

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 context with ADR Processes and justify their use; Investigate the best approaches adopted by other authors and get any new approach related with this research topic. To understand the development of ADR evaluation within the field as a whole. 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 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 context with measuring outcomes i. e. cost, procedural quality and efficiency from the past and current research and publications 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; and Searches 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

<https://assignbuster.com/the-development-of-adr-evaluation-law-general-essay/>

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 may be another 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 investigated. From 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'

<https://assignbuster.com/the-development-of-adr-evaluation-law-general-essay/>

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 or 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, " law is often discriminatory and legal processes are expensive, slow and complex.

<https://assignbuster.com/the-development-of-adr-evaluation-law-general-essay/>

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) states "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." 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 client may 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.[5]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 allows and involve procedures and cost that are proportionate to the nature of the issue.

Another report Civil Justice Review Task Force Ontario Canada

Report[6] 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)[7] states " repeated studies of access to justice have shown that two factors predominate in determining whether people are able to use available legal remedies." [8] The first, and by far the most important, is access to financial resources. Hiring lawyers and using legal institutions can be costly, but it 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[9](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."

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:[10]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."[11]According to James A Schellenberg (1996)[12], 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." [13] Genn, H (1996) [14] 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." [15] 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." [16] 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." [17] 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." [18] Anderson (1999, 10) [19] describes in his published article " a lack of judicial independence is an obstacle to justice." [20] Other problems of justice institutions are their slowness [21], the costs of legal process [22], a lack of adequate information provision of legal

norms and legal practice, and the geographical distance from the poor to the courts.[23]24The 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."[25]A report " The Cost of Justice Weighing the Costs of Fair & Effective Resolution to Legal Problems"[26]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).

[27]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."[28]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." [29] 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)[30] 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[31]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."[32]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." [33] 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." [34] 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 less than two years, and reduced the average waiting period before hearing from five years to four months." [35] 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. [36]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 assesses the monetary costs and benefits of litigation from the parties' perspective. When it is observed that litigation "pays," this means "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." [37]Civil Justice Review Task Force Ontario Canada Report [38]discusses 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."