

# Alternative Dispute Resolution and the Administration of Justice – Basic Principles

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## 1 Introduction

The use of mediation and other forms of alternative dispute resolution (ADR) has increased markedly over the past 10 years. Several countries in Europe, most recently Norway and Finland, have introduced legislation about mediation. This article gives an account of the underlying principles on which ADR is based and compares them with the administration of justice in court proceedings. That is to say: How are ADR processes constructed and in what way are conflicts resolved through ADR? It also examines the advantages of using ADR instead of legal proceedings and explores the reasons behind the rapid increase in the use of ADR. In addition, it touches upon some of the criticism that has been directed against ADR and the question of what quality an ADR settlement has. Finally, the question of whether court-annexed mediation falls under the scope of Article 6 of the European Convention on Human Rights is analysed.

The emphasis of this presentation is on mediation as a form of ADR.

Before I enter into the first-mentioned issue of how ADR processes are constructed, a number of different types of ADR will briefly be described in order to illustrate the diverse selection available. The majority of the ADR processes referred to have their origins in the USA and in other common law countries. In Europe it is mainly mediation that is used.

### 1.1 *Some Different Types of ADR*

*Arbitration-Mediation* is a time-limited arbitration procedure where the arbitrator places his or her decision or judgment in a sealed envelope before the parties. The role of the arbitrator then changes to become that of a mediator who encourages the parties to find a negotiated solution within a rather narrow time frame. If the parties are successful with this, the envelope containing the decision is destroyed. If they fail, the envelope is opened and the parties are bound by the decision. *Early Neutral Evaluation (ENE)* is a process through which the parties receive help from an experienced third person (most often an advocate), who gives a non-binding and motivated proposal about how the conflict should be resolved. With the support of the expert in question, the parties discuss settlement proposals, define disputed issues and receive assistance to prepare for legal proceedings if the negotiations fail. *Fact-Finding* is a procedure whereby the parties meet in order to clarify which facts they are in agreement on, which facts are disputed and which conflict resolution method they could consider using for the purpose of reaching a settlement.

*Final-Offer Arbitration* presupposes that the parties must each give an offer individually. The arbitrator must then choose one of these. This method has been used and continues to be used, among other things, within the athletics world when top-class players are purchased from clubs. It makes the parties endeavour to give well-considered offers since the arbitrator does not compromise but selects the offer which he believes is the most reasonable. *High-Low Arbitration* is where the parties, above all in an action for damages, determine the highest amount which may be imposed. The initial party agreement also implies that the party that loses the case is guaranteed a certain sum. The existence of this ADR-method is due to the fact that damages in the USA can amount to very large

sums. *Mediation-Arbitration* combines mediation and arbitration. The mediator becomes an arbitrator if the mediation is successful and the negotiated agreement is then applied as the basis for an arbitration award.<sup>1</sup> *Mini-Trial* is a private form of ADR where representatives before an appointed expert and panel of representatives for the parties – as a rule companies – argue for their positions. The deputies from the firms, which have a high executive or leading position and which form the panel, have not concerned themselves with the dispute previously. After hearing the parties, the panel gives a proposal which is not binding. *Summary Jury Trial* is a reduced form of full legal proceeding where a jury gives a decision and the parties choose whether they want to be bound by it. This method works well if the parties' views lie far away from each other, since they have an opportunity to receive a more realistic view about what the outcome should be in a trial. Other forms of ADR include *Concilio-Arbitration*, *Counselling*, *Issue Mediation*, *Rent a Judge* and *Negotiation*.<sup>2</sup>

Common for all forms of ADR is their purpose of *facilitating settlement* between the parties. Moreover, ADR is either entirely *private* as seen, for example, in Mini Trial or *court annexed* as seen in Summary Jury Trial. ADR may be *compulsory*, i.e. the court will not deal with the dispute before the parties have attempted to resolve it with some form of ADR, or completely *voluntary*. The latter form is also the most frequently used when it concerns *mediation*. That so many cases are not settled until after an action has been instituted shows that the courts can be said to be a part of ADR in a *broad sense*. When an action has been instituted time limits are set and these compel the parties to act. Thus, the proceedings automatically become more organised. It also becomes time for the parties to examine their arguments more carefully, the closer the main hearing approaches and to estimate the risks of an unfavourable decision.

An interesting issue in this connection is *to what extent the parties have in fact negotiated but failed before the action is instituted*. The opinion that they tried but failed is widespread, but it is doubtful whether this view is correct. Brolin *et al* state that, in their experience, it is actually unusual for the parties to have made proper attempts to negotiate.<sup>3</sup> Considering the large number which are settled after the action has been instituted, my hypothesis is that parties deliberately institute an action as part of the negotiation plan to a greater extent than one is, perhaps, at first inclined to believe, and that in most cases the plaintiff does not have as the *objective* that the case shall be decided through a judgment. The court thereby performs the functions of an *assisting instrument in the parties' negotiations* by making deadlines and clarifying the issues in dispute. Since such assistance is *free* it is not surprising that this facility is commonly utilised.

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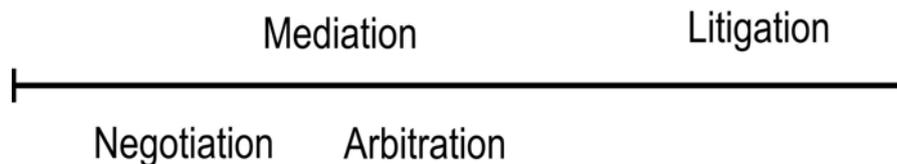
1 This transformation, i.e. of the mediator to an arbitrator, is quite common internationally and is also provided for in the Swedish Mediation Institute's rules.

2 With respect to ADR processes, see Nolan Haley, J.M., *Alternative Dispute Resolution in a Nutshell*, St. Paul Minnesota 1992 p. 174 and Lindell, *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, Uppsala 2000, 26 ff.

3 Brolin, T., Widebäck, M., *Tvistemålsprocessen I. En handledning för förberedelsen*, Stockholm 2001, p. 151.

## 2 The Parties' Right of Determination and Choice of Method for Conflict Resolution

Various forms of conflict management may be placed on a lateral axis as follows:



The figure shows the administration of justice furthest to the right. The parties have handed over the dispute to the court, which passes a judgment and which also, in substance, presides over the proceeding, even if it is a dispositive dispute. At the extreme left of the axis is negotiation, which is also a form of ADR, although few think of negotiation as an alternative conflict resolution method since it is so common.<sup>4</sup> In negotiation, the parties determine the *result*. They also fully control the *negotiation process*. A third party who judges does not exist. Forms of ADR other than negotiation may be placed on this axis. All of them lie far to the left on the scale. Arbitration proceedings also lie to the left on the axis, but in such proceedings a judgment is rendered and the parties are not fully in control of the process.<sup>5</sup> Indispositive civil cases and criminal cases lie far to the right on the scale, as do the dispositive civil cases. In this connection it should be mentioned that the classification in obligatory, dispositive, mandatory and optional procedural rules, represents a distribution of power between the court and the parties which can also be placed on a scale which illustrates the parties' respective the court's power over the procedure.<sup>6</sup>

As mentioned above, all forms of ADR aim to facilitate a settlement. The advantages of a negotiated solution are many. It is faster and less expensive; the end can be anticipated; delays are avoided; and transaction costs are reduced. Further, the parties escape the stress which, as a rule, accompanies legal

4 Brown, H., Marriot, A., *ADR. Principles and Practice*, second edition, London 2005, p 12. The authors do not count negotiation as a form of ADR, apparently because it is so common.

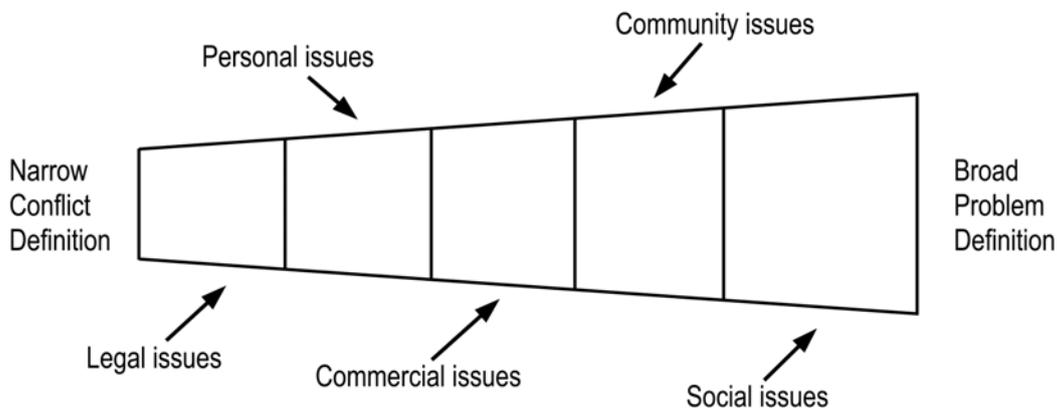
5 Certain provisions contained in the *Arbitration Act* are mandatory.

6 See Lindell, *Civilprocessen*, Uppsala 2003, p. 77. If the parties have chosen a particular form of ADR they must, of course, adapt to the principles which apply for the type of ADR that they have chosen. This is rather obvious since it must be assumed that they have selected the ADR method in question because they consider that it suits their needs. If the parties choose not to decide over the procedure, certain general recommendations are usually used which have been issued by one of the many institutions which administer ADR proceedings.

proceedings, and they have better possibilities to preserve good relations.<sup>7</sup> There are, of course, cases which are not suited for negotiation; e.g. one of the parties has a power advantage; the presentation of evidence or security measures are required; one of the parties is threatening or wants to delay the process; the parties would like a precedent; or one of the parties want the court to be a scapegoat for a decision which can be anticipated to be unpopular.<sup>8</sup> The advantages of a negotiated solution may well be said to be supported by the fact that so many cases in Sweden are resolved after an action has been instituted – approximately 60 percent of all dispositive cases settle.

### 2.1 Principles for the Assessment of a Conflict with the use of ADR

The following figure may serve as the starting point for the description and analysis of an important basic principle applied when ADR is used.



The figure resembles a funnel and is intended to show that courts use a *narrow problem definition* because only such circumstances which are of *legal relevance* have significance.<sup>9</sup> With the use of ADR, on the other hand, it is typical that the *problem definition is broad*. As a rule, consideration is given not only (and sometimes not at all) to legal factors, but also to commercial interests, personal factors, the community and occasionally, even to social factors. All of these factors – depending on the nature of the dispute – may have a different significance. For example, a person who has purchased a car which is faulty, may, perhaps, not only want it repaired but might also want an apology from the car company which sold the car. The car company could, in turn, be interested in retaining its goodwill, and so on. Another example could be where a conflict

7 Brown & Marriot, *op. cit.* p. 2, Williams, G.R., *Legal Negotiation and Settlement*, St. Paul Minnesota, 1983, p. 10-11.

8 In Prop. (*Governments bill*) 1986:87:89 p. 207, mediation is recommended only in large and complicated cases. However, in those cases where negotiation has a good chance of success, mediation should, in principle, work.

9 Cf. Wade, J., *Representing clients at mediation and negotiation*, Bond University, Queensland, Australia, 1998, p. 70.

occurs in a small community, which could bring about the closing of a factory. In such a situation, community and social factors could come into the picture, which would not be the case if the matter went to court and a judgment rendered.

Through a broad problem definition an *integrative context* can be created. That is to say, it then becomes not only whether to *distribute* a disputed amount of money. If more factors are considered in the negotiation pot and the problem definition is broad, it is possible to create a so called "win-win" situation, that is, the conflict will conclude *optimally* with both parties winning something. Thus, there will not be a winner and a loser. In order to be able to bring about a "win-win" situation it is important to attempt to elucidate both parties' *needs* and *interests* and subsequently try to tailor a solution for them instead of investigating their *rights* and *obligations* according to existing law. The investigation of needs and interests also consists of *uncovering hidden interests*, which are relatively common even in commercial disputes. In other words, there are reasons behind a conflict which seldom come onto the table in court proceedings. It is, of course, not certain that the parties' hidden interests will come forward if ADR is used. However, through *individual discussions (caucus)* with the parties – which regularly occur in mediation – in a relaxed environment, there are considerably better conditions to discover such interests than in a court case. If the parties can negotiate and communicate, if the focus is turned to needs and interests and the problem definition is broad and the context is integrative, it is thus possible to *solve* the conflict between the parties and not only to make it manageable. Perhaps this could appear to be a utopian objective, but it works, unquestionably, sometimes. It is also why ADR and particularly mediation is so highly recommended as a beneficial way to resolve conflicts – both for the parties concerned and for society.

In a legal proceeding, on the other hand, a judgment is passed. One party wins and the other party loses. The parties refer to rights and obligations and not to needs and interests. Problem definition is, accordingly, narrow. An integrative context, as a rule, is not achievable even if the dispute involves several issues because claims must be examined and determined separately, apart from a few exceptional cases (e.g. set off). Moreover, through legal proceedings the conflict often escalates and becomes bitter. These differences between legal proceedings and ADR are, naturally, important reasons for the division between the administration of justice and other forms of conflict management. ADR signifies, among other things, the parties' right of determination and that the problem definition is broad so that nonlegal factors may be permitted to have meaning while the administration of justice is a small subset of everything that is included under conflict management. The principle that legal rights and obligations are fundamental shows itself to be particularly marked when it is time for the payment of the litigations costs.<sup>10</sup> "The winner takes it all" and those who lose must pay. Thus, the provisions governing litigation costs make the

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<sup>10</sup> Thus, in Sweden, as well in all European jurisdictions, the American rule on litigation costs is not used.

loser responsible for the costs of the proceeding because it was his fault that the costs were incurred.<sup>11</sup>

A broad problem formulation gives, without doubt an *increased bargaining zone*. Generally speaking, bargaining zone means the area within which parties can make an agreement. As soon as a mediator or judge knows that such an area exists in the case at hand, it is also clear that a settlement can be reached. Importantly, a conflict is not always a question of money. There can be a number of non-monetary issues in the negotiation pot and in such cases it is not possible to establish what the middle way – in economic terms – is. One may, however, count on the fact that differing components are valued differently by the parties and for various reasons.

Instead of distributive and integrative contexts respective binary and polycentric issues, one may speak of *single issue or several issue disputes*. The latter may, however, contain simple issues here and there.<sup>12</sup> If there is only one issue in dispute – for example, has the debtor, as he alleges actually paid the debt? – there is not, as a rule, any scope to consider the parties' needs and interests. Single issue disputes are *typically* of such character that it is not a question of give-and-take but they often end with a *compromise* in the sense that the parties divide the amount that exists in the bargaining zone.

Supposing, then, that the parties are more satisfied with ADR than with the administration of justice. Does this mean that there is something wrong with the administration of justice, or the substantive rules? The question is, of course, justified but difficult to answer. Legal rules are *general norms* written in order to suit many situations. The administration of justice demands *predictability* and that *equal cases should be treated equally* (the principle of equality). This accounts for the limitation in what it is possible to achieve in a court of law. In mediation, on the other hand, no obstacles are met in order to accommodate a solution for the individual case. On the contrary, this is its objective. It should, however, be remembered that substantive rules are constructed in different ways. Some are relatively precise while others are more general and thus give more scope for the balancing of interests. Even for these rules, however, the requirements of equal treatment and predictability apply, which is why the area of application, bit by bit, is shaped in practice. The fact that the parties create their own rule with ADR clearly implies that – unlike the application of law – a subsumption of facts under a rule does not occur. The purpose of the subsumption of facts under a legal rule is foremost to *check* that the decision is correct,<sup>13</sup> but when a dispute is settled with ADR, it is not possible to check whether the solution corresponds to a particular norm. Nor is this usually the

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11 See SOU (*Statens offentliga utredningar*, Official reports series of Swedish legislative and investigations commissions) 1938:44, p. 231 and Jacobsson, U., *Parts kostnad i civilprocess*, Norstedts, Stockholm 1964, p. 58.

12 Cf. Runesson, E.M., *Avtals- och tvistlösningsförhandling*, Stockholm 2003, p. 217.

13 See Henke, H.E., p. 97. *Die Tatfrage. Der unbestimmte Begriff im Zivilrecht und seine Revisibilität*, Berlin 1966, p. 97. The legal conclusion also promotes uniformity. See Ekelöf, P O Tfr (*Tidskrift for Retsvitenskap*), Köpenhamn, 1945, p. 220.

aim. It should, however, be observed that the parties perhaps want the mediator to take on an *evaluative role* when it comes to dealing with the application of the law, as would occur in court or arbitration proceedings. Further, in a conflict there can be certain issues which are determined in accordance with a legal standard. Alternately, a legal standard can serve as guidance in the negotiations, which also, however, include other factors which are nonlegal. These can replace, influence or contribute to the legal factors.

ADR is thus a proceeding where the parties retain the right of determination over the dispute. This feature further exposes a fundamental difference, already indicated above, between ADR and the administration of justice, since it is connected to the subsumption. When a court makes a judgment we imagine that the court *accounts for its reasons in a rational way* after having listened to and assessed the parties' evidence and argumentation. The court should be able to give an account of its consideration which the parties can understand and which can be checked by a higher court if the decision would be appealed. With the use of ADR, however, the settlement is generally *tailor-made for the parties, in the dispute in question*. This settlement may contain components which make it *unique*. This means that another similar conflict could be settled in a completely different way in another ADR procedure. In other words, the settlement does not need to be rational in so far as it can be justified for others; it cannot, of course, be appealed; the only thing that could happen is that the parties or a number of them may not wish to adapt themselves to the solution. In such a case they could negotiate again or turn to the court. Against this background, *no written justification of the ADR decision* is required. The written motivation is closely associated with the fact that the court or another third party renders a judgment. When there is no one who renders a judgment, as in ADR (arbitration excluded), but the parties themselves negotiate a settlement of the conflict, a written statement of reasons would obviously be a paradox.

The fact that the application of ADR results in a balancing of interests does not imply that the administration of justice is not founded on the balancing of interests. On the contrary, it may be said to be fundamental for the *legislator* to weigh and measure needs, interests and objectives, and to make a rule that satisfies the objective (or the objectives) and different needs and interests to the greatest extent possible. This ambition spreads downwards to the *concrete application of the law* in the courts. That is to say, they attempt to base the law on the balancing of interests by – in the cases where the law does not provide an answer – creating a rule that builds upon the desired balancing of interests. Even in the administration of justice it can thus be said that rules are created which are adapted to the individual case with its own circumstances, as far as this is possible and suitable. The difference between ADR and the administration of justice *in this particular respect* is a *difference of degree* and not a *difference in kind*. The court must make a rule which it is prepared to apply in all the cases that have the same components as those in the case in question. In order to be able to do this it is necessary to *peel away* some of those factors (nonlegal) and

make a narrow definition of the problem.<sup>14</sup> How narrow it becomes must be presumed to fluctuate depending on the area of law, and the legislation's content and wording. Sometimes, it is presumed that the courts will do an *overall assessment* and take into consideration all relevant circumstances or use a social-ethical standard of the same type as that which may be found in everyday life. One could probably say that a general clause provides good possibilities to define a problem broadly. It can even be so, that the use of ADR in a corresponding situation should result in a situation where fewer factors are taken into consideration, namely, if this would be in accordance with the parties' needs and interests. As a general description it is, however, correct to argue that ADR presupposes a broad problem definition and the administration of justice a narrow problem definition.

Thus, if it may be assumed that in a conflict situation there is a natural ambition to find a compromise, the court must use methods other than ADR to balance interests. Perhaps the principal instrument in this respect is *the burden of proof rules*.<sup>15</sup> The court allocates the burden of proof between the parties and, with that, also distributes the risk for an erroneous decision when the relevant legal facts are and remain uncertain. If the plaintiff has reason for his claim, but cannot prove it with the normal standard of proof in respect to the particular claim, the requirement of evidence can be reduced or the burden of proof can be reversed for the purpose of achieving a reasonable result. Outside the court, however, the parties can very well use uncertainty as a ground for a compromise. If it is doubtful that the evidence is sufficient, the parties may share the risk so that a disputed amount is halved. In a court of law, one party will take the whole sum.

Thus, if the creditor alleges that the debtor has not paid his debt of 100 000 SEK and the debtor alleges the opposite, but lacks a receipt, the parties can come to an agreement that the debtor will at least have to pay 50 000 SEK, which is better for him than to pay 100 000 SEK. For the creditor, it is correspondingly better to receive 50 000 SEK than nothing at all, if it is in fact so that the debtor has not paid. There is, as I said before, nothing that forbids the parties to make a compromise of this kind outside the court and if there are several disputable issues between the parties, of which some concern what has happened, *all are included in the negotiation pot*. It is, accordingly, not so that the parties who are undergoing nonlegal negotiations exclude *empirical issues* from that which is negotiable. Why then is a court unable to correspondingly divide an amount in the middle if the facts are unclear? This depends on the courts' traditional duty to administer justice. The courts are obliged to respond to questions of law and may not for this purpose use the rules of burden of proof. Where it concerns questions of fact, according to a common view, one of the parties in a dispositive case shall bear the risk for the uncertainty about the facts. However, if *preponderance of evidence* is applied, the problem in question essentially

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14 Regarding drawing the line between legal and nonlegal factors, see Lindell, *Civilprocessen*, *op. cit.* p. 273, note 111.

15 See recently, Heuman, L., *Bevisbörda och beviskrav i tvistemål*, Stockholm 2006, 497 ff.

disappears. This is because this principle is built on a balancing of interests between the parties. This balancing of interests means that there are no reasons to place a larger risk for an erroneous outcome on one of the parties. Consequently, as a starting point, the parties carry *an equally large risk* for uncertainty about the facts which means that the court chooses *the most probable alternative*.

### 3 ADR and the Impact of Legislation in Society

The criticism put forward against ADR by, among others, Owen Fiss, concerns, foremost, the fact that legislation is not applied and the risks associated with this, primarily for the weaker party.<sup>16</sup> This argument about the importance of the substantive law's impact is appreciated and supported by those who emphasise the court's *behaviour modification* function. The usual counterargument is that the majority of civil cases are settled because the parties have the undisputed and absolute right to negotiate their way forward to a settlement.<sup>17</sup> This cannot, of course, be denied, but those who emphasise behaviour modification, above, mean that negotiated agreements as a standard, have the content of the substantive law. Accordingly, substantive law will indirectly have significance by broadly standardising negotiated settlements.<sup>18</sup> Another apparently dogmatic argument against mediation as a form of ADR has been put forward by Fuller.<sup>19</sup> He sees mediation as the antithesis to the application of law, which is rule based, and is of the opinion that the application of law should be the principal rule since mediation is not suitable in situations where there are more than two parties. Even Galanter has taken a stand against settlements since he harbours doubts about their quality.<sup>20</sup> Davis is critical against settlements in particular, for another reason. Davis means that ADR risks eroding the parties' right to demand a court decision and that there is a risk that they will negotiate their way to a poor settlement.<sup>21</sup> There is also a discussion about whether the courts shall stick solely to the application of law or if they should attempt to adapt to the development of modern trends in society. One speaks in this connection about "traditionalist" and "adaptionist."<sup>22</sup>

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16 Fiss, O.W., *Against Settlement*. Yale Law Journal, 1984, 1075 ff.

17 Lindell, B., *Alternativ tvistlösning – särskilt medling och skiljeförfarande*, Uppsala 2000, p. 252. Cf. Lindell, B., *Partsautonomin gränser*, Uppsala 1988, p. 95-96.

18 Ekelöf, P.O., Edelstam, H., *Rättegång I*, 8 ed., Stockholm 2002, p. 29.

19 Fuller, L.L., *Mediation – Its Forms and Functions*, South California Law Review, vol. 44, 1971, p. 313.

20 Galanter, M., *The Day After The Litigation Explosion*, Maryland, Law Review, p. 32-33.

21 Davis, G., *Partisans and Mediators: The Resolution of Divorce Disputes*, Oxford 1988, p. 28.

22 See Green, E., *The Complete Courthouse, Dispute Resolution Devices in a Democratic Society*, Roscoe Pound Foundation-American Trial Lawyers Association, 1985 p. 58-59. and

There is, thus, a view that negotiation and mediation occur *in the shadow of the law*, regardless of whether the parties negotiate themselves or with the assistance of a mediator.<sup>23</sup> In this way the substantive law should nevertheless have an impact. It is presumably correct that ADR often occurs with a view to what the result should be if the case went to trial, if it involves legal disputes.<sup>24</sup> Investigations in the USA have, however, shown that representatives who negotiate often do not want to spend so much time on each matter and that factors other than the content of the substantive law determine the contents of the settlement.<sup>25</sup> It is crucial to emphasise the importance of the existence of standards while at the same time verify that ADR, in principle, does not give any such standards.

It is essential to more closely consider the assertions that ADR solutions are based upon the parties' needs and interests and that the parties create their own rule, while the administration of justice implies that the concrete case is arranged under a general rule (which makes it difficult to take much consideration to the parties' needs and interests). How important, really, is the alleged difference between ADR and the administration of justice?

As mentioned above, in several-issue disputes there can be one or two simple questions here and there, e.g. is it clear that the limitation period for a claim has run out?<sup>26</sup> However, whether the party may nevertheless use this claim for set off could depend upon whether the opponent receives something in return, which is valuable to him, in the final *package*. Because the court is limited to the use of legal argument it disqualifies other arguments that both the parties and a reasonable person would be deemed to be of great importance instead of or alongside of the legal arguments. For this reason, court judgments in these cases are *less nuanced* than a negotiated package.

It should, however, be pointed out that a court, in a complex dispute which contains several issues, *must* in principle determine every sub-question independently since the law demands this. A court cannot, consequently apply an *overall perspective* and in the judgment prescribe a package, even if it considers that this would be the best. Such a solution presupposes negotiations between the parties since it is based on voluntary give-and-take. Accordingly, nor has the legislator, with the creation of the substantive rules, taken or been able to take consideration of the fact that disputes may be very complex and

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Barr, L.D., *Whose Dispute is This Anyway?: The Propriety of the Mini-Trial in Promoting Corporate Dispute Resolution*, Journal of Dispute Resolution, Missouri, 1987, p. 133. See also Brown & Marriot, *op. cit.* p. 407-408.

23 Boule, L., Nestic, M., *Mediation – Principles – Process – Practice*, London, Dublin, Edingburgh 2001, p. 32.

24 See Runesson, *op. cit.* p. 219, who calls a conflict about the application of law a dispute. Accordingly, a legal dispute is a negotiation about a conflict which concerns the application of law.

25 Menkel-Meadow, C., *Lawer Negotiations: Theories and Realities – What We Learn From Mediation*, The Modern Law Review, vol. 56 p. 57.

26 Nyström, B., *Medling i arbetstvister*, Stockholm 1990, p. 277.

contain a large number of sub-questions. Obviously, such situations cannot be captured in a law. There is, however, no reason to believe that the legislator, if it were possible, should legally regulate *complex polycentric disputes* in another way than what the application of legal rules on each individual sub-question in complex disputes gives for the final outcome. The conclusion is, thus, that there is no built in antagonism between ADR and the administration of justice. At least such antagonism has not been able to be documented or proven.

Another conclusion is that the dispositive rules which the law provides in dispositive disputes when the parties cannot agree, must represent a *minimum solution in a polycentric context*. In such situations, a negotiated solution is – I am convinced – more often than not superior to a judgment. It is more comprehensive; broader; gives all parties better satisfaction; better addresses the legal questions which are in the conflict; and interleaves nonlegal factors which are relevant for the parties with legal factors in a more balanced way. A judgment in a corresponding situation expresses, as mentioned above, a minimum acceptable standard. One could not expect anything else either since rules of law are general and can never address all factors of significance in the individual case.

That which is now argued, i.e. that there is no built-in antagonism between ADR and the administration of justice owing to the substantive law's necessary failings in complex situations, is a very important finding, as is the assertion that the substantive law contains supplementary minimum rules. These findings should, of course, stop the exaggerated claims about the administration of justice's behaviour modification function and the alleged risks that ADR undermines the substantive law.<sup>27</sup> In actual fact, ADR addresses and solves many cases which substantive law is not capable of solving in a satisfactory way and which consequently cannot be determined in a satisfactory way in a court either. ADR is therefore an *important complement* to the ordinary administration of justice and not something harmful or dangerous, as ADR critics would like to make it out to be.

Furthermore, the statement that legislation will have its impact in the courts can appear trivial. It is obvious that it must be this way because it is, of course, the courts' duty to apply legislation adopted by the Parliament. It is, however, important to note that the substantive law in each individual case *materialises through the judgment* and the extent to which this reflects the substantive law and its content may well be considered an open question. There are, of course, often no results to compare the product which comes out of the machinery of justice. Indeed many cases are simple. It is therefore sometimes possible, with quite a considerable degree of certainty, to *predict* how a case will be determined. If, however, it is a question of a complicated case, one can never so easily predict how it will end. For those who assert that ADR is risky because "existing law" is unable to have an impact, there is also a troublesome burden of proof when it comes to explaining what "existing law" in fact is, and in what

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27 Lindblom, P.H., *ADR- opium för rättsväsendet? Synpunkter på alternativ tvistlösning och valfri civilprocess*, SvJT (Svensk Juristtidning) 2006, 110 ff.

way it could be said to have an impact.<sup>28</sup> In the end, the application of law in difficult cases simply boils down to a consideration of the parties' needs and interests, just like in ADR, but owing to the legal context, a legal consideration of these interests becomes instead a *half measure*, at the best.<sup>29</sup>

Assume that we have a large and complicated contract which concerns in part whether the contract has been made and partly whether certain obligations have been fulfilled. Assume further – in order to make it simple – that all questions of fact are indisputable and that the parties dispute only about issues of interpretation and application. Imagine further that there are two cases, exactly the same, which are being determined in the court, independently of each other. The thesis about the substantive law's penetrating power presupposes, as far as I understand, that these cases must be determined in the same way and with the same motivations. If they are given different outcomes and are motivated in different ways, it is clear that not only the behaviour modification function of the courts disappears but the predictability and the equality of treatment is also lacking.

I argue that the probability for two such cases to be determined in an identical way is very remote, unless the cases are determined by the *same members in the same court or by the Supreme Court*.<sup>30</sup> Let us further assume that one case goes up to the Supreme Court and becomes a precedent and that the other subsequently commences in the District Court. The parties are acquainted with the precedent. The party who, in accordance with the precedent, seems to have poor prospects for success omits, however, to allege certain facts that were in the first case in order to be put in a better position (the cases, as mentioned above, contain the same facts). The Supreme Court takes up the case and it results in a *new precedent*, which differs from the first, and which is due to *the reduction of facts*.

*The court renders a judgment upon what it sees.* Thus, two precedents can exist side by side, although they have the same original elements. This example shows *the importance of the litigation* for that which becomes “existing law.” The parties choose which of their cards they would like to show to the court; the court bases its decision on these cards. The example does not, on the other hand, show that there is no such thing as “existing law”. Yet, even if there is an “existing law” on a certain given occasion, this does not imply that there is a behaviour modification effect.

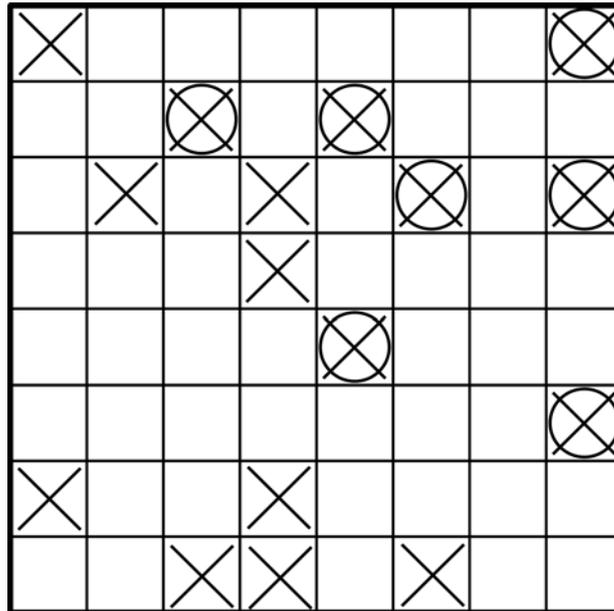
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28 Ekelöf states in Rättegång I, *op. cit.* p. 20 that: “The administration of justice exists in order to give the substantive rules effectiveness in the society.”

29 This does not amount to a denial that there are rules of law but due to the vagueness of the content of so many norms, they must be specified in the concrete applicable situation, at which time consideration must be taken of the needs and interests. It is denied, however, that there are norms suited for several-issue disputes.

30 In this example it is a question of a decision made in the District Court. It should be emphasised that one generally may expect that difficult questions of law and fact are evaluated differently. The presumption therefore is that – if the outcomes are not different – the motivations will be different in each case.

The “existing law” never, however, comprises – and this should be emphasised – *all facts in the individual case* but rather *separate legal principles* which in certain cases can be extracted from a dispute. To find a legal principle that can give a clear and distinct formulation in a complicated dispute is accordingly very difficult, if not to say impossible. Moreover, there are many questions which are obscure and which make the contemplated individual precedent issue contaminated. There is, thus, an *antagonism between precedent and overall assessments*.



The figure is intended to schematically show how different fact constellations in the same dispute can be utilised in a precedent and in an overall assessment where it involves a package. Each cross symbolises a circumstance which is important in order to satisfy the needs and interests of the parties. The number of crosses in the conflict in question shows that consideration needs to be given to a large number of circumstances. Crosses in a circle imply that a factor is legally relevant. The figure shows that with a legal solution, consideration can only be given to a limited number of factors. A common view in this connection is that after having compared a larger number of cases, one may analyse those conditions which are *necessary* and which are *sufficient* for a certain legal consequence to arise. Analyses of this kind are, however, often very uncertain since one must have a great amount of material in order to be able to make an accurate statement. Meanwhile, however, the values of the society change. New legislation is implemented at the same time, which calls for revaluations. To find applicable law becomes thus like hunting a ghost. Particularly if the provisions are vague and flexible, one may also count on the fact that there are a number of occasions that produce sufficient but not necessary conditions, which stand alongside each other and all represent “existing law.”

As the figure above shows, a negotiated agreement will differ from a legal solution because in the view of the parties, it will be better due to the inclusion of nonlegal relevant factors. As mentioned previously, this depends on the fact that there are no rules tailored for complex situations of the sort in question. Legal rules are written so that *they address different individual questions but not the combined significance of several questions* which concern different rules and which lie intertwined with each other or that are in the same context. The only way to consider such facts is through negotiations. There is, nevertheless, nothing that states that the parties' agreements must deviate from what a court would arrive at.

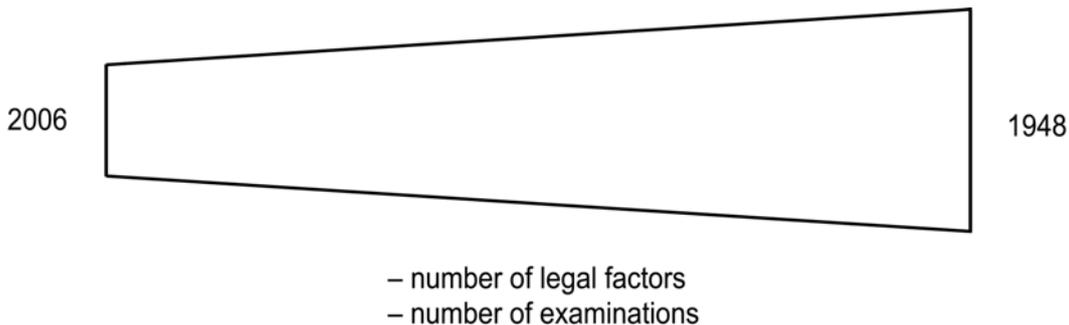
There are, moreover, *many and powerful preclusion rules in dispositive civil proceedings* that can lead to the Supreme Court only seeing a "corner" of the conflict. On this corner a precedent is built. It is rather plain that the precedent clearly risks being misleading. In addition, this "corner" may be used in subsequent negotiations between the parties, namely, if "the corner" becomes an integral part of a *greater context* that the court is not acquainted with. It is not possible for anyone to know the exact extent of the significance that can be attached to "the corner" in these negotiations.

With reference to preclusion, there is an historic perspective that deserves attention. Doubtless, it was an ideal of the creators of the Code of Judicial Procedure that the substantive law should have an impact through the proceeding. This purpose returns several times in the preparatory works with respect to the application of different provisions.<sup>31</sup> Over time, however, the

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31 This is particularly evident as regards the application of rules about the preclusion of new circumstances or evidence. In this matter, the parliamentary committee in question stated that the Code of Judicial Procedure 43:10 should be applied with great caution with reference to material of essential significance to the case. *See* SOU 1938:44, p. 449. When the regulations in question were sharpened in 1987 through the amendment of the prerequisite "gross negligence" it was said, on the other hand, that the regulation should be able to be applied even if the new material was of decisive significance in the case. With the 1971 reform of the preclusion rule in the Court of Appeal, The Code of Judicial Procedure 50:25 para. 3, introduced the prerequisite "other special reason" alongside "valid excuse" in order to be able to give the case a substantively satisfactory outcome. *See* Prop. 1971:45 p. 134 (this prerequisite is now removed). In the cited prop. at p. 134, it was stated – regarding the application of the regulation in question – that: "If there is reason to fear that the dismissal of new circumstances or evidence that is first alleged in the Court of Appeal should lead to a substantively unsatisfactory outcome, the possibility for dismissal should instead be used with great caution. As was more closely set out in the following, the cost sanction in 18:6 should instead be able to apply in such cases." *See* also the preclusion rules: Lindell, B., *Procedural preclusion*, Stockholm 1993, p. 116, 138, 148. Judging from these statements, a changed view about the importance of the substantively correct judgment would have commenced between 1971 and 1987. The comprehensive legal amendments recommended in Prop. 1986/87:89 for court of first instance proceedings confirms this. Relatively important interventions were made at that time to the principles of immediacy and orality, which principles had previously been considered to guarantee the substantively correct judgment. I, however, do not maintain that these changes really led to any marked effects as far as it concerns the possibility to bring about a correct judgment. Over the years, however, a great number of measures have been taken in order to make the proceeding more effective. The total effect of these measures is that it is more difficult to bring about a substantively correct

demand for a speedy and effective proceeding has become stronger and stronger. Against the background of this development, it can be maintained that the view of the proceeding and the substantive law has fundamentally changed. Today, it is more important that proceedings are fast than certain. Particularly evident is how the mentioned preclusion rules have been sharpened bit by bit. They did not exist when the Code of Judicial Procedure came into force. Today, however, new circumstances may be dismissed already under the preparation phase of the proceedings.



This simple figure is designed to show that the procedure has become more "streamlined" during the almost 60 years that have passed since the Code of Judicial Procedure came into force. From a general point of view, one can assert that fewer factors come into the examination today than in 1948 and that the examination of the case today is not equally thorough. With reference to the latter, today, in principle, everything must be alleged already during the preparation in the District Court, while before, the parties could contemplate for a long time about whether amendments should be made, either in the District Court or in the Court of Appeal. Moreover, in the Court of Appeal it was not only a question of a *check-up* of the District Court's judgment but a *re-examination*. With consideration to what has been stated, it can hardly be disputed that the examination in earlier years was more comprehensive and more thorough than it is today, any more than it can be contested that it was costly and took a long time. Regarding what "existing law" is, one must consequently establish that in 1948 there were other conditions to clarify "existing law" compared to 60 years later. One conclusion of this is that "existing law" is, to a great extent, a *functional concept*. Of course, the narrower and more streamlined the proceeding, the thinner the "existing law" will be in comparison with what "existing law" could have contained. If the parties are permitted to introduce 100 units into the machinery of justice, which contains three complete examinations, the result or the output will in all likelihood be different compared with a

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judgment, although at the same time, the changes – and this is the most important – indicate a *changed attitude* with the lawmaker regarding the importance of bringing about substantively correct judgments. That which was almost inconceivable in 1938 has clearly become accepted in 2006.

situation where the parties are only able to introduce 10 units and it is also, essentially, a question of an *examination in one instance*.

The conclusion of what has been stated above is, thus, that the thesis about the impact of the substantive law and behaviour modification does not at all reflect the reality that exists in the 21<sup>st</sup> century – or at least it has a very different content in comparison with earlier years. The apprehension that the legislation will have less impact if ADR is used is thus exaggerated and instead begs the question: to what extent does the substantive law have an impact through the administration of justice? The irony about the administration of justice today in Sweden and other countries (all European countries suffer from essentially the same problems) is that *it is the courts themselves which, through the constant demands of greater effectiveness, erode the impact of the substantive law* and not ADR. The solutions reached with ADR are presumably, from a general point of view, of better quality than court decisions. At least the parties may finish what they have to say and are satisfied with the process. The fact of the matter probably is that while the substantive law constantly *increases in size* (the so-called juridification) procedure goes in the other direction. Accordingly, it *decreases in size* all the time. This is because the measures taken to make the procedure more streamlined are unilaterally focussed on the administration of justice and not on reducing the substantive law. As a consequence of this, a *discrepancy* in the form of a chasm arises between what the substantive law contains and the result that the process gives, and which in the end reflects “existing law.”

## **4 ADR and the Administration of Justice Today – Position and Trends**

### **4.1 Background – General Observations**

Although much has been written and spoken about the functions of the administration of justice, little has been said about ADR’s functions. This is partly due to the fact that ADR is something relatively new in Europe, but is also because ADR’s functions seem to be rather simple to identify. As it will be shown, this is probably, in some respects, an illusion. In this and in the following section, the question of what the strong growing interest for ADR in Europe might depend upon will also be discussed. The reasons behind the development of ADR can, however, not stand apart from ADR’s functions. The driving forces behind the development must be presumed to express needs and with that, also functions.

One can divide up a legal proceeding into the summons, preparation, the main hearing, rendering a judgment and execution. Each phase may then be further divided. The main hearing, for example, is divided up into pleading, presentation of evidence and summing up. The preparation is, as a rule, the longest and most time consuming part of a trial, while the main hearing can be comparatively fast. The trend over the last decades has been and still is to *move the proceedings closer to the summons and preparation*; to take parts from such phases that occur subsequently and attempt to squeeze them in earlier. One example in this connection is the introduction of the possibility to render a judgment on an

obviously unfounded summons application through disapproval, without communication with the respondent, to permit judgment by default if the respondent does not within a fixed time submit a reply.<sup>32</sup> Other measures are the simplified main hearings and – if the preclusion rules are not moved from the main hearing – to also allow them to apply already under the preparation.<sup>33</sup> Another trend is the increased use of the *cheese slicer method*, that is to say, the procedural operation is “thinned out.” Two examples of this are: that written evidence may be considered presented without being read aloud and that affidavits are more accepted today than when the Code of Judicial Procedure came into force 1948.<sup>34</sup> The aspiration to only have a presentation of evidence “live” in the District Court, and to ensure that the majority of the questions of evidence remain there, should also be mentioned. Likewise, a *cake slice method* is used in combination with moving activities to the preparation. Examples of this are the simplified main hearing and “judgment announcements.”<sup>35</sup> The latter, i.e. where the judge advises the parties how he anticipates the judgment would turn out, exists in Denmark, but so far not in Sweden. If the parties accept this, the announcement made by the judge will form the basis of a settlement and the judge does not need to write a judgment.<sup>36</sup> In combination with this development the possibilities to appeal as time goes on have been restricted while, at the same time, single judges have been given ever increasing authority to make judicial decisions.

The result of all of this is a proceeding that is very much “heavy at the front” with a great amount of activity in the beginning and insignificant activity at the end in combination with a summary trial which contains snippets of the principal elements. Behind this transfer and rearrangement lies an *effectiveness theory* which provides, more or less, that the more elements of the proceeding that are moved to the preparation or cut away or made “thinner,” the quicker it will go, and that the use of the procedural instruments that create the fastest and most effective proceeding shall be *maximised*. The effectiveness theory stands in contrast to what could be called the *legal security theory*, which may be explained as follows: It is more important to have a substantively correct judgment than a fast procedure. Procedural instruments which can worsen the possibility of reaching a secure proceeding should be used with great caution. The main hearing is a control station and may not be dissolved or confused with the preparation.

The most outstanding instrument to shorten the proceeding is the *settlement instrument*. If the parties can settle after the summons, or even before, the process will end or not even start. If the lawmaker wants to maximise the effectiveness, each measure that increases the settlement percentage should be

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32 RB 42:5 The Code of Judicial Procedure, hereafter referred to as RB 42.

33 RB 42:15, 42:15 a.

34 RB 43:5, 43:8, 46:5, 46:7

35 RB 42:20 para. 2.

36 Vindeløv, V., *Konfliktægling*, København 2004, p. 313.

stimulated. It is here where ADR enters in as a factor in the effectiveness theory. At the same time, however, mediation results in parties being more satisfied with the process, which is something I will return to shortly.

The mediation process has the great advantage over experiments with the Code of Judicial Procedure in that mediation *is a complete and fully adequate process with a solid and well-reasoned ideology*.<sup>37</sup> Experiments with the Code of Judicial Procedure, on the other hand, lead to an end product that is not based on any other thought than to cut the costs. Hence, it has *no well-reasoned and consistent theory* as groundwork. It becomes a product without an identity which is difficult to fit into the existing procedural system and which in the long run leads to the erosion of fundamental principles and legal security. If the choice lies between building alternatives in to the Code of Judicial Procedure, and allowing them to operate outside the Code, but with assistance from the courts, the choice should be obvious. Court mediation is a *hybrid* and it is used successfully in Denmark, Norway and Finland. It is, so to speak, housed in the public courts which administer the procedure, but is otherwise separate and independent from the ordinary process. It should also be mentioned that the courts in these countries not only administer the procedure. In addition, a legally trained judge of the court will function as the mediator without charging a fee. However, if the parties want someone else than a judge to mediate they must pay the mediator's fee themselves.

If one were to ask an economist which function the administration of justice has in the society, the response would probably be that it *serves the market economy*. The courts should render judgments that allocate resources and obligations in the way that best promotes a well-functioning and enduring market. Within the EU, this aspect has become more evident and more important. The inner market demands – in order to function optimally – a speedy, inexpensive and effective conflict management system. It would be an advantage if this system did not have any geographical borders, i.e. if conflict management was based on a method that went *beyond natural borders*. Mediation fulfils this demand because there are no forum rules annexed to mediation.

It has been stated that the law within the EU has been given greater significance; that the courts have been given more power; and that the continual stream of new law creates an almost impenetrable regulated society. How does this coexist with the ever increasing presence of court mediation, which is based on the parties' needs and interests and not on what the law provides, even if it

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<sup>37</sup> At present an investigation is in progress on alternative forms of dispute resolution in the District Court. According to the committee directive, Dir 2005:77, the objectives for the alternative should be voluntariness, speediness, influence of the parties, and flexibility. The procedure should be arranged in the existing court organisation (Directive, p. 10). Page 7 of the directive refers to the "kort geding" that exists in the Netherlands. This is a form of fast and brief procedure where the judge may take consideration to nonlegal factors. That is to say, according to the directive, a procedure that does not amount to the application of law should be accommodated by the existing court organisation. However, court mediation shall also be investigated.

can coincide? Moreover, the EU's institutions *advocate* an increased usage of mediation. Doesn't this have the effect of cutting off the branch one is sitting on? Doesn't it erode the impact of EC Law through the acceptance of parties' settlements which are based on needs and interests? Or can it be so that the talk about the "juridification" is a myth? With reference to the latter, a very large part of the rules and regulations within the EU concern production method, product quality, or special areas such as agriculture, regional subsidies or energy. For the sake of simplicity I call these *production oriented legislation*. When it comes to rights and obligations between individuals, i.e. such relationships that are regulated according to civil law, not so much has happened since the creation of the EU. That the EU encourages the use of mediation between individuals does not, thus, play an important role in the impact of EC law, since this influences other areas – those areas which from an EU political perspective are essential in order to ensure the union is strengthened and that it survives. That individuals within this framework are permitted to utilise the conflict resolution method they want to use does not disturb the EC law's impact at all even if 10 percent of the cases are "faulty" from the perspective of the Union. One can take such a loss without being particularly concerned.

When it comes to legal relations between individuals, it is obvious that the EU does not have the political ambition to regulate in detail – this is not the existing policy, at any rate. The explanation for this is quite simple. A detail-regulated regime would suffocate the market – the internal market – which works both at an individual and institutional level, and which needs flexible instruments, since it is in a state of constant movement. Mediation is flexible and can, in addition, easily adapt to new technical developments, while the law is slow and almost always behind. Moreover, politicians are thought to have realised that the national legal systems are not able to fulfil the duties expected of them. The courts are slow, costly and in regard to legal security, it has become a bit haphazard owing to the continual requirement to cut costs. One can therefore see the growth of mediation and other types of ADR as a sign that *the courts have failed*. The rapidly-expanding market with cross-border trade demands speedy solutions in order to implement the advantages of the internal market. Mediation satisfies these demands. The courts do not. Moreover, alternatives are necessary if citizens are to have *any kind of legal protection* at all when the courts are weighed down under their workload. Without doubt, the courts make certain desperate attempts to keep up by making proceedings even heavier at the front. In the long run, however, this experimentation with proceedings involves a considerable risk because the courts undermine their own role and will thus be neither bird nor fish. When resources shrink, a prioritisation must consequently be made. A division may, in the long run, occur between questions that are handled by the court and other questions that are managed by ADR. In this way, ADR fulfils a *relief function* that makes it possible for the courts to devote time and energy to the cases which they will determine. As such, and as already pointed out above, ADR is a complement to the courts which will presumably be indispensable in the future and regarded as natural.

In her doctoral thesis, Knuts compares the function of ADR with the functions that are usually attributed to the civil proceeding, i.e. legal security,

behaviour modification, conflict resolution, control and the creation of precedent. She finds that those alternative forms of dispute resolution that lack a connection to existing law do not have the objective of putting the one party in the same position as before. Rather, the purpose is solely *to bring to an end the dispute between the parties*.<sup>38</sup> ADR does not make any claim to have the functions said to be possessed by the administration of justice – it is not a question of the alternative administration of justice but an alternative to the administration of justice – but this does not mean that ADR lacks public functions. It must, for example, as indicated earlier, be regarded as an important public function to allow citizens to take responsibility for their disputes and thereby *relieve* the courts from a number of disputes. Above all, however, I believe that ADR has an important *market function*, in particular with respect to the inner market within the EU. Mediation is not limited by borders. One does not, therefore, need to concern oneself with forum rules. In addition, the settlement is fast, inexpensive and friendly. The low transaction costs are undeniably something which a well-functioning market economy benefits from. On the other hand, the slow and costly court procedures disturb the market. At the same time, it is not capable of living up to citizen expectations of a quick and inexpensive process.

#### **4.2 How can the Rapid Development of ADR be Explained?**

In order to find an explanation, or perhaps explanations, for the increasing interest in ADR, it is interesting to take a closer look at how ADR developed following an almost explosive start in the USA in the beginning of the 1970s.

*High costs and slow management* in the courts have previously been cited as the only causes for the rapid development of ADR in the USA. As time has passed, this *mechanical explanation*, which taken by itself is plausible and is a sufficient explanation, has begun to be questioned. Is this the whole truth behind the sudden wave of ADR that broke through? It has, in this connection, been pointed out that ADR came after the so called *Flower-Power Movement* in the 1960s. This movement's ideology was for flat organisations and consequently against hierarchies; for self determination and against authorities; for the decentralisation of power; and so on. When the movement began to fade away, its prominent figures ended up in the corridors of power where they advocated ADR, which exists in quite good harmony with certain parts of the ideology that Flower-Power stood for. This explanation, which is put forward by Oscar Chase, appears doubtful since, if he is correct, one could have expected that *Restorative Justice* would have made an appearance earlier and not approximately 15 years after ADR.<sup>39</sup> On the other hand, Christie's pioneering article "Conflicts as property," was written already in 1977 and Christie is, in addition, of the opinion that Restorative Justice must be based on the same principles as the decisions of civil cases.

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38 Knuts, G., *Förfarandegarantier vid domstolsanknuten medling*, Helsingfors 2006, p. 47.

39 Chase, O., *ADR and the Culture of Litigation: The Example of the United States* (Conference Paper, Paris 2004), p. 5.

Another explanation for the quick development mentioned, is *society's ever increasing complexity* and *the difficulties for the legislator in keeping up*. One example that has been put forward in this connection is a case in Japan. A manufacturer of infant formula was sued by a large number of parents after their infants died or became very seriously ill sustaining permanent disabilities after consuming the company-marketed products. To begin with, the parents demanded damages. The solution after mediation was, instead, that the company established a foundation, the purposes of which were to take care of all of the sick children for the rest of their lives and to pay compensation to the parents. The foundation model for damages of this kind is not contained in the Japanese law. Nor is it provided for in any other tort law in the world, for that matter. This solution could, however, be created through negotiation following a mediation procedure.

It is, of course, of great interest to be able to mention such a large and well known case that could result in a tailored solution totally outside that which the law could bring about. The thesis that we receive more ADR because the law cannot keep up is probably correct. A good example of this is that a number of state investigations about computer-related crime have not led to any legislation since the rapid technical development makes each investigation obsolete in a very short time.<sup>40</sup>

Another question investigated by Knuts in her doctoral thesis is whether there should be procedural security with court mediation. In this connection she compares court mediation with mediation, the judge's conciliation activity and arbitration proceedings and – against the background of some procedural securities – the right to impartial management, and the rights to equal treatment, adversarial procedures and public hearings. In her study she further describes court mediation in Finland, Norway and court-annexed mediation in Sweden in order to characterise the phenomenon and to further frame the question which she investigates from a legal dogmatic point of view. As the theoretical framework for the analyses, Knuts has used “*the decline of the great narratives*,” “*the challenges of the welfare state*” and “*the juridification*.” The frame of reference is well chosen and interesting and is not only a frame but also gives certain reasons for the rapid development of ADR.<sup>41</sup>

The decline of the great narratives contains or expresses the so-called *Postmodernism*, which represents the philosophy of science trend which grew from the time after the industrialisation of the western society. It is not possible to date this to an exact year. It comes, however, in time after the *Logical*

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40 See the survey in Ds (Official report series of the Ministries, Sweden) 2005:6, *Brott och brottsutredning i IT-miljö*.

41 “The great narratives,” an expression which comes from the French philosopher Jean-Francois Lyotard, is a kind of collective motive of thought – telling a story – which is spread in the civilisation. Christianity is one of our great narratives; the theory of natural selection another; Marxism a third; psychoanalysis according to Freud a fourth etc. It has been claimed that in the postmodern era, the great narratives have been replaced with many small narratives. See Thurén, T., *Tanken, språket och verkligheten. En bok om vår verklighetsbild och hur den byggs upp*, Stockholm 1998, 152 ff.

*Positivism*. Together with the principle of verification this means that there is an *independent reality outside* us which can be studied; it can be measured and weighed through empirical studies and statements about it can be verified or at least falsified.

It should be mentioned that the *Scandinavian Realism* was based on Logical Positivism. Rights could not be observed and, therefore, they were *metaphysical*. However, advocates of Postmodernism, which may be said to be a label for many intellectual streams, reject empirical research as cornerstones in the development of knowledge. Some postmodernists emphasize what Alvesson calls "*non-objective*" *perspectives of interpretation*, such as pre-understanding, paradigm and metaphor.<sup>42</sup> Considerably deeper are the ideas of those postmodernists which are called *discursivists* and *constructionists*. This group deny the possibility of science to explore the objective truth about the social world.<sup>43</sup> According to this view, every claim of truth says just as much or more about the researcher's subjective convictions about reality and the use of language.<sup>44</sup> Due to the vagueness of language it is thus not possible to observe reality and reproduce it in terms of "brute facts."

If the empirical research is discarded as the common unifying scientific method, several truths will stand side by side on the marketplace of truth, and we ourselves choose the one we consider is the most appropriate. The shifting of understanding about reality, values and morality to an individual level from a community level becomes the unavoidable consequence. Thus, the time when great narratives were spoken about is past. A consequence of Postmodernism is also that the behaviour modification function of the administration of justice has been denied. As one of the great narratives, it has declined.<sup>45</sup> When values disintegrate and fragment, alternative procedures that focus on the individual, such as mediation, become the natural choice – or the sole function of the administration of justice becomes conflict resolution.

The postmodernists have thus, one could say, in certain respects played right into the hands of ADR even though ADR as a phenomenon has no special scientific domicile. If there is, namely, no truth, why then should one go to court? The court, of course, cannot find it since it does not exist. It is therefore better to try to find the parties' interests and needs instead of wasting time on the impossible attempt to establish rights and obligations.<sup>46</sup>

"The challenges of the welfare state" represent, according to Knuts, the ability – or more correctly, the inability – of the State to supply a quick,

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42 Alvesson, M., *Postmodernism och samhällsforskning*, Stockholm 2003, p. 9.

43 This corresponds to the critical school within legal science with inspirers such as Foucault and the above-mentioned Lyotard.

44 Alvesson *op. cit.* p. 9.

45 Knuts *op. cit.* p. 42.

46 Alternative Dispute Resolution is the so-called third wave – or "tsunami", as Per Henrik Lindblom calls it, within the Access to Justice Movement. Lindblom, *op. cit.* p. 108. Regarding this see also Alexander, N., *Global trends in Mediation, Riding the Third Wave*, Köln, p. 1.

inexpensive and secure process.<sup>47</sup> In the long run, of course, the constant demand for cost-effectiveness leaves its mark on the administration of justice. One comes to a point where additional savings must take place at the expense of legal security. As far as Sweden is concerned, this point has probably passed. When politicians make reform after reform with assurances about the preservation of legal security or even its improvement, it is, thus, only idle talk. But what can one do about the matter? It is here that ADR – particularly mediation – comes into the picture. The fact that mediation gains more and more ground can therefore be seen as the result of the failure of the administration of justice (on behalf of the State).

With "juridification," Knuts means that more and more – and in addition, flexible – norms are created.<sup>48</sup> In connection to this statement – which incidentally is completely correct – Knuts is of the opinion that the civil proceeding, in spite of "the decline of the great narratives" has an important social function today. On account of "the juridification," she considers that the values and valuations of individual judges play an ever increasing role. According to Knuts, these values and valuations can be expressed through abstractions such as the function of the civil procedure. As examples, Knuts mentions the judge's focus on intervention in the case, the settlement activity and the issue of the burden of proof.<sup>49</sup> Since it is about the individual judge's values and valuations, it is possible, according to this interpretation, to find – at least theoretically – as many functions as there are judges.

Moreover, this view seems to imply a fragmentation, completely in accordance with the "decline of the great narratives." In a way, this appears logical since the great narratives have ceased to exist. At the same time, it is a paradox that fragmentation is represented as a "decline of the great narratives." What Knuts probably means, however, is that the function of the civil procedure today, more than ever before, is to clarify the meaning of a huge number of vague and flexible laws through precedent. In this way, the power of the courts has increased. At the same time, it can be maintained that the administration of justice, that previously has been *rigid and sluggish*, has become more multi-faceted and flexible. Therefore – as Knuts claims – fragmentation can, after all, be a "great narrative" or at least the beginning of a new story.

As a further explanation to the increasing use of ADR over the administration of justice offered by the State, one should probably count the *high education level* in the modern society. It is not so that the judge knows best, and is the best educated about the issues applicable in the dispute. Particularly in more complicated disputes which concern the areas of high-tech or IT or other complicated branches of law, the representatives are, as a rule, well equipped and have penetrated the case to a considerably deeper extent than the court could do since the court has neither the knowledge nor time. The fact that the parties go to court depends, thus, not on the fact that they receive the best, most

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47 Knuts, *op. cit.* p. 29.

48 Knuts, *op. cit.* p. 31.

49 Knuts, *op. cit.* p. 44.

informed and most equitable solution. Rather, this measure is taken because the parties cannot come to an agreement or find any another way to resolve the dispute.

That mediation is regularly used in common law countries is also connected to *the judge's role*. The judge may not, in principle, involve himself in the case that will be managed by the parties. In addition, under common law there is, perhaps, not the same *legal right-based thinking* as is seen in civil law countries, since common law is not based on the written law. This possibly makes it easier to think in terms of needs and interests than in terms of rights and obligations.<sup>50</sup> The civil-law judge, in contrast to his common law colleague, intervenes more *actively in the case* and attempts, as a rule, to make the parties settle their dispute. In Sweden, as in a number of other civil-law countries, such an obligation is even imposed by law. With consideration to this demand on the civil-law judge, it can be said, on the one hand, that court mediation is not needed. On the other hand, however, it can explain why *the move to court mediation should be easy to make*. It is really only a question of certain definitions and clarifications about what the judge shall do and not about the adoption of some activity that is unfamiliar to the courts.

As to an explanation for the increased use of *Restorative Justice*, the hypothesis has been put forward that the modern state no longer "rows" the boat but instead "steers" it and delegates to the citizens the management of the rowing.<sup>51</sup> This hypothesis about *delegation* thus means that the various states have transferred a part of the administration of justice to the citizens after having given *the direction* and possible *control mechanisms*. Explanations of this kind are, like other explanations, very difficult to assess, but as far as Sweden is concerned, one can probably, establish that many activities which have previously been public have been privatised and that the development in general has also moved in an individualistic direction.

There are also explanations which are based on the idea that nowadays people simply want to decide more about things that had previously been resolved by the courts. There appears to be a kind of *longing for self determination* of roughly the same character as the Green-Wave Movement in the 1970s which was, in part, characterised by a longing to be out in the country. In addition, there are certain *religious-coloured* speculations. In this way, Restorative Justice (RJ) carries certain clear religious signatures, foremost remorse, forgiveness and the "meeting of minds." Zehr, one of the prominent figures within the RJ-Movement, has worked to spread knowledge about mediation on behalf of *the Mennonites*, a religious movement in the USA.<sup>52</sup>

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50 Lindell, B., *Mediation in Sweden*, ADR.Bulletin. The monthly newsletter on dispute resolution, volume 7, number 5, 2004, p. 86.

51 Bottoms, A., *Some Sociological Reflections on Restorative Justice*, in *Restorative Justice and Criminal Justice*, eds. Hirsch, A., Roberts, J.V., Bottoms, A., Roach K., & Schiff, M., Oxford and Portland, Oregon 2003, p. 107.

52 See Lindell, B., *Alternativ rättskipning eller alternativ till rättskipning*, p. 76, Uppsala 2006.

## 5 The Quality of ADR Agreements

One question of great significance is what *quality* ADR decisions have. I limit myself here also to mediation. To begin with, it is necessary to state what is meant by quality. One immediately bumps into huge difficulties. If it concerns the mediation process itself it is nevertheless simple to establish that the parties are very satisfied with it.<sup>53</sup> As a rule, they consider it to be faster, kinder and cheaper. In addition, the parties appreciate the flexibility and the right of self determination. There is little doubt that the mediation process is of a considerably higher quality than the common court process when it comes to *the satisfaction of the parties*.<sup>54</sup> The reasons for this are simple: the parties become confirmed as individuals; their problems are also confirmed; they are treated respectfully and politely by the mediator; they are allowed to have their say; and they may – and are in fact supposed to – formulate the agreement. In contrast to this, the court process is impersonal, unfriendly, often heated and stressful. Further, the judge formulates the parties' problems who may, perhaps, not have their say either – perhaps even new circumstances and evidence is dismissed.

Because the parties are so satisfied with the mediation process, one of the parties can also put up with a settlement that is rather poor for him. This leads to the following question and dilemma: *Is it more important that the parties are satisfied with the process than to provide procedural guarantees?* Can one replace procedural guarantees with satisfaction with the process? Or is satisfaction with the process an essential element in a "fair trial," perhaps even the most important? The question is important and I shall not deal with it here except to say that one probably should not describe the mediation process as inferior, from a legal security standpoint, to court proceedings, or as a kind of second-class process which may be good enough since the State cannot afford to offer the best to everyone. The reason is that the court procedure, as shown above, has been depleted during the latest decades to become very lean. As a consequence of this continuing development, there is not so much legal security remaining in court proceedings and, at the same time, the parties are not satisfied with the process.

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53 There are a large number of investigations from the USA which demonstrate this. *See e.g.* McEwen, C.A., Maiman, R.J., *Small Claims Mediation in Maine: An Empirical Assesment*, *Maine Law Review*, 260 ff. and Tyler, T.R., *Citizen Discontent with Legal Procedure: A social Science Perspective on Civil Procedure reform*. *The American Journal of Comparative Law*, 877 ff. *See also* Vindeløv *op. cit.* regarding the positive experiences in Denmark, p. 317 and Austbø, A., Engebretsen, G., *Mekling i rettskonflikter. Rettsmekling, mekling ved advokater og mekling i forlikrådene og konfliktrådene*, Oslo 2003 p. 36-37 about the positive experiences in Norway. About that matter *see also* Hareide, D., *Konfliktmedling*, 2006 p. 37-38.

54 *Cf.* however, Lindblom *op. cit.* p. 113 who says that the actors in legal proceedings can contribute to greater understanding and even reconciliation. *See also* the same author, *Priogressiv process*, Stockholm 2000 at p. 56-57, 256-257, about the functions of the procedure.

There is little doubt that the good result that the mediation process shows, as far as it concerns the satisfaction of the parties, makes it necessary to more closely discuss what it is that characterises a good process. Perhaps one actually needs to go back to the fundamental question of *what legal procedure in fact is or should be*.

Is it possible to say something about the quality of *the mediated agreement* itself? In the investigations that have been undertaken on ADR the following variables are usually included: *satisfaction; fulfilment; number of agreements made; type of agreement made* (partial or complete); *effectiveness* (consumption of time); and *effect on the relationship*.<sup>55</sup> The consumption of time and the number of agreements which are made are relatively simple to measure, while qualitative factors, such as the quality (of the above-mentioned reason) are more difficult to measure. If one looks at the result shown by investigations in the USA and Australia, which touch not only the process but also the outcome – in other words the entire process – the picture is divided. This foundation points to a higher settlement percentage than in a court, but otherwise the overall results are not equally as positive as those shown in court mediation. An explanation as to why court mediation, according to the investigations undertaken in Denmark and Norway, shows such a good result, can be that the issues investigated represent only one form of ADR – mediation – which, in addition, follows a reasonably predictable pattern. Moreover, such mediation lies in the hands of professional actors with much experience in conflict management (usually judges), and takes place in an established and secure context, namely, in court.

As mentioned above, it is evident that, in general, a broader problem definition is used with ADR than in legal proceedings because its starting point is to take consideration of the needs and interests of the parties. This means that as a rule, it is not possible to compare a mediation agreement with how courts render judgments in similar situations in order to obtain a standard of quality.<sup>56</sup> Suppose, for example, that one would find that women who mediated about maintenance to children from their former spouses have been shown to have received on average X SEK less than what women were awarded by a court in a similar situation. Doesn't this then imply that mediation is inferior to court proceedings? No, one cannot draw the conclusion so easily. Of significance is what *has been included in the agreement*; perhaps it is not only a question of money. Even so, the suspicion that it concerns a *systematic maltreatment*, naturally exists. Moreover, the presence of an advantage is not necessarily connected to the inclusion of nonlegal factors as the basis for an agreement. The narrow problem definition which exists in legal proceedings sometimes provides a strong protection.

If the mediation process is seen as an alternative to the administration of justice and not as an alternative administration of justice, there is no reason to

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55 Mack, K., *Court referral to ADR: Criteria and Research*. Published 2003 by the Australian Institute of Judicial Administration Incorporated and the National Dispute Resolution Advisory Council, 18 ff.

56 See also Austbø & Engebretsen, *op. cit* p. 37.

objectively seek to determine the quality of a mediation settlement compared with a court judgment either. Since the solutions *build on different criteria* they are *not comparable*. The only matter of significance in this connection is, therefore, the parties' *subjective assessment of the settlement*. In that a mediation settlement is not based on the application of law, but that the norm is made *ad hoc* by the parties for the individual conflict, it is not of any great meaning to investigate whether a similar case would be assessed in a similar way in another mediation procedure. It is thus clear that one cannot in a meaningful way compare mediation settlements about a particular question with judgments about the same question, and that the equivalent applies to the comparison of different ADR settlements between themselves. On the other hand, one can and one should compare judgments about the same issue. This follows the principles of equal treatment and predictability.

The empirical investigations that have been carried out on mediation settlements show on the whole that mediated agreements also hold well in the long run, and that the parties are satisfied.<sup>57</sup> Of great importance for this satisfaction is the parties' right of self determination. There is no one who renders a judgment between the parties. They decide themselves whether they will accept an agreement or not. If they do not want to do this, or if one party does not want to, they may leave the negotiations. If a party makes an agreement, even though he is not completely satisfied with it, there is nothing or no one to lay the blame on – assuming that the parties are approximately *equal in strength and have made an informed choice*. The latter can be a problem in mediation. Mediation implies, as a rule, that the mediator does not intervene if one party is on the way to making a disadvantageous settlement. This applies also in court mediation. Thus, if the court mediator knows that the party has the right to a considerably larger sum of money according to the law, the general opinion is that the mediator shall not enlighten the party about this. The reason for this point of view is that the mediator's role is to help the parties to negotiate forward to a solution and that the responsibility for the solution, thus, rests on the parties. Accordingly, the mediator shall not be a guarantor for a correct solution. Should the mediator act as guarantor for a proper or reasonable solution, the mediator's role changes in such a way that the fundamental conditions for mediation disappear. For this reason the mediator does not usually write up the parties' agreement either.

In this line of reasoning there is clearly a hole; something which does not add up. What makes the reasoning weak is the thesis about the parties' responsibility for the solution, on the one hand, and their lack of information about fact and law in certain cases, on the other. In order for the parties to be able to take responsibility for the negotiated solution, it must be based on the assumption that the parties know the facts and the law, for without this knowledge, they cannot make an informed choice. If one of the parties is weaker and has no representative, this problem will be brought to a head. As a rule, the mediator

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<sup>57</sup> See Roehl, J.A., Cook, R.C., *Mediation in Interpersonal Disputes: Effectiveness and Limitations*. Mediation Research, Kressel, K., Pruitt, D.G., and Associates. San Francisco, London 1989, 31 ff.

solves the dilemma – which does not arise if the parties have legal representatives – by asking the parties to show the solution to an advocate or at least to a third person before they sign the agreement. Other control mechanisms are also conceivable. It should be emphasised that the same problem arises in legal proceedings. Should the judge enlighten the party about the fact that the claim is statute-barred in order to make the party allege this fact? A common interpretation in the Nordic countries is that the judge should not say anything if the parties are represented by an advocate, but give a "hint" that the claim is old if the parties act on their own.

Before coming to an agreement, parties have had reason to ponder about BATNA i.e. the best alternative to a negotiated agreement. If the parties accept what they have negotiated, this means that they have found that the negotiated solution is the best alternative.<sup>58</sup> However, in court mediation in Denmark, Norway and Finland, the mediator is usually a judge. He knows the law and can inform the parties about its content if it seems proper to do so in the individual case.

## 6 ADR According to the Swedish Model

In Sweden ADR does not exist in the forms commonly appearing abroad if one disregards arbitration proceedings and certain areas of the law e.g. labour disputes. There are probably many explanations for this. One important explanation can be found in the long social democratic holding of power in Sweden and the construction of the welfare state which is based on solidarity and equality. The private administration of justice, like privatisation on the whole, has been considered by the Social Democrats as presenting a threat to the welfare state. Accordingly, the party has chosen not to encourage such activity. In connection with the macroeconomic downturn between 1989 and 1990 it was, however, clear that the welfare state had become too expensive and a dismantling of this began which also consisted of privatisation in respect of certain parts of the infrastructure. Membership in the EU and the ever increasing, continuous internationalisation has further shown that the idea of the Swedish welfare state has not been possible to uphold; it is, of course, essentially a nationalistic conception which is not fitting in this period where it is necessary to establish good international relations in Europe. Indeed, the boundless society is not a classless society. However, the Swedish national welfare state must be sacrificed for loyalty and solidarity within the European idea of community. Even if the Social Democrats are no longer against privatisation in the same way as previously, the structure still remains from the *collectivist society* which was built up under the "golden years" between 1950 and 1975. In addition to this, Sweden has many strong organisations. The

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<sup>58</sup> The parties have thus come to the conclusion that legal proceedings or the drawing of lots or some other conceivable method for solving the conflict would presumably give a more unfavourable result or cost too much.

strongest, the Swedish Trade Union Confederation (LO) has many members and is closely associated with the Social Democrats as well as a number of large organisations including the tenants' association.

Sweden is, in comparison with many other countries, unusually rich in *organisations* and these organisations often assist their members with advice in conflict situations. Sweden is also known for its *ombudsmen*. The oldest of our ombudsmen is the Swedish Parliamentary Ombudsman (JO) which has been the prototype for similar institutions in some other countries.<sup>59</sup> Further, there are several *boards* of a number of different kinds.<sup>60</sup> Even the large number of boards are special for Sweden and also for the other Nordic countries. The most known is presumably the National Board for Consumer Complaints, but in addition, there is the Swedish Consumer Agency, which should be distinguished from the former.

Ombudsmen, as well as the boards, receive complaints from the public within their respective field of activities and endeavour to bring about corrections. If the recommendations are not followed, court action is still a possibility.

Naturally, the existence of all of the ombudsmen, organisations and boards means that the courts are relieved. It seems that the activity of these boards and ombudsmen is not really regarded as an alternative to the administration of justice and that they don't receive the appreciation they deserve.<sup>61</sup> If one makes the assumption that all boards and ombudsmen should disappear, would the courts manage to deal with all of the disputes that would be channelled their way? The answer is no. The boards have, as a rule, judges as chairs. This may be considered sufficient to guarantee that they function as the State's extended arm, that is to say, they safeguard the observance of the substantive law and do not encourage conflict resolution of the type that is common with the use of ADR with broad solutions to problems and a consideration to nonlegal factors, if these also exist.

## **7 Article 6 of the European Convention on Human Rights and Court-annexed mediation**

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59 The newest is the *Office of Ombudsman against Discrimination on grounds of Sexual Orientation* (HomO). Other Swedish ombudsmen include e.g. the *Office of the Equal Opportunities Ombudsman* (JämO), the *Swedish Consumer Ombudsman* (KO), the *Ombudsman for freedom of trade* (for non-restrictive practices) (NO), the *Office of the Ombudsman against Ethnic Discrimination* (DO), the *Office of the Children's Ombudsman* (BO), the *Patient Ombudsman* and the *Press Ombudsman* (PO).

60 Lindell, *Mediation in Sweden op.cit* p. 87.

61 They should, however, be counted towards ADR in a broad sense. See e.g. Lindblom, SvJT 2006, 101 ff.

There is no decision of the European Court of Human Rights about whether court-annexed mediation falls under Article 6.<sup>62</sup> There are, on the other hand, some decisions of interest concerning another form of ADR, namely *arbitration proceedings*. These decisions will be the starting point for the analysis below regarding the question of whether there are any procedural guarantees for court-annexed mediation. When it concerns *nonlegal mediation* there is probably no doubt that such guarantees do not exist.

Of interest for the question at issue are the following characteristics of the arbitration proceeding.

- 1 The matters of an arbitration proceeding are rights and obligations in the sense as intended by Article 6.
- 2 The right to obtain a rejected obligation is also a civil right, as is the right to be able to enforce the decision.
- 3 A "tribunal established by law" *does not* include an arbitration board in a voluntary arbitration proceeding. An arbitration agreement is regarded, namely, as a waiver of Article 6, since it constitutes a procedural hindrance.<sup>63</sup>
- 4 A "tribunal" is a public organ which determines matters within the scope of its competence and in accordance with existing law, and also in accordance with existing procedural rules.<sup>64</sup>
- 5 If the arbitration proceeding is imperative according to law or forced through threats or violence or strong pressure etc. it is not regarded as a valid waiver of the right to a trial by the court.<sup>65</sup>
- 6 The limitations of "access to court" are valid if the exception from a trial by the court is considered legitimate and proportionate to the measures; even the right to a public hearing can be waived if it is clear and unambiguous and does not conflict with any important public interest.<sup>66</sup> Accordingly, even an unequivocal waiver can be tried and declared invalid.<sup>67</sup>

One question that is a little unclear is whether an arbitration agreement implies that a party has abandoned *all* rights that are laid down in Article 6 or whether an arbitration agreement only signifies a *partial waiver* of rights. The cases *Bramelid and Malmström and Molin v. Turkey* appear to imply that it concerns a *total waiver*, while the case *Suvaniemi* suggests that waiver only concerns the right to a public court proceeding. Another obscurity is inherent in the question of which role the national courts have in relation to the enforcement of a

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62 Here, this expression includes court mediation.

63 *Deweere v. Belgium, KR v. Switzerland*.

64 *Le Compte, van Leuven and the Meyere Judgment*.

65 *Deweere v. Belgium, Bramelid and Malmström v. Sweden*.

66 *Axelsson and others v. Sweden*.

67 *Suvaniemi and others v. Finland*.

judgment. The case *Nordström v. Netherlands* appears to suggest that the convention does not demand that national courts check that the procedure was in conformity with Article 6, while another opinion is that the national courts have the duty to check that the arbitration proceeding is carried out in compliance with fundamental procedural guarantees.<sup>68</sup>

Although it would be interesting to more closely investigate the legal aspect of arbitration proceedings, this will not be undertaken in this essay because there is sufficient information – in that which has been said above – to be able to make a reliable statement about whether court-annexed mediation falls within the application area of Article 6. Characteristic of such mediation is that:

- 1 the parties have voluntarily abstained from an ordinary court trial,
- 2 there is no court that renders a judgment,
- 3 the parties themselves are responsible for the resolution of the dispute,
- 4 problem definition is, as a rule, broad, and consideration is often also given to nonlegal factors, and
- 5 the mediation procedure is unregulated and, thus, contains no legally-confirmed procedural rules.

At least as court mediation is constructed in our neighbouring countries, the parties make a *choice*; they are asked about whether they would like to mediate and can choose legal proceedings instead. The parties thus make a choice about *how to resolve their conflict* and *if they choose mediation they also give up the application of procedural guarantees*. It makes no difference that the mediation is carried out in a court by a judge who takes the place of a mediator. In this connection, the Danish agreement in particular should be pointed out.<sup>69</sup> These formulae presumably have the object of not only informing the parties about what mediation is but also *making the waiver of a court trial unequivocal and indisputable*.

The settlement activity of the court, on the other hand, falls under Article 6, at least as it is drawn up in Sweden. The reasons for this are as follows:

- 1 Settlement attempts made by the judge are a part of the legal proceeding in dispositive civil cases if the procedural rules prescribe that the judge shall attempt to reconcile the parties.<sup>70</sup>
- 2 A waiver of Article 6 does not occur in relation to ordinary settlement activity.
- 3 The judge attempts, as a rule, to conciliate the parties from outside of the existing law and it is the court that acts.

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<sup>68</sup> *Jakob Boss Sohne KG v. Germany*.

<sup>69</sup> This document describes the mediation process and in particular emphasises that the parties themselves are responsible for the outcome and that the court will not intervene if a party makes a bad settlement.

<sup>70</sup> According to the Code of Judicial Procedure 42:17, the judge is obligated to make settlement attempts if this is deemed proper in the individual case.

- 4 The court has an investigative role in the settlement activity; it is not the responsibility of the parties to, through this activity, find a common solution in the same way as in a mediation procedure. So-called "forced settlement" shows how active the judge can be in persuading reluctant parties to reach an agreement.

Court mediation and the settlement activity undertaken by the court cannot therefore be placed on a par with each other, as far as it concerns the application of Article 6. Even if *the substance* of the activities can be almost identical, there is a decisive difference with respect to procedural guarantees. It is – against the given background – important to mention that it can hardly be a coincidence that court mediation does not lead to an application of Article 6. On the contrary, the purpose of court mediation is to create a procedure that exists outside the ordinary court procedure. Only in this way is it possible to create the advantages that court mediation offers. Procedural guarantees are, of course, good. However, they are not suitable for mediation, which is based on completely different assumptions than ordinary administration of justice. Thus, it is important to remember that mediation is not the administration of justice but an alternative to the administration of justice. Moreover, if procedural guarantees applied to court mediation it would no longer be correct to characterise the activity as mediation. In reality, it would be a special form of process that is assimilated with the ordinary procedure. An important reason for this is that if procedural guarantees would be applied to the mediation process, the mediator would have a power position which would upset the foundations of the process. With that, the mediator would become a judge since he would have to see to it that the procedure fulfilled the procedural guarantees. In such a situation someone would also be required to supervise the mediator, that is to say, legal remedies would have to be introduced.

## 8 Concluding Remarks

Considering that the court system is severely burdened by long waiting times and is costly and is unable to meet the citizens' requirements for a speedy, legally-secure and inexpensive process, one may well ask whether it is reasonable that the courts provide, automatically, the right to a trial in *dispositive cases*, which the parties should preferably clear up on their own through negotiation. Even large companies, which can afford arbitration proceedings, are given this assistance at the expense of more urgent cases that concern *mandatory legal provisions*. As a result, the hearings of these more pressing cases are delayed. I have, in another connection, argued that the parties should be compelled to attempt to resolve their disputes through serious negotiation discussions before they go to court.<sup>71</sup>

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<sup>71</sup> Lindell, B., *Förlikning och medling*. I Vänbok till Torleif Bylund, Uppsala 2003, p. 278.

That even the right to an unconditional hearing by the court must be called into question as a consequence of the increasing usage of ADR is, in my view, beneficial since it is not at all obvious that the courts should provide assistance in those disputes that are potentially able to be resolved through a settlement if the parties have not even attempted to settle their differences through negotiations. The former Government has, however, with reference to *commercial disputes*, stated that it is desirable that more disputes be determined in courts instead of arbitration boards.<sup>72</sup> It is, above all, precedent which are desired.<sup>73</sup> With a view to the strained situation in the courts, this wish is not completely easy to understand. The commercial disputes are often large and time consuming and can block up a division for a long time, which delays the management of more deserving cases. Against the given background, it would therefore be logical if the Government would be pleased if trade and industry disputes were settled by arbitration boards since this relieves the courts. The Government's wish, however, clearly implies that it willingly sees large corporations such as Volvo, Saab, NCC or Skanska in the national courts, in spite of the fact that such large actors have resources to buy exclusive conflict resolution services on the market, which they indeed do.

There is hardly any acceptable reason to wish for a change of the current situation. The reason for this is the balancing of interests. On one side lies the weight of an increased formation of precedent in commercial disputes and on the other, the weight of tax revenue which is instead used to determine disputes that concern individual citizens. The choice should, in my view, be simple. The rational alternative, however, is to attempt to remove the dispositive disputes from the courts, as far as possible, either through the introduction of regulations which provide that the parties must show that they have attempted to negotiate, or through the requirement that the parties have attempted to mediate outside the court but have failed. Another possibility is to introduce court mediation, which has been successfully implemented in our neighbouring lands. Even if – as has been shown above – this form of mediation does not fall under Article 6 of the European Convention on Human Rights it is in most cases preferred by the parties instead of a long and costly trial where the outcome is often difficult to predict.

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72 Prop. 1998/99:35 p. 34. The Social Democrats lost the election in 2006.

73 The value of precedent is in my opinion exaggerated. This applies particularly to commercial disputes which are often complicated. Moreover, if a commercial dispute is international, it is, for obvious reasons not uncommon that the foreign party does not want to have a decision from a Swedish court because he thinks that the court will be biased if the counterpart is a Swedish entity. The formation of precedent is best suited and most beneficial in everyday disputes with relatively few facts.