Völkerrechtsblog
Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

ALTERNATIVE DISPUTE RESOLUTION SYMPOSIUM

The History and Development of "A" DR (alternative/appropriate dispute resolution)

CARRIE MENKEL-MEADOW — 1 July, 2016

What is "A" DR? In its modern incarnation, the "A" stands for "*alternative*" dispute resolution, meaning "alternative" to formal court hearings, trials and formal legal proceedings. But the name is a misnomer. In most legal systems these days, most disputes and conflicts are settled or resolved in some way short of a formal trial – through an *ombuds* (a person who works for the government or for private industry by sector, e.g. energy, financial services, aviation to resolve disputes with providers) (especially true in European consumer disputes, given the EU Directive on Consumer

Disputes (2013), direct *negotiation* of the parties, *mediation* (a third party facilitates a negotiation between the parties) or *arbitration* (a private hearing with a third party who is not a state appointed judge). Many special kinds of disputes also go to *special tribunals* which are more administrative and not courts, e.g. in labour disputes.

So, actually we now say the "A" is *appropriate* dispute resolution – we look for the right process to resolve the particular dispute or conflict we have, or to transact a new arrangement (e.g. a peace treaty), or create a new international organization or process (such as The Iran-US Claims Tribunal (arbitration). Not every dispute or conflict should be handled in the same way, so we now talk of "process pluralism." Much of our choice about what is "appropriate" depends on **who** we are having a conflict with (a friend, family member, stranger, the government, an organization, a number of parties, organizations or countries) and **what** the dispute is about (a scarce resource, like land or property or money, or something we could share, or something we want to do that is new rather than routine (for which we could use a form contract). Deciding what dispute resolution process to use (or to design for those who have repeated disputes with each other) is often a complicated choice and requires knowing what each process offers (e.g., a contract, a legally enforceable judgment, a treaty, a promise, or a contingent agreement that can be revised later).

Although "A"DR is now dated from the late 1970's as a social and legal reform movement in the United States (from the 1976 Pound Conference on the Causes of Public Dissatisfaction with the Administration of Justice), which called for more efficient and different forms of dispute resolution for different kinds of matters, ADR is really

thousands of years old and has several different motivating concerns: efficiency, flexibility and tailoring of outcomes, party empowerment, legitimacy and participation of the parties and sometimes, with privacy, avoidance of precedents for others.

The different kinds of processes that make up ADR include *mediation*, *arbitration*, *negotiation*, *ombuds*, *consensus building* (used for complex many party and many issued conflicts) and some new hybrids of these processes, including "*negotiated ruling making*" or "reg-neg" (when governments and regulated industries negotiate their regulations before they are promulgated), *med-arb* (try mediation first with the parties negotiating and then ask for a decision from an arbitrator if that doesn't work) or *arb-med* (start with a neutral decision maker who then facilitates the parties direct negotiation) or *neutral fact-finding or inquiry* (used in many international disputes) for investigation of facts before parties decide what to do about them), or *early neutral evaluation* or *preventative or early dispute resolution* when some third party evaluates a case and gives advice to the disputants about how to proceed for resolution or further investigation, in the hopes of avoiding or settling early a more formal legal proceeding.

In fact, many forms of dispute resolution are thousands of years old, dating from Confucian principles of promoting harmony and community, rather than individual, "justice," in China and then later other Asian countries, or African community dispute resolution processes called "moots" (or in some countries *Ubuntu* or *gacaca*), which are mediation like processes in which community elders listen to narratives of the dispute from the parties and either help negotiate a solution with the parties, or, more like

arbitration, decide or command some remedy, with the goal of preserving community peace. The goals of such older forms of dispute resolution are to prevent further conflict and escalation of the dispute beyond the parties, to restore the community to peaceful existence.

In the West (Continental Europe and in England), the middle ages saw the movement from "*trial by ordeal*" (putting disputing parties on a horse to joust, or dropping them into a fire or body of water to see if God would "protect" them and declare the innocent or non-wrongdoer) to *trial by evidence*. The development of formal rules of evidence was designed to use rational forms of proof and judgement by "peers" (juries) about what had happened to cause the dispute. "Modern" justice meant that judges or juries declared winners and losers (in both civil and criminal cases) so that the guilty would be punished or pay damages and the innocent would be vindicated by using the same rules of procedure and substantive rules of law to everyone ("equal justice under law").

In the late 20th century this more modern way of achieving "individual" justice caused many court systems to become very crowded (in countries like the US and Italy it could take as much as 5-10 years to get a hearing), and once there, the court and formal trial process became quite expensive, requiring the hiring of lawyers and other professionals (experts) and the paying of high fees.

So in the 1970s two different groups of reformers proposed different solutions to the court delay problem. Some American judges and scholars proposed "alternatives" to court (mediation, arbitration, negotiation, mandatory settlement conference,) to encourage parties to settle their

differences quicker and cheaper with out-of-court processes. This was called the "*Multi-Door Courthouse*," an idea that people would choose a process and reduce their costs and time in resolving disputes. The US government actually funded a few local court systems to create such multi-door courthouses and many people (lawyers, psychologists and community leaders and social workers) were trained as mediators.

A different group of reformers (including this author) proposed that different forms of dispute resolution were necessary to solve problems in a different way. There are many modern problems that don't have simple right or wrong answers—the "truth" or "justice" are more complicated sometimes, and parties working together might come up with more creative and different solutions than those courts were authorized to give, since courts are limited by law as to what they can do (award damages or sometimes an injunction) and so have "limited remedial imaginations." Joint custody of children after divorce is one example and intellectual property licensing agreements are another. This approach to "ADR" (creative problem solving) in turn led to the development of specialists in designing "appropriate" dispute systems (now called DSD, *dispute system design*) for different kinds of disputes. Thus, some are motivated to use ADR for *quantitative*, *efficiency* reasons and others for *qualitative*, *better solutions* and more *participation by the parties* (more deliberative democracy and party control over conflict resolution). There are different motivations behind different kinds of dispute resolution, leading to different schools of practice (e.g. *facilitative vs. evaluative mediation*).

In the last few decades different forms of ADR have gone global—a new field of *transitional justice* has developed

to provide both punishment and reconciliation in post-apartheid, post-civil-war and other post-conflict zones. So although there is now an International Criminal Court for state violations of human and civil rights and criminal prosecutions, in some settings, a form of ADR has been used to create *Truth and Reconciliation Commissions* (e.g. South Africa, Bolivia, Argentina, Liberia) which are often hybrid institutions that seek the "truth" about what atrocities have occurred, but also try to use various forms of narrative, apologies, forgiveness ceremonies and rituals to attempt to "heal" the past, so newly constituted countries can move forward. Ironically, or in a return to earlier history, some countries have used older indigenous processes like community moots (gacaca in Rwanda) to attempt to combine justice of the past with peace for the future. These new forms of institutions are hybrid because they draw on both public international law concepts (international criminal law) and national or indigenous processes.

At the international level, *negotiation* (between and among different countries, states and communities are as old as humankind) and is a process now used by the 200 countries in the world to negotiate treaties (which are state commitments to not engage in war or other bad acts, or to positively collaborate on other activities, like poverty amelioration, environmental protection, anti-discrimination, health, education and cultural cooperation). Modern international legal activity is often conducted in informal networks of negotiation and new forms of international administrative actions, rather than by formal courts or executive diplomacy. *Mediation* by international officials is now commonly used to try to resolve interstate conflicts before they escalate to war. Mediation and arbitration are both used in both public law and private, commercial law

settings. *Arbitration* is used on an international level to resolve border and boundary disputes, private commercial cross-border disputes, and now disputes involving private investors in foreign countries. Formal institutions like the World Trade Organization use arbitral processes and investment arbitration now represents a controversial hybrid, using arbitral processes, but relying on more public law principles and demands for transparency. Most informal dispute processes ultimately rely on the enforcement powers of national courts under international treaties, such as the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards or the Washington Convention for dispute processes for foreign investment disputes with states.

At the level of everyday disputing, the European Union and some national court systems are now promoting various forms of ADR, such as those described here, to reduce long court delays and to provide consumer and even businesses different ways to resolve their disputes, including the promotion of Online Dispute Resolution (computer platforms for trans border and national consumer disputes or disputes between citizens and states). The expansion of different forms of dispute resolution has led to interesting issues and policy differences about whether conflicts and disputes belong to the parties, so they can privately choose their form of resolution, or whether conflict resolution should remain a public and transparent state function when the impact or precedent of a conflict resolution might be greater than just on the interested parties.

"A"DR is used in many different ways these days, in local disputes, in global disputes, in public and in private. Some call this "*informal*" *justice* (party choice of process and

outcomes with ~consent") versus "*formal*" *justice* (with clear rules of law, evidence, but limited remedies) and others now see that we have not only formal and informal but "*semi-formal*" (hybrid and combined forms of) dispute resolution. *Which process is appropriate in what settings* depends on what the parties want to do, both in terms of what outcomes they seek, and how they want to deal with their fellow disputants. The evolution of human dispute processing is both more sensitive to different aspects of human conflicts, providing more flexible and different remedies, but also provides some complexity in assessing what process is best for what dispute.

Carrie Menkel-Meadow, Chancellor's Professor of Law, University of California and A.B. Chettle Professor of Law, Dispute Resolution and Civil Procedure, Georgetown University.

ISSN 2510-2567

Tags: *Alternative Dispute Resolution*, *History of International Law*

Related

Strengthening the means of (international) law enforcement
30 June, 2016
In "Alternative Dispute Resolution"

Systemic deficiencies of US FTAs' arbitral labour dispute settlement procedures
11 November, 2015
In "Labour Standards in a Globalised Economy"

From curse to opportunity: Mediation of natural resource conflicts
13 July, 2016
In "Alternative Dispute Resolution"

PREVIOUS POST
Strengthening the means of (international) law enforcement

NEXT POST
Investor-State Arbitration as Part of the International Rule of Law

No Comment

Leave a reply

Logged in as ajv2016. Log out?

SUBMIT COMMENT

☐ Notify me of follow-up comments by email.

☐ Notify me of new posts by email.