An essay on the development of adr evaluation law general essay

Law

2. 1 Introduction

The literature review is considered, a selection of current research materials from sources such as books, academic journal articles, significant research reports, evaluations, reviews, academic writings, studies, submissions of academic and non-academic papers, case study reviews and previous studies related to the research topic with aims to: Explore the different concepts of justice in traditions, cultures and religions and their effects on people; Identify and evaluate the barriers in non-ADR systems in developing countries on a standard scale, found by other researchers to access justice; Find a suitable path for justice users in the context with ADRprocesses and justify their use; Investigate the best approaches adopted by other authors and get anynew approach related with this research topic. To understand the development of ADR evaluation within the field as awhole. Knowledge of Dispute Resolution processes, formal or informal, is getting recognition with the increase in literacy rate especially in developing countries and so many books, research articles, reports, conferences and seminars papers, online libraries and databases, by famous authors, and Internet resources are available for readers. The researcher has reviewed and evaluated some of them using standard research criteria, what most effective and effective strategy or models of dispute resolution exists in developing countries and what barriers exist in the context with access to justice. This Literature Review explores that ‘ access to justice’ is not only a complex subject but a complicated topic where no database exists. The researcher’s criteria for determining the ‘ usefulness’ of the reports/ reviews/ evaluations/ studies are as follows: Books and magazine articles written in last two decades in printed

and electronic form; Collection of information or data, which is relevant and valuable to the subject information; Views and analysis made by other authors linked to the answers of research questions; The research has identified a number of institutional, operational and traditional barriers in non-ADR and ADR systems in developing countries in terms of measuring outcomes i. e. cost, procedural quality and efficiency from past and current research and publications, and this is the research plan where the researcher wants to explore all types of existing or expected barriers in a single source, explain their causes and validity, their effects on outcome i. e. how the user gets the justice or deprived of from the justice because researcher understands that a vacuum exists here in the available literature.

2. 2 Methodology

A review of the literature consists of searches in scholarly periodical University indexes including, but not limited to: LexisNexis; Social Work Abstracts; PsychArticles; WestLaw; andSearches for brief articles and conference proceedings using the Internet search engines: (a) Google. com; (b) Google. Scholar; (c) Yahoo. com; and (d) Altavista. Electronic searches included the following search terms in various combinations: Alternative Dispute Resolution Systems; Alternative Dispute Mechanisms, Non-ADR Systems; ADR Systems; adverse dispute resolution systems; Access to Justice, Traditional Justice Systems; litigation; mediation, arbitration, court connected ADR; barriers; barriers in access to justice, measurement of justice, evaluation of justice, concept of justice in cultures, religions and tribes, history of traditional systems. Considering the broad vision and diversity of ‘ justice’ in cultures, religions, communities, society and legal

systems, the material covered and studied makes no claim to be comprehensiveness and the expectations of people with multiple and complex needs running through this literature.

2. 3 Limitations

There are some notable limitations to the information presented in this study that weighs to be acknowledged: It is not the intention of this literature review to provide a complete listing of all the practice initiatives related to dispute resolution systems in developing countries. Rather, this literature review intends to provide a topic of discussion of issues, related with barriers in access to justice. We find different empirical researches on cost and time in developed countries in litigation, but this study illustrate the broader issues of access and justice. There are a number of excellent reviews and summaries that provide information about different barriers in non ADR systems to access to justice; However, there is no comprehensive study that integrates both the barriers and measures with the practice evidences. This study is an first step to explore the barriers in non-ADR systems in developing countries. To understand the issues of awareness, strategies for ameliorating limited education in general encounters, and suggestions for the future are still the subjects to be investigatedFrom this study, we outline four main conclusions about cost, time and outcome, and more general issues about access to justice. It is to be noted that the author has preferred to include those articles, journals and books which have been published in electronic form within this decade. Search on Google explores more than 100 books containing the word ‘ dispute resolution’ or the research topic words, with different alternatives. Two online libraries ‘ Questia’ and ‘ Highbeam’

were accessed after subscribing the services, to read books, articles and reports online. The literature review will focus on the following five topics, the main objectives of the research: What is access to Justice; What barriers exist in access to justice in the non-ADR system; Evaluation of the barriers either they are barriers of not? Alternatives of dispute resolution;

2. 4 Access to Justice

C. Parker (1999) views " access to justice is not only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve ‘ everyday justice’; the justice quality of people’s social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved. Claims of justice, are dealt with as quickly and simply as possible whether that is personally (everyday justice) informally (such as ADR, internal review) or formally (through courts, industry dispute resolution, or tribunals)"[1]but what happens in the society is that each sphere of barrier in justice influences the quality of justice. " Improving access to justice requires improving access to formal and informal justice mechanisms and improving the justice quality of daily life."[2]Gramatikov‘ s (2007, 12) defines approach to justice as " the commonly used procedures through which users of the legal system proceed in order to obtain an outcome". Professor Ladan Muhammed Tawfiq's, considers courts as the main ‘ suppliers’ of justice arbiters of legal issues, able to express what the law is, what the rights and obligations of parties are and enforce those declarations. In his view, in developing countries, the " law is often discriminatory and legal processes are expensive, slow and complex.

The result is that people and particularly poor people feel inadequate and unequal access to justice through the formal legal system. For these reasons, they tend to rely much more on customary justice systems, but these can be discriminatory. Improving access to justice requires that both formal and customary systems be made to work justly and equitably."[3]Robert McClelland[4](2009) state " access to justice, a basic right to the rule of law and integral to the enjoyment of human rights". It is an essential precondition to social inclusion and a key element of a well-functioning democracy. In his view " an effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to and the respect of, the community it serves." He considers courts, an important aspect of the justice system where people expect the outcome, they are looking for to resolve their disputes. He argues " People have, and will continue to have, disputes, mostly resolved without resorting to the machinery of formal justice (such as lawyers, courts or dispute resolution services)." Robert McClelland comments " access to justice should include resilience: reinforcing and enhancing the capacity of people to resolve disputes themselves. However, the Government has a role in ensuring that there are mechanisms available to resolve disputes lawfully, peacefully and fairly, and to reinforce the fundamental principles that are embodied in laws. An accessible and effective way of resolving disputes is central to the rule of law. Without it, disputes are either unresolved or dispute resolution is driven underground. In either case, the outcome is a loss of confidence in the rule of law and the expectation that society has the capacity to ensure cooperation is respected and rewarded." Conflicts, disputes and Justice are

the elements which roots to the history on this earth. C. Bvumbwe and D. W. Thwala[5](2011) argue " there is a great deal of literature about the causes of conflict and disputes. Some writers refer to ‘ causes’ of conflict, others to ‘ sources’ ‘ reasons’, or ‘ triggers’. Botha (2000) has identified the following causes of disagreements based on the literature survey: Misunderstandings usually occur because of poor communication. Values differ between people, professionals and skills. People often have unrealistic expectations. The client wants speedy completion and a quality building at a low price. The contractor may want more time, a more reasonable quality and maximum price. Emotions play a role, the ability to handle stress causes dispute. A person’s self-esteem (or lack of it) can also cause disputes. Factors under this heading include languages, dynamics, geography, childhood experiences, upbringing and religion. Education levels and both structured and unstructured learning can have an influence on conflict. There are many differences between projects. From one project to the next there are different building teams, different financiers and different designers. Not all people are equally skilled at visualising two-dimensional drawings in a three dimensional way. Changes to plans, deadlines, payment dates, and so on, can cause disputes. It does not matter who or what is to blame for a delay. It could be the weather, a subcontractor, the bank or whoever. The mere fact that there is a delay could cause disputes. Parties often inadequately define quality. High quality may mean different things to a plasterer and to the project director or project manager. One must use objective standards to define materials and workmanship. One must precisely describe what one requires. A clientmay specify a much higher standard than what he wants

while asking a lower price. A sub-contractor may misunderstand the actual requirements and may quote a lower price than other contractors may, then when he realises his mistake, dispute results.[6]The idea of all different views on ‘ access to justice’ has been compiled by Lord Woolf (1995) in his General Principles to Access to Justice report. According to him, to ensure access to justice in a civil justice system which should be: Fair and be seen to be so by ensuring that litigants have an equal opportunity regardless of their resources to assert or defend their legal rights providing every litigant with an adequate opportunity to state his or her own case and answer his or her opponents; Be just in its outcome; Deal with cases with reasonable speed; Be understandable to those who use it; Provide as much certainty as the nature of particular case allowsand involve procedures and cost that are proportionate to the nature of the issue. Another report Civil Justice Review Task Force Ontario Canada Report[7]discuss different scenarios related with access to justice in courts which are similar to with a court system, anywhere in the world, developed country or developing countries. The writer of the report examines unreasonable delay in the disposition of disputes is, indeed, the enemy of justice and peace in the community which breeds to inaccessibility, fosters frustration and leads inevitably to unreasonable costs forming disrepute to the justice system. Anderson (1999)[8]states " repeated studies of access to justice have shown that two factors predominate in determining whether people are able to use available legal remedies."[9]The first, and by far the most important, is access to financial resources. Hiring lawyers and using legal institutions can be costly in themselves, but also entail opportunity costs, which for the poor usually means time away from

income-generating activities. The second factor usually identified is institutional skill – the ability to understand and use the system. Discussing other factors in ‘ access to justice’, Anderson[10](1999, 18) argue " reluctance to use the law to get the right or justice" in the societies of developing countries is common and " it is noted that in many cultures there is a reluctance, particularly among the poor, to become entangled with the courts. This is sometimes attributed to the strong social stigma attached to any encounter with the law, no matter how innocent. Thus, litigation may be seen as making trouble while a brush with the police can be interpreted by the local community as guilty until proven innocent. In his opinion " this is because people have no trust on law". He further writes " the view that the law does not serve the real needs of the poor, but serves some other set of interests or ideals is difficult to refute in such circumstances. For the most part, the poor ‘ see the law as a tool which the wealthy and well-connected can use against them." When we review the cultures, Identities and religions in the context with justice, it is hard to define and conclude which way is best to access to justice, the negotiation or mediation with more chance of success. Faure and Rubin (1993) define culture as " a set of shared and enduringmeanings, values and beliefs that characterize national, ethnic and other groups, and orient their behaviour." We see cultural differences in the society between the individual and the collective. Each country has its own cultural and religious values. Some countries respect to their cultures, and some prefer religious laws in daily life. The Sulha is the Arab traditional way of conflict resolution. It works because of the collective responsibility of the extended family (hamula). This responsibility and commitment to preserve

the honor and reputation of the family prevents all members of the family (even those who did not participate personally in the ceremony, and future generations) from breaking the customs and laws of the Sulha (Jabur, 1993)." Both Berbers and Bedouin follow this Islamic practice of a ritual ceremony of forgiveness. Once the ceremony is performed, the dispute may not be discussed – it is as if it never occurred" (Wolf, 2000). It is an effective and efficient way of resolving disputes in these communities. Even in cultures with a high degree of collective responsibility (such as Japan and China), we find cases where individual goals are opposed to the collective ones. We recognize the existence of sub-cultural differences in religions, organizations, and gender, and within various groups of professions (doctors, engineers, and so on). Identity as defined by J. Rothman " is people’s collective need for dignity, recognition, safety, control, purpose, and efficacy." Many conflicts carry within them identity issues, and these conflicts may last many decades and be very destructive domestically (the conflict in Northern Ireland) or internationally (the conflict in Yugoslavia). Many international and group conflicts contain identity-based interests and needs that were not fulfilled (Rothman, 1993). Rothman argues that the approach to resolving cultural and identity-based conflicts is a combination of interest-based negotiation and the process of dialogue and consensus building. The " third party" would help to identify the parties to the negotiation and decide who the participants will be; conduct a conflict assessment by identifying the major issues and interests of the parties, and identify the reasons and motivation for participating and resolving conflict.

2. 5 Barriers or Obstructions in Access to Justice

Arrow et al., (1995) view about resolution of disputes is " the conflicts may not be resolved easily, and can last many years. Sometimes these conflicts persist in spite of the fact that they cause heavy losses of resources, and even human life". According to a study at Stanford University, there are three categories of barriers to resolving conflicts:[11]Tactical and strategic barriers; this stem from the parties' efforts to maximize short or long term gains. Psychological barriers; this stem from differences in social identity, needs, fear, interpretation, values, and perceptions of one another. Organizational, institutional and structural barriers; these can disrupt the transfer of information and prevent leaders from reaching decisions that are in the interests of the parties in dispute".[12]According to James A Schellenberg (1996)[13], access to justice is often diminished due to delay, congestion, high legal costs, lack of resources and improperly designed legal rules. " They are [1] the costs of litigation, [2] the delays in the court system and out-of-court settlement, [3] the uncertainty associated with trial outcomes, [4] the divergent interests of lawyer and client and [5] the technical difficulty associated with determining damage compensations."[14]Genn, H (1996)[15]point in his report " Survey of litigation costs: In Access to Justice" on " three perennial problems of cost, delay and complexity have been inflicting the civil justice system for ages, and it was these ills that Woolf reforms along with the previous attempts at reform of civil justice wanted to redress."[16]Lord Woolf wanted to eliminate the defects in the civil justice system which were identified as being: too expensive, too slow, lacking equality between powerful and wealthy litigants

and under-resourced litigants, too uncertain in terms of the length and cost of litigation, too fragmented and too adversarial."[17]The " key problems facing civil justice today are cost, delay and complexity, these three are inter-related and stem from the uncontrolled nature of the litigation process. In particular there is no judicial responsibility for managing individual cases or for the overall assessment of the civil courts."[18]Lord Woolf (1995) in his Final Report urged " people should be told and encouraged to resort to the growing number of grievance procedures, or the ADR before taking up the judicial review proceedings. There are no complex court procedures to be adhered while using ADR and also it saves a lot of time and avoids the ever escalating litigation costs."[19]Anderson (1999, 10)[20]states in his published article " a lack of judicial independence is an obstacle to justice."[21]Other problems of justice institutions are their slowness[22], the costs of legal process[23], a lack of adequate information provision of legal norms and legal practice, and the geographical distance from the poor to the courts.[24]25The poor possess a limited capacity to express effective demand for any good or service, and there is no reason why justice should be any different. The actual costs of engaging a lawyer, the opportunity cost of time spent in court, and the general level of skill and education required to litigate effectively all serve as deterrents."[26]A report " The Cost of Justice Weighing the Costs of Fair & Effective Resolution to Legal Problems"[27]describes " equal access to a civil justice system that can uphold rights and fairly and effectively resolve disputes, is a fundamental and far-reaching component of democratic societies (Farrow, 2006a, 2009, 2010a; Friedman, 2006; Marshall, 1950) and " there is mounting evidence

that the public cannot afford to resolve their legal problems through formal litigation processes because the cost of legal advice and representation required is beyond the means of low and middle-income Canadians (Access to Justice Study Committee, 2007; Cannon, 2002; Knutsen, 2010; Lord Woolf, 1996; Systems of Civil Justice Task Force, 1996; Stratton & Anderson, 2008). [28]When we look into the major barriers in access to justice in non-ADR systems, a review by Taylor and Svechnikova (2010) is considerable which surmises " there is a lack of empirical knowledge concerning the actual costs of justice."[29]Kakalik & Robyn (1982, 3) states " scholars have long recognized an essential tension between costs and civil justice, there is a lack of data, empirically address the question, how much does the civil justice system cost? The Rand Institute of Civil Justice noted the absence of any hard data on costs of justice and pointed out that most information is anecdotal and that —no impartial institution has undertaken the laborious task of collecting, standardizing and comparing available cost and workload data to evolve overall estimates with some claim to statistical validity."[30]Literature review explores that Six large-scale empirical inquiries into the ‘ costs of civil justice’ (Genn, 1996; Kakalik & Pace, 1986; Kritzer & Anderson, 1983; Trubek, Sarat, Felstiner, Kritzer & Grossman, 1983; Williams, Goldsmith & Browne 1992; Worthington & Baker, 1993) has proved that cost is the basic obstruction in access to justice. Worthington & Baker (1993) included a cost-benefit analysis of litigation from a litigant‘ s perspective in his study. The researchers looked at legal costs in terms of lawyers‘ fees and disbursements incurred by plaintiffs and defendants and compared these to amount recovered by plaintiffs. Findings reported

plaintiffs‘ costs at just over a quarter of the amounts they recovered (mean of 29 %; median of 26 %). Another notable finding was that litigants who recovered higher amounts of money also tended to incur higher costs. However, when proportions were calculated, the higher the amount recovered, the smaller the relative cost. These results are consistent with Trubek et al (1983) in terms of benefits to plaintiffs. Stipanowich (2004, 861) and Silver (2007) offer quite comprehensive review of more current research on cost of ADR versus court resolutions, but add a little clarity via their conclusions. Stipanowich looks at the effect of federal and state court-annexed mediation on costs as incurred by disputants, concluding that mediation has a positive impact on costs along with other benefits such as settlement rate, overall satisfaction with the process or its results, perceptions of fairness, speed of resolution, continuing relations between family members or other participants, compliance, and collection of restitution in victim-offender scenarios. Silver‘ s (2007) overview of research on the cost effects of court-annexed mediation offers conclusions that are contrary to those of Stipanowich (2004), stating that empirical studies have uncovered no significant effects of ADR on time and costs. In particular, Silver provides compelling citations from other researchers in the field: Bernstein (1993)[31]comments " there is no conclusive evidence that [court-annexed arbitration] programs reduce either the private or social cost of disputing. " About the Institutional Obstacles to Legal Accountability, Anderson (1983, 10) argues that judicial (and legal) systems in poor countries are not more effective and constrain the behaviour of political leaders and people who occupy positions of state authority. Language is

another barrier in access to justice in developing countries where Anderson’s view is " formality of language and precision of ritual are two of the devices by which legal systems are cloaked in legitimacy. Like medical training, legal training introduces the student to a new vocabulary that can be used to describe the ordinary world in new terms. This use of formal language seldom aids either analysis or clarity[32]although it may play an important role in allowing the legal profession to charge high fees and claim a monopoly of competence in the law."[33]In addition to the language barrier in access to justice, ‘ Legal Information and Legal Literacy’ plays an important role in access to justice. Mr Anderson (1983, 21) view is " many developing countries lack the academic resources to produce legal textbooks which play an important role in distilling, explaining, and commenting upon official law even for judges. So it is not uncommon for judges in some Commonwealth countries to rely upon textbooks commenting upon English law even though the substance of the rules may be very different. " Inadequate legal representation is another obstruction in view of Anderson’s experience where " In most legal systems, private citizens are not even allowed to appear in court to present their own case – a monopoly of competence is bestowed on the legal profession. Legal rules thus require litigants to use lawyers, but lawyers are often in short supply. An extreme example is Chad, where roughly 100 judges and only 7 practising lawyers serve six million people."[34]In such circumstances, it is not surprising to see lawyers develop practices focusing on lucrative commercial or government work rather than representing the poor against abusive state powers.(P-21)" About the delay in courts, Anderson writes, Justice delayed is justice denied.

" Unfortunately, most court systems in developing countries are very slow. A 1986 study of tort litigation in the state of Maharashtra, for example, showed that the time between the filing suit and receiving final judgement was 17. 4 years on average."[35]But reforms to speed up court processes are possible. " In Singapore, reforms of the Supreme Court in the early 1990s reduced the backlog of cases by 90% in under two years, and reduced the average waiting period before hearing from five years to four months."[36]Goldberg et al, (1985: 5) identify four separate goals discernible within the movement, goals which may overlap and conflict: To relieve court congestion as well as undue cost and delay; To enhance community involvement in the dispute resolution process; To facilitate access to justice; To provide more " effective" dispute resolutions. Goldberg et al (1985, 7) defining an effective dispute resolution, writes, " one that is inexpensive speedy and leads to final resolution of the dispute. All the same time it should be procedurally fair, efficient (in a sense of leading to an optimal solution), and satisfying to the parties." Trubek, D., Sarat A., Felstiner, W., Kritzer H., & Grossman, J. [37]Reports, some of the principal findings of the Civil Litigation Research Project (CLRP). The results of this study are set forth in D. Trubek, W. Felstiner, J. Grossman, H. Kritzer & A. Sarat, Civil Litigation Research Project: Final Report (Mar. 1983, University of Wisconsin Law School) where the authors seek to contribute to the debate over " costs", by analyzing direct expenditures of time and money on processing disputes through litigation. The analysis made by the authors assess the monetary costs and benefits of litigation from the parties' perspective. When it is observed that litigation " pays,"' this mean " the parties often secure monetary results that exceed the

fees they pay lawyers and that these results would not change if we added value of the client's time and out-of-pocket expenditures."[38]Civil Justice Review Task Force Ontario Canada Report[39]discuss case delays. It says " the case processing functions performed by court administrators, on one hand and those performed by judges, on the other hand, there is a wide range of activities which can be dealt with more expeditiously and in a more cost-effective manner by non-administrators and non-judges." The report recommends an Independent Judiciary " To ensure the requisite high quality of justice and the fair and impartial determination of matters coming before the Courts a strong, and completely independent judiciary is essential."

2. 6 Evaluation of barriers

Barendrecht, Mulder & Giesen (2006)[40]have looked at the preliminary issues that arise when trying to measure access to justice in a systematic manner. The authors discuss the possibilities of a framework in which the costs and quality of access to justice can be determined and where costs are not merely measured in terms of money, but also in terms of time and emotional costs, for example, stress. Taylor & Svechnikova (2010, 19) considers Gramitov’s " work on measuring the cost and quality of access to justice which involved building a measurement framework that includes approaches to the study of litigation, the choice of units of analysis and measurement, the choice of data and collection methods."[41]Conley and Moot (2003) specify that evaluation base on comparing reality to a set of criteria. They present a typical evaluation criteria, but warn that criteria used for evaluation needs to closely match the evaluations goals. They also offer a third category which is specific to the outcomes of the individual project area

(IE environmental, transportation, etc.).[42]Broadly shared visionClear, feasible goalsDiverse, inclusive participationParticipation by local governmentLinkages to individuals and groups beyond primary participantsOpen, accessible, and transparent processClear, written planConsensus-based decision makingDecisions regarded as justConsistent with existing laws and policies[43]Conley, Moot, 2003) state " figuring out what to measure is indeed a daunting task. Evaluations take different shapes depending upon an evaluator’s needs." However, even when measures come up short there can still be positive and long lasting social consequences among participant’s knowledge and understanding and working relationships with each other (Buckle, Thomas-Buckle 1986). According to Conley and Moot, ‘ the most common form of evaluation focuses on whether and how collaborative efforts meet their identified goals and objectives’. Rolph (1995) and Church (2002) suggests other methods of evaluation to be considered and " include focus groups, practitioner round tables, professional evaluators for meta-review, and employing multi-phased project evaluation at key milestones in a project’s development. A before-and-after design offers a practical and deployable solution in these projects.. Further, to ensure that we do not capture bias from one single phase of a project, evaluation should be iterated at different points of a consensus building project."[44]Martin Gramatikov (2007), a part of the Netherlands access to justice research group focuses on the challenges of measuring the cost and quality of access to justice, costs (out of pocket expenses, the costs of time spent, costs of delay, and emotional costs), outcome quality and procedural quality, in access to justice and intend to find ways to measure the conceptual ideas

advanced in Barendrecht et al (2006). Martin Gramatikov and others (2009) [45], explaining " What are the Benefits of Measuring Paths to Justice?" attempt to serve a variety of measurement needs. Expose Insufficient Access to JusticeEvaluate Performance of ProceduresEvaluate Performance of Legal SystemsImprove Decisions of UsersMonitor Effects of ReformsValid Benchmark for Paths to JusticesImprove Transparency and AccountabilityThe MA2J aim to build a measurement framework which is valid, reliable and efficient enough to allow implementation at a global scale. Gramatikov (2007, 8) admits that demand-oriented studies of access to justice require the use of subjective data that are, " information on the perceptions, preferences and values as these are expressed by users or potential users." He argues that the use of objective data (e. g. Laws, case law, official statistics) are of limited value to projects such as the MA2J. Gramatikov (2007, 14) emphasizes the importance of defining the beginning and the end of ‘ path to justice’, when the legal need emerges, when the person decides to take action, when information to resolve the problem is sought, when the professional is contacted for advice or when action to resolve the problem is taken". As to the end of a path to justice, one could conceptualize it as " any final outcome on the merits that results from any procedure or the moment when a person decides to give up the issue" (p. 14). The unit of measurement adopted for the MA2J is " natural persons (anyone who might potentially have a legal problem) rather than legal persons" (who are somehow already involved in the legal process). Karl J. Mackie[46](1991, 11) in his paper " Methodological challenges in measuring cost and quality of access to justice", discuss the development of a measurement framework for

estimation of cost and quality of justice. To measure the experiences of end users with cost and quality of justice, the author propose a model in which paths to justice are the principal units of analysis and individuals are units of measurement. Paths to justice are conceptualized and operationalized in slightly narrower terms than the approach, used by the research on legal needs. Specific strategies for sampling and collecting data from end users from justice are reviewed and assessed for validity and reliability.(p-3)The author aim to build a measurement framework which is valid, reliable and efficient enough to allow implementation at a global scale. His focus is the costs that people face while trying to solve their problems and disputes with the mechanisms of formal and informal paths to justice. Karl J. Mackie view is " MA2J goal is to investigate the costs, perceptions on procedural quality and satisfaction with the outcome that people experience when solving their disputes." He recommends that at least three questions should be addressed when designing a methodological framework: Where to find and how to select units of measurement; Which methods to apply to collect data; andHow to make sure that collected data could be compared across jurisdictions. Karl considers some of the potentials and challenges in such a design and associated measurements. These reflections are useful to methodological development but fall well short of the goal of a globally applicable model. A ‘ path to justice’ approach is taken which proposes to follow the user through commonly used procedures to obtain an outcome. Attempts to measure actual monetary costs is abandoned in favour of " perceptions, preferences, and values" as expressed by users and potential users (p. 8). Barendrecht, M. Mulder, J. and Giesen, I[47]have published a

report " How to Measure the Price and Quality of Access to Justice? Written by famous researchers Maurits Barendrecht (Tilburg Law School; Tilburg Law and Economics Center (TILEC), José Mulder (University of Amsterdam - SEO Economic Research) and Ivo Giesen (University of Utrecht) during November 2006 which explore how the price and quality of access to justice can be determined. " What lacks, until now, is an all-embracing systematic way to assess (all) the barriers that people experience when they seek access to justice."[48]What are these barriers exactly? How powerful they are (in costs)? The goal is to explore how access to justice can be measured. (P-3) The report says " Legal scholars have revealed procedural hurdles that hamper access to justice, but have not yet developed a broader encompassing theory regarding access to justice."[49]Surveys have tested the hypothesis that the users of mechanisms weigh the costs and benefits of the different interventions they have access to (Genn et al. 1999, ABA 1994). [50]'[51]In this paper, the authors have discussed " how access to justice can be measured in a more systematic manner" and has explored " the possibilities of a framework in which the costs and quality of access to justice can be determined and where costs are not merely measured in terms of money, but also in terms of time and emotional costs (e. g. stress)." The authors write " what can be measured are the average costs of following the procedures, encountered when the claimant stays on the main trail." What can be measured is, Out-of-pocket Expenses, Time spent by the claimant and other persons addressed by him, Costs of delay and Emotional costs giving the outcome, a path that gives access to justice. There are several alternative ways to include the quality of outcomes in a measurement

framework for court procedure and other paths to justice. For instance, the quality of outcomes might be measured separately. Much like a consumer survey does for, say, insurance products or banking services, the price of the path to justice can be measured next to different aspects of the quality of this service. The authors claim " three decades of socio-legal research have demonstrated that citizens also care deeply about the process by which conflicts are resolved, and decisions are made even when outcomes are unfavourable, or the process they desire is slow or costly. So not only time and money are important, things like lack of bias, thoroughness, clarity, voice (the ability to tell one’s story) and a dignified, respectful treatment are at least as important."[52]Soft measures regarding process have been identified as information participants received about the process; Their ability to present their side of the dispute; Amount participants participated in the process and were able to communicate; (Susskind & Field, 1996)How much control participants had over the process; whether or not the ‘ right’ people were part of the process; (Bingham, 1986, Todd, 2001)Whether or not the examination of technical and scientific issues was made clear and accessible to participants; (Susskind & Field, 1996)Whether process participants gain knowledge as a result of the process; (which can be shared with others) (Innes, 1999)Whether or not participants felt fairness in the process; (O’Leary 2001).[53]Orr (2008) states " other measures of interest include whether or not the ADR process was more effective than participant’s best alternative, if participants are satisfied and endorse the process, benefit over cost is appropriate, some kind of public benefit is obtained additionally, neutral 3rd parties areoften also asked questions

about process and outcomes."[54]Evaluation of ADR processes cannot be neglected when non-ADR processes are under critique. Judith Innes has indicated a call for third-party evaluations to avoid bias in results and avoid the problem that many ADR practitioners face: they do not know much about evaluation principles. However, others feel that the practitioner sits in an advantaged position to perform evaluations as the practitioner has detailed knowledge of the subject material, project history, and (hopefully) has built trust with the parties. " Yet another form of evaluation deployment entails participants being in charge of evaluation themselves wherein they conduct self evaluations and focus groups as part of the ADR process itself. Another, yet time and cost intensive method, uses a neutral observer as part of the project process (Rolph 1995).[55]Sourdin, (2008) comments " evaluation of the mediation process, particularly in the context of the growth of ADR has been an important aspect of the development of the process." We observe much research during recent decades regarding the users of mediation, cost of mediation, effects of mediation at a personal level and in the communities, but there is little research that specifically evaluates the theory of the sustainability of the mediated agreements. Ghais (2003, 3) confirms this saying that " there has been extensive research on the mediation process, however to date little is known about the sustainability of mediation outcomes." Although some research has been achieved in the evaluation of ADR processes, but it is limited in its scope because research about the nature and sustainability of mediated outcomes is difficult. This is because comparison or analysis of outcomes needs to take account of the range of mediation models and approaches. Problems also arise in terms of

the availability of data, confidentiality and party willingness to participate in research. However, Hedeen (2004, 122) has noted the considerable value of analysing the " stability of mediated resolutions over time". First, because " it represents disputants’ abilities to fashion a fitting solution to their differences and to comply with the terms of any agreement made"; and second because it indicates that the participants will not require further intervention (for example, by the courts, police, or the mediation centre) or other resources. According to Hedeen " party satisfaction with the mediation process is undoubtedly important, but also important are the time and cost efficiencies and savings (for parties and also for government." Wade, (1997, 345) notes, " there are no comparable measures of outcome, such as durability and respect. There is no point measuring money in if there is no balancing of quality out." Bercovitch (1993, 295) and Lamare state " outcomes that appear successful at one point may seem as somewhat less so a few months or years after mediation" and asserts " we know very little about the performance of mediation and even less about the conditions that affect its effectiveness or success". (P-291)Giddings, Mckillop, Neumann and Sipe (2003, 150) note " a criticism of Alternative Dispute Resolution in general, has been the lack of long term assessment of the success of agreements and maintenance of relationships amongst parties, post resolution." Gurthrie (1998, 886) states " due to the difficulties associated with evaluating mediated outcomes, mediation is often assessed simply in terms of party satisfaction with the mediation process. Current available research is very heavily oriented towards assessing the parties’ satisfaction with the process". Their research focus on " one criterion, satisfaction, and

one constituency, parties. Ghais’ (2003, 3) evaluate research on mediation also focussed on " the parties’ level of satisfaction and their perception of fairness of the process, the mediator, and the outcome". Van Gramberg (2003, 241) views different one. He argue, " party satisfaction is not always a reliable measure as it may be achieved through dispute closure rather than obtaining a just and sustainable outcome."

2. 7 Alternatives of Dispute Resolution

Nancy F Atlas[56](2003, 2) define Alternative Dispute Resolution as " anything but a bench or jury trial under the auspices of some judicial body." ADR refers to those processes, outside of a court hearing, where an impartial person helps the parties to resolve their dispute.[57]ADR options include arbitration, conciliation, mediation, negotiation, conferencing and neutral evaluation. The potential benefits of ADR include: Early resolution of disputes and identification of the real issues in disputeLess adversarial processes for matters that involve ongoing relationshipsOwnership of outcomes by parties who have participated in ADR, andProportionate cost in cases of early resolution. Menkel-Meadow (1997, 417) state that " proponents of the mediation process, in particular, argue that much of its success derives from the inherent flexibility and creativity of the agreements reached through the mediation process and that it is a relatively low cost option in many cases." Tania Sourdin (2007) has undertaken research over five years to understand better who uses alternative dispute resolution services and who does not – and why?. In particular, her research has suggested " that many disputants who may have grievances or concerns do not access or use complaints and dispute resolution services". Sourdin concludes that there are a number of

factors that impact on use and access to ADR. Her findings indicate that those who use these services do not appear to be representative of the general population (using ABS data). " Vulnerable" consumers – i. e. those living in typically low socio-economic regions appear to be least likely to access ADR and have been found to experience additional barriers to accessing ADR".[58]Menkel-Meadow, (1997, 408) define " mediation can therefore be said to be a process that focus on achieving positive and collaborative processes and solutions, as well as time and cost efficiencies for the parties. Sourdin (2005, 14) comments " in addition to the growth in court-bases and community bases dispute resolution schemes ADR has been institutionalised and has grown within Australia and overseas" where as Boulle (2005, 65) accept " one of the main reasons for the success of mediation can be attributed to the high level of participation by the parties involved and thus creating a sense of ownership of, and commitment to, the terms of the agreement. These characteristics are associated with some of the core values of mediation, particularly as practised in community-based models as found at the DRCs. These core values include voluntary participation, party self determination and part empowerment". Koplan, Spruce and Moser Chronicle[59]discuss the origin and history of early ADR origins, in traditional societies of USA, Egypt, Rome, Malaysia, Trinidad & Tobago, Guyana and Ghana and how people are familiar with traditional dispute resolution systems. The paragraph referred in chapter one " It is well-documented that mediation has a long and varied history in all the main cultures of the work. As stated by CW Moore in his book, " the mediation process, Jewish, Christian, Islamic, Hindu, Buddhist, Confucian and many

Indigenous cultures, all have extensive and effective traditions of mediation practice." Giving the example of Ghana, " for example, there is abundant evidence showing the historical existence of ADR processes. In the privy council case of Kevasi et al v Larbi,[60]there is the discussion in the judgment of the Board on the question whether there is right to resile from arbitration after the award has been made. References were made to Sarbah's Fanti Customary Laws (Gold Coast) published in 1887, and the case of EKUA Ayafiev Kwamina Banyea[61]reported in 1984. Koplan, Spruce and Moser Chronicle explain advantages of different ADR procedures. In context with ' arbitration' they describe " its history may be linked to the genesis of human society itself, parents are normally arbiters in disputes between their children." Giving another example " there are mentions of disputes between two gods being submitted to a third for decision in the earliest myths. Stories from ancient Egypt tell of disputes between Osiris and Seth, and Horus and Seth, being decided in that way..... the earliest Greek arbitration myth is of a mortal arbiter, deciding between immortal parties, Hera, Athene and Aphrodite.[62]Concerning with details of the nature of ADR processes and techniques underlying " successful" negotiation and mediation, Karl Mackie, explores negotiation through three recent major works relevant to negotiation skills, and highlights the importance of levels of analysis in evaluating the success or otherwise of negotiated settlements and the nature of the processes involved. Fisher et al., (1991) understands " the reason to negotiate is to produce something better than the results that you can obtain without negotiation". The goal is to reach an agreement that is acceptable to all parties, to which they remain committed, and which they

indeed implement. This is the essence of interest-based negotiations, which has the following principles:[63]Elix (2003, 113) confirms the importance of the process supporting the parties in improving their relationship where as Boulle (2205, 73) comments that this is achieved " by taking into account the real needs of the parties, by providing a participatory and informal procedure, by modelling constructive negotiation and problem-solving techniques, and by humanising the management of conflict." A common indicator of the effectiveness of mediation is the settlement rate achieved. High settlement rates for mediated disputes have been found for Australia (Altobelli 2003) and internationally (Alexander 2003). Boulle (2005, 590) notes " mediation agreement rates claimed by service providers range from 55% to 92%". Karl J. Mackie[64](1991, 11) understands the dispute resolution processes, a new wave in resolution of disputes between communities, societies, nations and countries as these processes have been quietly slipped into mainstream of legal experience where changes occur and develop. He experiences " over the past two decades ADR has become a cornucopia of processes, procedures and resources for responding to disputes, all of which supplement rather than supplant traditional approaches to conflict. Contrary to its legal, ADR is not an alternative or substitute at all; it adds useful tools to an attorney’s existing professional tool box."[65]Karl J. Mackie (1991, 11) discussing disputes argue " many grievances and disputes, probably a majority, are never resolved as such but only allowed to die by one party " lumping it" or by the unilateral action of another party exercising power." Tom Tyler, the co-author of Karl J. Mackie states " a key concern in such studies is what determines how satisfied

clients feel with the third parties that are the lawyers and judges with whom they deal and with various dispute resolution forums used to settle the problems. In other words, what do people want from third parties and how they evaluate them". The writer concludes three basic points to examine, " First, that issues of procedures matter to clients, second there is more to fair procedures than achieving a fair outcome third people’s conceptions of fair procedures often differ in important ways from the formal structure of fair procedures in the American Legal System".(chapter 2)Welsh (2004), through the post-mediation interview research, reported that regardless of whether the ADR intervention is facilitative, evaluative, or transformative, the following process characteristics are essential: dignity, thoroughness, fairness, progress toward resolution, and adherence to procedural justice. She further noted that disputants valued mediation both for the procedural justice it provided and for its assistance in helping them achieve resolution, or progress towards resolution.[66]Dukes (2004) concludes ADR processes as " failed process, perhaps one with no agreement reached, can have lasting effects on the participant’s ability to work collaboratively. Participants in mediations that do not come to a conclusive agreement nevertheless derive significant benefits from the mediation. Those potential benefits include parties identifying or discovering their own real interests, generating new ideas for solutions, providing insights for regulators, and improving negotiation skills. His remarks " a process that reaches very solid and long lasting agreements, including monitoring and party accountability, may fail on the grounds that participants end the ADR process more hostile toward each other than when they began while being bound by ADR process

outcomes. Further, how success is seen can depend on the relative perceptions of participants and external audiences and can be relative to types of conflicts themselves. A twenty year long hostile environment could be a success simply because the parties are willing to come to the table. Attempting to capture and generalize any one measure of success across multiple projects and stakeholder groups runs the risk of ignoring the important facets of individual areas of conflict and resolution.[67]Nancy F Atlas[68]explains the hybrid processes in which neutrals first attempt to facilitate a settlement but failing that will give a binding or non-binding decision. Different perspectives on success could include: Stakeholders: Achievement of the process goals as defined by the group at the outset. Agencies: Completion of mission critical project goals. Improved working relationships with stakeholders. Practitioner: Stakeholder satisfaction with process, stakeholder endorsement of ADR [ECR]. Sponsor: Effective use of resources relative to alternatives (Orr 2008)[69]Another author, Sourdin's (2007) research points to the need for further empirical research into the reasons why disputants decide to ' give up' on resolving their dispute, or which avenues disputants explore prior to lodging a complaint or dispute for resolution. Sourdin notes that there are few statistics available on how effective or well-received any ' self-help' advice is or whether those that ' give up' do so because they find ADR schemes or services difficult to access or too difficult to understand and engage impartial persons." Contrary to the approach to mediation most widely promoted inmediation literature, court-connected mediation has a tendency to beorientated to settlement and to involve an element of evaluation".[70]Michelle Lebaron and Zena D Zumeta

(2007) state " there are three main reasons that justify the focus on legal participants to explore the divergence of court connected mediation practice from mediation theory. First, court-connected mediation tends to be very lawyer driven".[71]Second, there are many accounts in mediation literature of inappropriate lawyer expectations or behaviour within mediation. [72]Third, because court connected mediation occurs within the legal system, legal perspectives have a significant impact on the practice of mediation in that setting.[73]No empirical evidence has been published in respect of the court’smediation program that supports these claims about expedition, cost savingsand the delivery of justice. There is evidence that the court has improvedits ability to cope with its caseload but those improvements are not solelyattributable to the mediation program. [74]Nancy A Welsh (2001) says " court-sanctioned mediation is part of a system that delivers justice, not just settlement, and therefore there is an obligation on courts to promote fairness within their mediation processes". [75]This requires more involvement than simply referring matters to mediation in the absence of quality control measures.[76]McAdoo and Welsh (2004-2005), urges " there is an obligation upon courts who refer matters to mediation to have systems in place to assure parties about the quality and fairness of the process to which they are being referred".[77]Hilary Astor (2001) suggests " quality control may be achieved by applying and advertising standards of mediation practice and welcoming complaint about breach of those standards, together with mechanisms to monitor participants’ experiences of fairness".[78]

Conclusion

The researcher reviewed a number of books, journals articles, Internet resources, conference papers, libraries, online databases, online libraries and databases, during the five years tenure but could not find any single book or database that have the contents related with obstructions in non-ADR and ADR context, their reasons, measurement in terms of access to justice or the methodology to prove that the obstructions are the actual barriers in access to justice and that which ADR process is considered better in terms with getting the good results. Here the researcher find a vacuum in literature review in exploring the obstructions in ADR and non-ADR processes, evaluation of paths to justice in context with different models and finding some neutral, speedy and cost effective way for ‘ access to justice’, a single source of information. Tony Marshall[79]" provides a useful summary of the key motivations behind the ADR and outlines the development of mediation approaches and draws a distinction between two types of mediation used, principally deriving from the extent to which mediation processes are an outcome of justice systems referrals or centred in voluntary community disputes. The rationale for action in this area has been the need to develop broader and ‘ better’ goals of settlement than are provided within the standard philosophical map of the legal justice approach".