition, ADR practitioners' inability to organise and be recognised as a profession, the lack of coherence in regard to what constitutes ethical practice of ADR, the description of ADR processes and, finally, the hybridisation of ADR processes (Waldman, 2011; Steffek and Unberath, 2013) have created further gaps in ADR's access-to-justice discourse. These dynamics have led to multiple variations of ADR processes, creating a challenging environment for ADR regulation. Users of ADR processes often enter processes without a clear understanding of the process or lacking the capacity to engage in the process/participate effectively (Field and Crowe, 2017).

The need for global regulation of ADR in order to improve access to justice (to wit, ADR's relationship with justice) has been proposed by Steffek and Unberath (2013). It is suggested that such regulation should proceed on the basis of agreed principles. Principled regulation, they argue, is important for setting standards in ADR and '*promises* justice across the various types of dispute resolution mechanisms' and will foster freedom, equality and efficiency (Steffek and Unberath, 2013, p. 34, emphasis in original). Furthermore, they argue that the regulation of dispute resolution should be based on 'normative individualism as well as just and efficient dispute resolution' (Steffek and Unberath, 2013, p. 17). While Steffek and Unberath identified this principle as necessary for dispute-resolution regulation, they also adopt party self-determination (normative individualism) and existing descriptions of processes to assign duties to ADR participants while acknowledging that differences may exist across jurisdictions and cultures (Steffek and Unberath, 2013, pp. 5, 35, 45–50). By embracing normative individualism, the assessment of justice in ADR is left to parties and beyond practitioners' authority. This regulatory approach may, however, leave unresolved questions relating to the capacity of ADR to promote justice between parties.

Even where ADR regulation in the form of ethical principles and accreditation exists, empirical research has found the standards are limited in promoting justice in ADR processes. For example, mediators, when faced with ethical dilemmas, find existing standards inadequate. The restrictions placed on the mediator by ethical codes appear to disempower them in relation to promoting outcome justice (Noone and Akin Ojelabi, 2014). This also creates ethical dilemmas for ADR practitioners (Akin Ojelabi and Noone, 2017). In some instances, ADR practitioners may withdraw from or terminate the process where they find it difficult to 'do justice' because of regulatory constraints (Akin Ojelabi and Noone, 2017; Noone et al., 2018).

[2]While mediation is not the only ADR process, it is the most researched and written-about third-party ADR process.

Regardless of the complex relationship between ADR and access to justice, the growth in ADR has often been due to an emphasis on the well-known advantages. These include efficiency in relation to the time and cost of resolving disputes both to parties and to the government as well as the relational benefits in terms of supporting parties in fostering relationships into the future. The disadvantages of ADR have been relegated to the background in most jurisdictions and ADR's value of increasing access to justice has been celebrated. Furthermore, evidence of settlement rates in ADR programmes including court-connected ADR programmes has been pivotal in the growth of ADR. The endorsement of ADR based mostly on the number of settlements achieved prompted a renowned scholar to comment that mediation is just about settlement and not about just settlements (Genn, 2012). However, policymakers are now encouraging further research into the relationship between ADR and improved access to justice. For example, the Australian Productivity Commission has stated that 'more concerted efforts are needed to understand the impact of mandated ADR [mediation] in improving access to justice' (Productivity Commission, 2014, p. 309).

Since the foundational principles of ADR are similar across jurisdictions, this Special Issue facilitates cross-jurisdictional analysis of how ADR processes, principles and practices are developed to improve access to justice in various jurisdictions. The papers relate to six different countries and different contexts of ADR, including online dispute resolution, arbitration and family dispute resolution. They focus on how ADR processes contribute to and promote access to justice.

The first paper, by Noone and Akin Ojelabi, discusses ways in which access to justice is being enhanced through ADR processes in Australia. The paper considers ADR processes in the civil justice system, the community and those legislatively based, and highlights how the objectives of relevant legislation can support the process and enable practitioners to address justice issues and, by so doing, achieve better outcomes for parties. The authors argue that, to improve access to justice, ADR processes should be designed taking into consideration the type and nature of the dispute, the parties involved and the availability of resources. In addition, ADR processes should have the overarching objective of promoting access to justice for users. This argument is made on the basis that access to justice is not just about gaining access to a dispute-resolution forum or process, but also about outcomes that are just. While there have been many ADR initiatives in Australia for the purposes of improving access to justice, research is scant on the extent to which the processes actually improve access to justice. More empirical research is required to understand more thoroughly ADR's contribution to access to justice.

Dorcas Quek Anderson's paper on Singapore's mediation movement sheds light on how the concept of access to justice has evolved over the years. Quek Anderson details a shift in Singapore from an adversarial to a conciliatory form of justice with the introduction of modern mediation. This built on and adopted an indigenous pattern of mediation that allows the mediator to be seen and to act as a trusted third party whom parties can rely on to ensure fairness of the process. With the institutionalisation of mediation and the need to conform mediation as practised in Singapore to international standards, however, party autonomy or self-determination became a fundamental principle and objective of mediation. Quek Anderson argues that this shift had implications for mediation's role in promoting access to justice. Concepts such as party autonomy and the mediator being merely facilitative created an uncertainty in the community about the role of the mediator in relation to procedural and substantive justice. She concludes by canvassing for the monitoring of quality to ensure that mediation continues to facilitate access to justice.

Reporting on the situation of ADR in Scotland, Charlie Irvine's paper engages in the debate on the fairness of mediation outcomes and whether or not 'lay' people – that is, non-lawyers or those not legally trained – can determine what justice is. After reviewing relevant literature, the paper presents findings from a pilot study on the question: 'What is the place of justice in the thinking of small claims mediation participants?' Compared to Australia, judicial encouragement of ADR in Scotland is limited, although some encouragement comes, albeit, minimally from other quarters, including the Law Society. The study found that mediation participants were able to identify procedural justice as a component of the process, had substantive justice goals and were able to 'take a strategic view of

dispute resolution processes'. Irvine concludes by arguing that justice is not a concept only understood or able to be achieved by lawyers; rather, ordinary people have their own justice criteria that they apply in mediation processes. As such, mediation is not just a 'horse-trading' game due to the absence of lawyers and judges; ordinary people can also do justice.

Wang and Chen's paper presents a more complex relationship between ADR and access to justice in China. While mediation has been promoted as a dispute-resolution process since 1945, and is indeed a traditional method of dispute resolution, the current approach to ADR combines dispute resolution and social control as goals of ADR processes. The 1982 Constitution and the Law on Civil Procedures of the PRC 1982 were both critical to the 'development of mediation' with supervision of the people's mediation committees by the government. The Law on People's Mediation identified the importance of ADR with social-control functions and so did subsequent laws promoting mediation for the resolution of social conflicts. Another ADR process that has gained recognition in China is arbitration. Arbitration is a preferred and institutionalised process for the resolution of economic disputes, although arbitration of labour and land disputes is still a mechanism for social control. The latest development in Chinese ADR, however, is 'a pluralist dispute-resolution mechanism' that Wang and Chen explain as being a 'comprehensive dispute-resolution system' in which processes are not considered as alternatives, 'but as mutually supportive components of an integrated system' still geared towards social control and management when considered more broadly.

While China is developing an integrated system, reform of the civil justice system in England and Wales is seeing a move towards more constrained and technology-driven dispute resolution with the introduction of online courts. To date, mediation has not gained a strong foothold within the civil justice system; however, Prince argues that there is room, in the new landscape, for ADR processes to 'be at the core of any design for an effective system'. She argues for the reformed system and attending digital processes to achieve access-to-justice goals; they must be user-centred. A user-centred system places the needs of users front and centre in the design of processes; it is a shift from a focus on lawyers, legal aid and judicial officers in designing processes and systems to the needs of users of processes, including equipping them with skills required for problem-solving. This user-centred approach will better facilitate access to justice particularly for low-value claims.

The final paper focuses on the access-to-justice needs of parties in family dispute resolution (FDR) in Australia. Akin Ojelabi and Gutman discuss the connection between different ADR developments within the family-law system in Australia and access to justice. Moving through various legislative changes, they argue that FDR has improved access to justice in relation to the resolution of family disputes, but more can be done to strengthen the link between FDR and improving access to justice. What is evident within the Australian family-law system are the many reviews and evaluations to enable the system to better deliver on justice outcomes.

This collection of papers highlights the complexity of ADR systems and their relationships with access to justice in a variety of jurisdictions. Dispute resolution is an important aspect of society and justice is integral to any dispute-resolution process. While access-to-justice problems remain in most jurisdictions, there are many approaches to how those access-to-justice problems may be addressed. ADR is one response to improved access to justice; however, continued critical analysis, monitoring and evaluation are required to ensure ADR actually does deliver on access-to-justice goals.

References

Access to Justice Advisory Committee (1994) *Access to Justice – an Action Plan*. Canberra: Commonwealth of Australia, 1994.

Akin Ojelabi L and Noone MA (2017) ADR processes: connections between purpose, values, ethics and justice. *Law in Context* **35**, 5–23.

Cappelletti M and Garth B (1978) Access to justice: the worldwide movement to make rights effective: a general report. In Cappelletti M and Garth BG (eds), *Access to Justice: A World Survey*, Vol. **1**. Alphen aan den Rijn: Sijthoff and Hoordhoff.

Delgado R, Dunn C, Brown P, Lee H and Hubert D (1985) Fairness and family: minimizing the risk of prejudice in ADR. *Wisconsin Law Review* **85**, 1359.

Field R (2004) A feminist model of mediation that centralises the role of lawyers as advocates for participants who are victims of domestic violence. *Australian Feminist Law Journal* **20**, 65.

Field R and Crowe J (2017) Playing the language game of family mediation: implications for mediator ethics. *Law in Context* **35**, 84–100.

Fiss O (1984) Against settlement, *The Yale Law Journal* **93**, 1073.

Genn H (2012) What is civil justice for? Reform, ADR and access to justice. *Yale Journal of Law and the Humanities* **24**, 397.

Grillo T (1991) The mediation alternative: process dangers for women. *The Yale Law Journal* **100**, 1545–1610.

King M, Freiberg A, Batagol B and Hyams R (2014) *Non-adversarial Justice*. Annandale, NSW: Federation Press.

Mack K (1995) Alternative dispute resolution and access to justice for women. *Adelaide Law Review* **17**, 123.

Noone MA and Akin Ojelabi L (2014) Ensuring access to justice in mediation within the civil justice system. *Monash University Law Review* **40**, 528.

Noone MA, Akin Ojelabi L and Buchanan L (2018) *Mediation Ethics and Justice*. Pyrmont, NSW: Thomson Reuters.

Productivity Commission (2014) *Access to Justice Arrangements*, Vol. 1, Inquiry Report.

Sackville R (2018) Law and poverty: a paradox. *UNSW Law Journal* **41**, 80–99.

Steffek F and Unberath H (2013) *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*. Oxford: Hart Publishing Ltd.

Waldman E (ed.) (2011) *Mediation Ethics: Cases and Commentaries*. San Francisco: Jossey-Bass, a Wiley Imprint.

Waldman E and Akin Ojelabi L (2016) Mediators and substantive justice: a view from Rawls' original position. *Ohio State Journal on Dispute Resolution* **30**, 391–430.

Woolf, Lord (1996) *Access to Justice: The Final Report*. London: Lord Chancellor's Department.

Cite this article: Akin Ojelabi L, Noone MA (2020). Jurisdictional perspectives on alternative dispute resolution and access to justice: introduction. *International Journal of Law in Context* **16**, 103–107. https://doi.org/10.1017/S1744552320000087