Global Lessons in Mandatory and Voluntary ADR Systems

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Shahla Ali (Faculty of Law of the University of Hong Kong)

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The question of voluntary and mandatory ADR including arbitration has been a richly debated topic in many jurisdictions. Since the mid-twentieth century, the question of achieving procedural and substantive justice in the context of judicial dispute resolution has received significant attention beginning with the work of Owen Fiss and Lon Fuller who articulated early insights into the role, forms and limits of adjudication. Fiss argued that the purpose of adjudication is to provide a public forum to enact public values and not a forum for settlement proceedings.[fn] See Fiss, O., 1979. The Forms of Justice. Faculty Scholarship Series. Paper 1220; Fiss, O., 1984. Against Settlement. Yale Law Journal, 93(6), pp.1073-1090.[/fn] Fuller saw alternative processes such as dispute settlement as potentially appropriate in cases where adjudication reached "its limits."[fn] See Fuller, L.L., 1978. Forms and Limits of Adjudication. Harvard Law Review, 92(2), pp.353-409.[/fn] This occurred, Fuller argued, when adjudication attempted to resolve what he described as "polycentric" type disputes (such as when there is no clear issue subject to proofs and contentions).[fn] Ibid.[/fn] According to Fuller, mediation or other forms of ADR are commonly directed towards the creation of relevant interpersonal norms rather than the conformity to such norms.[fn] L.L. Fuller, Mediation Its Forms and Functions, 44 S. CAL L. REV 308 (1970).[/fn] Mediation is especially useful when the parties concerned are locked in a relationship of "heavy interdependence", such that each is dependent on some form of collaboration with the other.[fn] Id. at 310-312.[/fn] In general, the facilitation of the mediator can speed the discussion, reduce the likelihood of miscalculation and help parties reach an optimal agreement by adjusting the parties' divergent valuations.[fn] Id. at 318.[/fn]

Recent work has highlighted the growing inefficiencies of civil litigation in economically advanced countries, while at the same time, caution is given to the potential denial of justice through exclusive reliance on extra-judicial procedures[fn] See: Amy J. Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values* (August 21, 2011), Fordham Law Review, Vol. 78, p. 101 (2009).[/fn] Building on a growing body of empirical cross-jurisdictional research examining ADR reform and policy[fn] See: Steffek, F., et al. (2014). *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Oxford, U.K.: Hart 2013); Schonewille & Schonewille. (2014). Variegated Use of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World. (The Hague: Eleven International Publishing, 2014); Stienstra, D., Willging, T. E., & Federal Judicial Center. (1995). *Alternatives to litigation: Do they have a place in the federal district courts?*. Washington, D.C. (One Columbus Circle, N.E., Washington 20002-8003: Federal Judicial Center); Wissler, R. L. (1995) *Mediation and adjudication in the small claims court: the effects of process and case characteristics.* Law and Society Review 29, 323-358; Menkel-Meadow, C. (2013). *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to*

the 'Semi-formal' in Regulating Dispute Resolution: ADR and Access To Justice at The Crossroads (Felix Steffek, Hannes Unberath, Hazel Genn, Reinhard Greger & Carrie Menkel-Meadow, eds., Oxford, U.K.: Hart 2013); Stipanowich, Thomas, *The International Evolution of Mediation: A Call for Dialogue and Deliberation* (2015). 46 Victoria University of Wellington Law Review 1191 (2015); Strong, S.I., *Realizing Rationality: An Empirical Assessment of International Commercial Mediation* (February 24, 2016). Washington and Lee Law Review, 2016 (Forthcoming); Genn et al. Twisting Arms: *Court Referred and Court Linked Mediation Under Judicial Pressure* (Ministry of Justice Research Series, 2007); De Palo, G., and Harley, P. (2005). *Mediation in Italy: Exploring the Contradictions* 21 Negotiation Journal 469.; Macfarlane, J. (2004) *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering*. Research Project Journal of Dispute Resolution, 2004: 179-228.; Farrow, T. C. W. (2002) *Negotiation, Mediation, Globalization Protests and Police: Rights Processes; Wrong System, Issues, Parties and Time*. Queen's Law Journal, 28: 665; Lisa Blomgren Amsler (formerly Bingham), Janet K Martinez and Stephanie E. Smith, Christina Merchant, *The State of Dispute System Design* (November 12, 2015). Conflict Resolution Quarterly, 33: S7-S26; Andrea Kupfer Schneider, *Foreword: The Future of Court ADR: Mediation and Beyond* (February 24, 2012), Marquette Law Review, Vol. 95, No. 3, Spring 2012; Tania Sourdin and Archie Zariski, *The Multi-Tasking Judge: Introduction to Comparative Judicial Dispute Resolution*, (Australia, Thomson Reuters, 2013); Dorcas Quek Anderson and Joel Lee, *The Global Pound Conference: A Conversation on the Future of Dispute Resolution* (September 20, 2016), Asian Journal on Mediation 70 [2016].[/fn], recent research has explored initial comparative findings examining the association of judicial voluntary and mandatory mediation structure with perceptions of justice, efficiency and confidence in courts. These findings are of significance to arbitration practitioners since many of the same issues surrounding voluntary and mandatory access may apply to arbitration as well.

Courts in multiple jurisdictions face the challenge of reconciling procedural and substantive justice in designing court mediation programs. How such programs provide opportunities for party directed reconciliation on the one hand, while ensuring access to formal legal channels, remains an area of continued inquiry. In some jurisdictions, mandated programs require initial attempts at mediation, while in others, voluntary programs encourage party-selected participation. Recent research by Shahla Ali has explored comparative empirical findings examining the impact of judicial mediation structure (mandated or voluntary) on perceptions of justice, efficiency and confidence in courts in ten jurisdictions. It does so by investigating whether, and if so how, variation in civil mediation policy as one factor, affects variation in judicial efficiency, confidence in courts, and perceptions of justice. Given the highly contextual nature of court mediation programs, the study highlights achievements, challenges and lessons learned in the implementation of mediation programs for general civil claims.

The principal finding of the research indicates that overall, while both voluntary and mandatory mediation programs demonstrate unique programmatic strengths and are associated with positive gains in the advancement of civil justice quality, the selection of program design involves some trade-offs. For example, sampled voluntary mediation programs are associated with a higher proportion of longitudinal advancement over a five year time period in levels of efficiency, with a slightly higher proportion of advancement in terms of confidence and perceptions of justice within sampled civil justice systems. At the same time, from the perspective of the 83 court mediation practitioners surveyed, practitioners report slightly higher levels of confidence in mandatory mediation programs, higher perceptions of efficiency with respect to voluntary programs, and regard voluntary and mandatory mediation programs with relatively equal perceptions of fairness. Program achievements largely depend on the functioning of the civil litigation system, the qualities and skill of the mediators, safeguards against bias, participant education, and cultural and institutional support.

More information on the study can be found here.

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