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Alternatives to Law and to Adjudication

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The question should be asked: what such alternatives would actually be alternatives to. If they were alternatives to law as such we would have to engage in the definition of law and to become immersed int a discussion of legal pluralism. If they were alternatives to the present legal system we would have to consider historical and contemporary efforts to achieve law reform. If they were alternatives to adjudication we would have to account for the fact that the settling of a court case by trial is not the rule but the exception, and would need to explainwhy the choice of an institutionalised alternative is the exception to the exception.

During the upheavals of the 1960sthe legal landscape in the United States was significantly changed. Part of this transformation was a particular discourse on alternatives to law which developed at least temporarily into an alternative-movement. From the beginning the discussion was not about alternatives to the legal system, but about alternative modes of conflict resolution within this system. It took informal justice as an alternative to the formal court system.

The present article follows this restricted perspective. However, as a first step an attempt will be made to explain how this restriction developed. The second part will deal with the informal-justice-movement of the late 1970s. The third section will address the second wave of the Alternative Dispute Resolution discourse in Germany. The fourth section introduces what might be called the second mediation-paradox. The closing comment will assess the future of Alternative Dispute Resolution (ADR).

How the Discourse on Alternatives to Law Lost Sight of Alternatives

The discourse on alternatives to law was embedded in a more general discussion on legalisation and delegalisation. But the general discussion did not really deal with alternatives to law, either, but with a different and presumably better law, taking account of the difference of formal-rational law and substantive law as outlined by Max Weber (Abel 1980; Weber

1968). However, in the 1960s, empirical research in legal sociology which could have opened up this restricted view, was just waiting in the wings. It took some more years to show that litigation is not the only answer to conflicts of all sorts. Businessmen seek to avoid lawyers and courts, and they prefer to negotiate with their counterparts (Macaulay 1963). Consumers take their complaints directly to the provider, rarely approaching even such informal intermediaries as media ombudsmen or Better Business Bureaus (Steele 1977, Best and Andreasen 1977; Hannigan 1977; Ross and Littlefield 1978). The majority of tort claims are settled out of court, regardless whether or not insurance is involved. Even within the administrative process compromise and consent decrees are the preferred mode of dealing with conflicts. If the law makes the involvement of a court mandatory, as in divorce or criminal matters, the parties mostly reach a settlement before they appear in court. In fact, adjudication is the alternative as most conflicts are settled without a judgement. In addition to such empirical observations, Felstiner (1974) suggested that in complex and technically advanced societies the disputants could veer away from each other at little cost. Thus he considered lumping it or avoidance to be a way to deal with conflicts in modern society, making the search for alternative modes of dispute settlement superfluous. Even though there were grounds to object to it there were also reasons to look for modes of grievance handling at the behavioral level. However, it took until the early 1980s for research to direct its attention to the earlier stages of conflict developement. Felstiner himself, in a now famous piece on "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming …", led the way to "a neglected topic in the sociology of law": "The emergence and transformation of disputes – the way in which experiences become grievances, grievances become disputes, and disputes take various shapes, follow particular dispute processing paths, and lead to new forms of understanding" (Felstiner et al. 1980/81, 632).

In their early stages conflicts develop at the behavioral level and do not lend themselves to easy intervention. Behavioral change is difficult to bring about. The ADR-movement, however, was in the first instance a social reform movement, directed not towards behavioral but towards structural change. In the 1960s, reform-oriented lawyers and sociologists had just discovered the law as a weapon for social reform and a means to benefit the weak. Underlying the sociological analysis of the 1960s were critical theories and approaches which searched for the causes of such individual conflicts as are dealt with by the courts in pathologic social structures. The class structure of society, or social stratification, were identified as causes of conflict. The intellectual climate obliged scholars to contribute to the social reform project. In the US, where the discussion started, conflict was taken as the point of departure, since in common law adversarial practice lies at the heart of the legal system. And for non-lawyers, it was encouraging that anthropologists had told them for decades, that law develops around the handling of conflicts.

The beginnings of the ADR-movement coincided with the service-delivery-project elicited by president Lyndon B. Johnson’s War on Poverty of 1964. As a consequence, problems were downgraded to the level of legal needs and legal services. Thus, from the beginning, genuine alternatives to the law were eliminated. This initial restriction of focus entailed a second, the restriction of dispute regulation to institutionalised procedures, normally with the help of a third party. It is the irony of dialectics that the Marxist view of law put the onus upon the

service-delivery-project. The question of legal needs and legal services had arisen in the 1930s as a marketing tool for the bar. The Marxist view denied – philosophically – that law constituted an end in itself or – sociologically – that it had autonomy from capital and labor. As a consequence now, the courts were aligned as mere service providers.

The new perspective soon revealed the diverse legal needs of the public, and the unequal chances of getting them met by legal services. Consequently legal needs, and barriers to access and success became one of the most important topics of legal sociology and of the law reform movement in the 1970s. The formalities of legal procedure, and its cost and length, together with lack of legal knowledge and legal advice, were identified as the main barriers and failings. (Cappelletti and Garth et al. 1982, 686). As the welfare state was not able or willing to expand the court system beyond legal aid, the reformers sidestepped into the search for alternative modes of dispute resolution.

Informal Justice

The Alternative-to-Law-Movement

The discussion of alternatives went on against the background of a more general critique of modernity as it had developed since the end of the 18th century under the pressure of technical and economic innovations, and organised by law. As is well known, Max Weber (1968) had characterised the contribution of the law as formal rationalisation, and he also described the consequences that give reason for criticism: the masking of the situation and of the interests of the people involved in concrete cases. During the 1960s sociology and anthropology lent their voice to this criticism.

Social theorists raised alarm about an alleged crisis of the state and its law. We were told there was a crisis of legitimation, a crisis of the welfare state and a crisis of regulation. Others gave disenchanted descriptions of legal procedure. Luhmann's »Legitimation durch Verfahren« can serve as an example (Luhmann 1969). According to his analysis – which appeared to many as cynical –court procedure does not aim for truth and justice, but for the social isolation of the loser. Anthropologists provided vivid accounts of non-legal modes of conflict resolution in tribal societies. They gave examples of how conflicts were settled by families, neighborhood-groups or senior group members mediating between the disputants (Gibbs 1963; Ekvall 1964; Gulliver 1973; Lowy 1973; Danzig 1974; Danzig and Lowy 1975). At the same time reports of alternative dispute settlement in modern Japan (Kawashima 1963; Rahn 1980; Rokumoto 1980), of popular tribunals in socialist countries (Berman and Spindler 1963; Berman 1969; Eser 1970; Lubman 1967; Kurczewski 1980), and of conflict regulation in religious and ethnic subcultures (Cohen 1966; Doo 1973) aroused interest. Interest once being sparked, alternative modes of dispute settlement in modern society surfaced: arbitration, consumer protection agencies and Better Business Bureaus, labor mediation, intra-organisational conflict mechanisms, experts, ombudsmen, the media and others. All this made clear to a wideraudience that legalisation and litigation are contingent, and showed models for possible alternatives to adjudication.

Nils Christie (1976) developed an additional argument: the state via its lawyers and treatment personnel robs the parties directly involved of their conflicts, taking away not only the victims' direct compensation but also the victims' and their communities' opportunity for participation, fuller understanding, and norm clarification. As a remedy, he recommended placing the conflict back in the hands of the principal actors who should be allowed to resolve their own disputes. However, it should be mentioned that the American Alternatives-to-Law-Movement had no direct connection to the abolitionist movement that centered around the Scandinavian Criminologists Nils Christie and Thomas Mathiesen (1974).

About the same time, the apparent impotence of traditional criminal law to fight criminality with imprisonment provoked the quest for diversion, i.e. for new forms of sanctions. In addition, rising caseloads in the courts presented the court administration with managerial problems. A general mood of change led in 1971 to the Night Prosecutor Program in Columbus/Ohio, USA (National Institute of Law Enforcement and Criminal Justice 1974). This program's success and widespread publicity inspired similar projects in various places in the US.

Eventually, the development gained momentum once it caught the attention of the judicial administration as a means to fight cost and delay in the courts. In 1976, 70 years after the now famous speech of Roscoe Pound (1906) on the Causes of Popular Dissatisfaction with the Administration of Justice, Federal and State Court Judges met with representatives of the US Department of Justice and the American Bar Association for the Pound-Conference at St. Paul/Minnesota. Harvard Law Professor Frank E. Sander (1976) pioneered a managerial use of alternative dispute resolution by designing the forum "to fit the fuss". The conference set up a working party that recommended the establishment of alternative dispute settlement forums alongside the courts.

It has been often remarked that the notion of informal justice appeals to a broad political spectrum. The anthropological and comparative literature lent it the necessary intellectual flavor. Conservatives bewailed the moral decline of contemporary society and complained about "hyperlexis" (Manning 1977), "legal pollution" (Ehrlich 1976) and a "litigation explosion" (Barton 1975). They at times joined the alternative movement, as did liberals who regarded states per se as dangerous. Jacksonian democrats who demanded popular participation in the judiciary could easily grasp the ideas of anthropologists who romanticised community justice. Finally, technocrats who wanted to fight court congestion embraced informal justice as a cheap and expeditious alternative to adjudication.

The Neighborhood Justice Centers

As a consequence, within a few years a great number of projects, partly public, partly private, sprang up all over the US. The most prominent were the three Neighborhood Justice Centers in Atlanta, in Kansas City and in Venice/Los Angeles. From the Law Enforcement Assistance Administration of the U.S. Department of Justice they received about 200.000 $ each. For an evaluation the LEAA added another 347.000 $.

The centers were thought to provide on an experimental basis an alternative to the local courts, and to test the use of mediation, conciliation, and arbitration as relatively inexpensive, expeditious and fair alternatives to adjudication for so-called minor disputes which seemed too "uneconomical" for the formal court process, or which for various reasons never reached the latter, and to relieve the courts of a portion of their cases which presumably were "better handled" without the formalities of adjudication.

The NJC were only three out of a total of more than 100 informal justice projects which were active during the second half of the 1970s. The following account concentrates upon the Neighborhood Justice Centers, and similar informal justice projects, because they became the best known and the most discussed. Of course, it must be emphasized that the practices involved as "alternatives" to law were much more diverse.

Fundamental Criticism Marxist Style

A fundamental critique was soon formulated by the Critical Legal Studies circle (Abel 1982, Hofrichter 1982), a group of scholars who analysed the legal system from a Marxist standpoint. They claimed that ADR ultimately resulted in a new form of class struggle. Informal Justice, it was suggested, was nothing more than a means to widen the net of social control, the goal being the unopposed accumulation of capital. Informal Justice would deliver second- class justice to relegitimize the capitalist state. The processing of disputes in closed hearings prevented the development of general solutions for more general problems. Community Justice would absorb or channel discontent before it erupted as collective action or even as revolution. This critique was supported by the noted anthropologist Laura Nader (1990). She argued against the “harmony ideology” behind ADR. In her view it worked as pacification and essentially as a response to the 1960s legal rights and access-to-justice movements by removing so-called “garbage cases” from the courtroom into an arena that emphasized harmony, compromise and the language of therapy over talk of injustice. Now, after the failure of state socialism, it is cheap and easy to reject the Marxist critique. It might therefore be worthwhile to refer to Maureen Cain, who herself claims to write from a working class standpoint. She rejects this kind of critique as being more deduced from a certain state theory than based on empirical evidence, and much less on a theory of individual understandings (Cain 1988, 55). However, even 30 years earlier, a realist could not have taken the “abort the revolution-argument” seriously. In the actual historical and political situation of the US it was simply ridiculous. It was not to be expected that community justice could prevent discontent being translated into political action, since at the same time there was a strong movement fighting in court against discrimination.

“Widening the net” is a wonderful but misleading metaphor. There was and is no coordinated action, and no central social control agent who acts as the fisherman. The metaphor is based on a notion of legal centralism and a centralist vision of social control that had already been rejected by the legal sociologists of the 1970s. On a day-to-day-basis the court system is largely reactive to demands from the public which uses the legal system as a last resort (Merry 1979). The conflicts in the Neighborhood Justice Centers did not reflect property

relations, economic interest and the class basis of the state. Roughly three quarters of cases brought before the Neighborhood Justice centers involved private people with their personal problems, families, neighbors, former spouses, lovers or friends. If exceptionally creditors, landlords or vendors were involved, they did not represent big business, and they were already prepared to accept a compromise. It was not necessary for mediators to label the contested behavior – mostly simple assaults, threats, harassment, property damage or drug abuse – as deviant. The parties themselves regarded it as such, but were not able to change their behavior on their own. Thus, mediation worked as a service to people struggling with negative adjustments to interpersonal problems.

In principle, it seems true that mediation does not provide possibilities to deal with power relations and disparities between the parties. But that was not the problem of the community justice centers. Neighborhood justice was mainly the small claims side of the criminal process. The power problem or – in Marxist terms –class conflict, may come to the surface in different kinds of alternative dispute resolution forums, particularly those which are organised by businesses. Dispute handling provided by businesses and organisations often constitutes an attempt to prevent the more invasive forms of judicial conflict resolution. In the US, to begin with, the Better Business Bureaus played a considerable role in ADR. In Germany, great expectations have been invested in arbitration and mediation centers set up by several industries serving private customers. Most of them had already been established before the ADR-discourse reached Germany (Morasch 1984). In the US, there seems to be a problem with contractual arbitration included in form contracts in the employment and purchase arenas by "repeat players" and institutionally strong disputants (Menkel-Meadow 2009). In Germany, the bar for arbitration contracts to get used between consumers and providers is set too high. Other alternative fora which are provided by private organisations deliver only nonbinding outcomes. That is particularly true for the ombudsmen of the financial industry.

General Criticism

To return the Neighbourhood Justice Centers of the late 1970s and early 1980s: the evaluation studies commissioned by the LEAA were overwhelmingly positive. Scholars who did not participate in the evaluations turned out to be more critical. Tomasic (1982, 221) took from academic publications, evaluation reports and policy-statements 18 goals or expectations against which the projects should be measured. Besides the four centers mentioned he includes the Brooklyn Dispute Resolution Center, a project that concentrated on victim-offender-mediation (Davis et al. 1980) because this project allowed for the observation of comparable cases in mediation and in the court.

In regard to all these 18 items, Tomasic (1982) arrived at the conclusion that the Community Justice Centers had not come up to expectations, and that their superiority to court procedure had not been established. Many observers agreed that informal justice was an experiment which had failed. As a consequence, the majority of projects were soon suspended.

Reassessing Informal Justice

Looked at now, the critics of community justice failed to appreciate its merits. To a considerable extent the verdict on informal justice was a function of the exaggerated claims which went along with the rhetoric of informalism. The centers served as experiments that have shown what mediation can achieve and what it cannot. Each of the Neighborhood Justice Centers was somewhat peculiar. But even so some generalisations seem to be in order. They can be backed by the long and varied experience in mediation procedures that has developed since the early beginnings (e. g. Wissler 1995). Arbitration and other law-related modes of conflict resolution such as mini-trials etc. did not play a major role. Mediation borrowed elements of conciliation. But conciliation could not achieve the status of a distinct mode of conflict resolution. Thus mediation became the general label for the kind of third party intervention applied in community justice experiments to promote a consensual settlement.

Coercion an Voluntariness in Informal Justice

Before we turn to the "cannots" and "cans" of Informal Justice let’s look at the question of coercion and voluntariness. Informal Justice came with the promise of a non-coercive alternative to adjudication. Critics, however, maintain the procedure practised in the community justice centers turned out to be thoroughly coercive. In their view, coercion flows from three sources:

1. Mediation usually starts with an involuntary referral.

2. The parties are under pressure to settle because otherwise they are sent back to court.

3. The mediator exercises pressure to reach an agreement.

Critics doubt that mediation agreements are voluntary because most parties are referred to mediation by the courts, the police or the public prosecutor. For two reasons, referrals as a source of pressure should not bother us too much. in the first place, a look at the anthropological literature which gave initial support for the idea of community justice shows that it is difficult to find voluntary use of mediation. Small scale societies that rely on mediation for conflict resolution place substantial pressure on their members to participate. In modern society, too, consent and coercion are very close (McEwen and Maiman 1984). Secondly there is the famous mediation paradox. The general experience is that even parties who are pressed into mediation mostly use the procedure effectively, and evaluate their mediation experience positively. The settlement rate does not increase very much if participation in the mediation hearing is consensual, as well as the settlement itself . McEwen and Milburn (1993) have called this phenomenon the mediation-paradox.[1] The second source

1 Independently another author talked about the phenomenon of Californian Lawyers working as mediators pro bono as a mediation paradox (Parselle 2005, 11).

of pressure is not a strong reason for concern either. In a sense, all mediation is coercive. There is always the coercion of the BATNA, the best alternative to a negotiated agreement, whatever that might be. However, informal justice could be seriously questioned if mediators exerted pressure to direct parties to a settlement that accords with their own preferences. In the view of critics, the sessions remain fundamentally coercive, although appearing otherwise. New symbols make sure manipulation is now relaxed, and coercion is disguised. Mediators are trained to bear in mind that their value system is irrelevant. Of course, mediators cannot at all times successfully suppress the way they feel about the behavior exhibited in mediation hearings. Nevertheless, a sufficient degree of voluntariness is not just ideology but can be safeguarded by mediator training and supervision.

The Cannots

1) Informal justice cannot not build upon any kind of community, and it cannot restore community either. It should have been clear from the outset that village justice could not be transplanted into a modern Western society. The jurisdiction of the Neighborhood Justice Centers extended over metropolitan areas. Thus, from the very beginning, the idea of neighborhood as a basis for community was rendered null and void. The disputants had little more in common which each other than the dispute itself. The search for a community embracing the persons involved was an illusion. The hope of revitalising some kind of community through neighborhood justice was not realized either. At best, local events of some importance, e.g. environmental planning or a serious crime, can lead to the formation of interest groups. On the other hand, it turned out that mediation as a conflict settlement technique is not dependent on the existence, or even presence, of a group. For it to succeed, it is not necessary, either, that the mediator should belong to the same group as the disputants, or share their values.

2) Mediation cannot take the place of professionalism. The hope that mediation could be handled by lay people has also been disappointed. The community justice centers started with volunteers. Among volunteers, there is strong self-selection. Some do better on the job than others, and are therefore engaged more often. Thus, even on a volunteer basis, mediation tends to become professionalised.[2] As a consequence, the centers came to rely more on volunteering professionals – mainly lawyers and some psychologists – and on paraprofessional fulltime mediators. It became clear that mediators who belonged to a community have difficulty in achieving the required detachment. Mediators are trained – as it seems, quite successfully – to suppress their evaluations. "Ironically, it is the interest in providing neutral and detached mediators that facilitates the emergence of a core of mediators who are professionals." (Harrington and Merry 1988, 730). Anyway, trained mediators did much better than judges in granting the parties participation in the procedure.

2 "New informalists" pin their hopes on a "democratic professionalism" which should not prevent community participation but, on the contrary, act as catalyst and helper (Olson and Dzur 2004).

3) Mediation can deal with the underlying causes of conflict only in a very restricted sense. The notion of underlying causes is quite complex (Felstiner and Williams 1980, 46). Many circumstances which could be considered as underlying causes are out of reach of mediation procedures. This holds true for social conditions like unemployment, inadequate housing, schools, health and recreation facilities, disparities in wealth and power, and the evil consequences of discrimination and racial hostility. And this applies for personal conditions like psychic peculiarities or drug addiction which could at best be influenced by medical treatment. In mediation procedures the search for underlying causes therefore extends only as far as circumstances at close range of the parties, such as escalating misunderstandings, unintended hurts, alcohol abuse, chronic violence, infidelity and jealousy, or the failure to accept separation. A main criterion for the selection and referral of cases to informal justice alternatives were ongoing relationships among the disputants. However, interpersonal disputes involving long term relationships turned out to be less likely to produce long-term resolutions than property disputes (Merry 1982, 185). The resolutions were much less successful where they required a change of behavior. Therefore mediation functioned mostly to sever relationships rather than to reestablish them. The NJC should at least get credit for bringing parties to talk about their problems and to cope with them, if only in a cursory manner. The law does not offer solutions for many problems of daily life, either (Merry 1979).

4) Mediation cannot attract disputants in considerable numbers on a voluntary basis. The biggest problem of the NJC turned out to be the lack of cases. None of the centers succeeded in eliciting walk-ins from the public in the hoped-for numbers. The centers became dependent upon referrals from the police, the prosecutor and the courts. Only the San Francisco Community Board Program resisted this kind of cooperation with the judiciary. Yet it had to accept an even more severe shortage of cases. It was thoroughly marked by the personality of its founder Raymond Shonholtz, who gave it a special community flavor. This center, however, is the only one that still survives, and maybe part of the reason for this is that the state of California, more than any other state, relies upon private forums of the community justice type for ADR. In general, however, all of the ADR forums receive their main reason and possibility for existence from their dependency upon the official court system.

The "Cans"

1. Mediation has proven to be an effective technique to settle interpersonal disputes of many kinds. Mediation as a settlement technique is so successful that one could talk of a natural law of mediation: About two thirds of all cases can be settled, if the disputants participate in a mediation session. This "law" becomes apparent from constant settlement rates in the range from 60 to 80 % which are reported in the available evaluations. Table 1 illustrates this with some figures for comparison.

Table 1: Settlement Rates in Mediation Procedures

Procedure	**Reported by:**	**Settlement Rate (all filings)**	**Settlement rate after mediation session**	**Mandatory mediation?**
Citizen Dispute Settlement Process in Florida 1978/79	Florida Supreme Court 1980, 31	43,8 %	80,7 %	no
Mandatory mediation in the First Appellate District of the Court of Appeal, California	Task Force on Appellate Mediation 2001, 9	n = 288	43,2 % (n=213)	yes
Bauschlichtungstellen	Boysen and Plett 2000		75 %	no
Small claims voluntary and Mandatory Mediation in Boston	Wissler 1997, 581		46 %	yes
		62 %	62 %	no
Urban-Court-Programm, Dorchester	Felstiner and Williams 1980, 22	59 %	89 %	no
Neighborhood Justice Centers Atlanta, Kansas City, Venice	Cook et al. 1980, 43	Atlanta (n=1099)	81 % (n=813)	no
			95 % (n=307)	
		Kans. C. (n=834)	66,7 %(n=231)	
		Venice (n=739)		
Small claims mediation in Maine	McEwen and Maiman 1979, 249		66 %	no
Obligatorische Streitschlichtung vor dem Schiedsmann 2002	Röhl and Weiss 2005, 66	48,7 %	62 %	yes

Güteverhandlung vor dem Schiedsmann 2002	Röhl and Weiss 2005, 67	49,1 %	73,8 %	no
Güterichter in Bavaria	Greger 2007, 14	München 38 %	71 % (n=248)	no
		Augsburg 40 %	77 % (n=151)	
		Weiden 33 %	65 % (n=75)	
Richtermediation in Lower Saxony	Spindler 2005	LG Göttingen	87,5 % (n781)	no
		LG Hannover	43,9 % (n=171)	
		AG Hildesheim	67,4 % (n=138)	
		AG Oldenburg	54,5 % (n=55)	
		SG Hannover	86,1 % (n=101)	
		VG Hannover	76,9 % (n= 52)	
Citizen Dispute Settlement Florida 2005/2006	Reshard 2007, 24	n=2482	70,0 % (n=903)	?
County Mediation Florida 2005/2006	Reshard 2007, 31	n = 53.790	65,0 % (n=37.345)	?
Family Mediation Florida 2005/2006	Reshard 2007, 47	n=20.835	62,6 % (n=14.975)	?
Dependency Mediation Florida 2005/2006	Reshard 2007, 65	n=4436	80,7 % (n=3546)	?
Circuit Civil Mediation Florida 2005/2006	Reshard 2007, 75	n=8947	44,7 % (n=6494)	?

2. Informal Justice came with the promise to be faster, cheaper and more satisfactory than adjudication. There is a surprisingly high level of satisfaction (75-95 %) among those who actually participated in mediation.

The question of cost is not so clear. In as much as mediation relies on referrals from the judicial system, the costs for ADR are additional costs. Hitherto the parties who make use of institutionalised ADR are charged, if at all, only a nominal fee. In general, ADR is publicly funded. If there are savings, they accrue to the parties. A main source of legal costs are

lawyers' fees. These days parties mostly come to ADR forums with counsel. Therefore the savings may be limited.

In general, there is no shortage of mediators, and the date for the hearing is set quite swiftly. Therefore mediation is certainly fast, if it is successful. However, if mediation fails it may prolong the dispute settlement process.

What happened afterwards?

The many disappointments and failings should not blind us to the fact that the community justice experiments opened the door for ADR. One reason for the door-opening function of the community justice experiments was the publicity they were given, and the extensive evaluations done. Second, there was this great alliance of advocates of informal justice with an ideologically quite different background. However, criticism turned ADR in new directions. Community-based and court-based reformers run on separate tracks. The idea of community justice has not been totally abandoned. The existence of more than 350 projects in 1985 has been mentioned. Currently we find authors who characterise themselves as "new informalists" (Matthews 1988; Pavlich 1996; Olson and Dzur 2004). They look for a field of application for community justice mainly in victim-offender-mediation and restorative justice. So far, however, long-standing efforts for community justice have been unable to make a noticeable impact upon society.

Court Reformers took a different road. They focused on civil cases of every size. As a first step the managerial use of extrajudicial dispute resolution spread. In many places mandatory arbitration and mediation were introduced locally by court rules. Legislative adoption followed at both state and federal level. Mediation has been legalized to such an extent that it is not any longer adequate to talk about informal justice. Court administrators have now installed some modes of court-based mediation and settlement programs almost all over the world (Hopt and Steffek 2008).

What the community justice experiments failed to bring about was an alternative mode of dispute resolution which the general public, without pressure, preferred to court procedure. As a third track, the community justice experiments generated a new discipline of dispute resolution research and teaching. Research brought forward the concept of integrative or principled negotiation that has "revolutionized how negotiation is taught in law schools, business, public policy and planning, and in international relations and government departments" (Menkel-Meadow 2006, 485). Some critics talk about a new ideology of communitarian bargaining (Condlin 2008).

Imposed versus Genuine Alternatives

From a more distant standpoint, the early informal justice projects, and the broad spectrum of institutionalized dispute settlement programs seem to lack an essential precondition for an alternative to the state court system, in that they are not embedded in a social structure

independent of the state. Of course, in the US or in Europe nobody could expect to find communities comparable to those in which anthropologists had observed indigenous modes of dispute resolution. Therefore we need to turn to research on genuine alternatives to state law that exist in modern societies (Bernstein 1992; Ellickson 1991; Feldman 2006; Weyrauch and Bell 1993). There are not many of them, and almost all cover civil law disputes only. However, the literature on alternative modes of dispute settlement which are not imposed by recent law reforms or management efforts suggests that independent ADR as a part of private ordering works only on the basis of pre-existing social ties between the disputants (Richman 2004). All working autonomous dispute regimes show some common features. They are restricted to a fairly homogeneous social group (Merry 1979). In the main, pre-existing social ties are of ethnic or religious origin, but long-term engagement in a highly specialized kind of business such as diamonds, tuna or potatoes may suffice. Group membership as such has to be advantageous. The group should not be too big to allow easy circulation of information pertinent to personal reputation. It seems to be helpful if the group lives close together. But neighborhood as such does not make a group. What makes a group is not dispute resolution alone, but norm generation. Dispute resolution cannot be isolated from its normative basis. As the preconditions for a sufficiently close-knit community cannot be artificially generated, attempts to establish grass-roots justice or community mediation as non-judicial forms of dispute processing are bound to fail. That is what the community justice experiments showed.

ADR in Germany

The First Wave

German scholars were prepared for the ADR discourse by the seminal work of Vilhelm Aubert and Torstein Eckhoff. Eckhoff's "The Mediator, the Judge, and the Administrator in Conflict Resolution", originally published in 1966, was in 1967 already part of the first German Reader on legal sociology (Hirsch and Rehbinder 1967). It provided an analytical basis for ADR. Of greater personal importance for the author of this paper was Vilhelm Aubert's "Competition and Dissensus" of 1963. From this piece there was much to be learned about the difference between a legal decision and a compromise over interests.

The ADR discourse which started in the US did not appear in Germany before the mid-70s. Christie's (1977) famous piece on "Conflict as property" was published in a German translation already in 1976. In 1977 legal sociologists held a conference on "Alternative Rechtsformen und Alternativen zum Recht" (Blankenburg et al. 1980). There was a search for remnants of ADR in the Schiedsmann institution (Röhl and Hegenbarth 1987), in consumer complaint agencies (Morasch 1984) and in the settlement efforts of judges (Röhl et al. 1983). After reunification, the search gained new momentum because, in the hope of finding something useful in the remains of the GDR, the socialist conflict commissions attracted some attention. Unlike in the US, where new forms and institutions have been tried out on a large scale, in Germany the discourse remained confined to an inventory of available institutions. Later administrative exploitation and legislative adaptation followed.

From research two models emerged which could be reactivated: the publicly organized lay-mediation by the Schiedsmann, and conciliatory proceedings embedded in the court procedure. Lay-mediation was of considerable importance during the nineteenth century, but it had long withered away. After the centralisation of the legal system in 1881 all civil cases were directed to the courts. Between 1950 and 1970 the number of criminal cases dwindled, too. Criminal cases that fell into the competence of the Schiedsmann, mainly libel, trespassing, and minor assaults were no longer taken seriously (see Christie 1977, 6). Attempts to revive the mediation activity of the Schiedsmann remained unsuccessful. Integrated conciliation proceedings in the labor courts, and judicial settlement efforts in civil proceedings, gained more attention. In practice however, little changed. New structures were not set up. A single exception was the private ombudsmen of the banking and insurance industries. This stagnation was only stirred up by the second wave of the discussion over ADR which started in the mid-1990s.

The Second Wave

A second generation of young German lawyers once more discovered ADR in the US (Breidenbach 1995; Duve 1999; Eidenmüller 1997; Birner 2003; Prause 2008). They found their orientation mainly in the work of Frank E. Sander and the Harvard Negotiation Project. There they studied with Fisher and Ury a learnable and teachable technique for settling conflicts. In Germany it became popular as "Mediation". Originally just the English word for what we in German call *Vermittlung*, the foreign word worked like a magic formula, similar to the Scandinavian Ombudsman 20 years earlier.

Under the new title of Mediation a considerable number of lawyers, and various members of other professions gathered, hoping to find a new vocational field where they could combine their desire to do worthwhile social work with making a living. Soon the education industry discovered those idealists. Currently more than 20 institutions offer mediator training. The fee for a mediation course starts at 5.000 EUR and can easily be double this. Mediator training in Germany was the precursor of a considerable number of additional study programs marketed by German universities. They form the core of a dispute settlement industry that makes (very modest) money by producing literature, providing vocational training for mediators and hosting conferences and seminars.

In Germany today about 6000 trained mediators[3] offer their services. Among them the basic elements of professionalization can be observed. There are efforts to establish dispute settlement as a new vocational field by self-organisation and the stipulation of training requirements, peer-review etc. New journals have sprouted, together with textbooks, manuals and weblogs. The discourse about mediation has developed into a self-supporting process. New applications have been discovered. The legislature has adopted some mediation programs. Eventually the discourse won the accolade of a European Union mediation-directive, yet even so it was only applied in the small sector of transnational conflicts.

3 Website "Mediation an der FernUniversität Hagen": http://www.fernuni-hagen.de/ mediation/ [22.2.2010].

Few items of legal policy have raised so much hope and commitment and produced so much disappointment as ADR. Unlike those of the US, German courts are not allowed to release court rules. As a consequence, in Germany the legislative adaptation of ADR preceded its use as managerial instrument. January 1st, 2000 saw a new law – section 15a EGZPO – come into force that authorized the *Länder* (Provinces) to introduce a mandatory conciliation procedure for small claims. However, mandatory conciliation proved to be a failure. Although the mediators did a good job the parties successfully circumvented the mediation procedure by using the summary procedure for debt collection as a loophole (Röhl and Weiß 2005).

In 2002 the Federal legislator tried again by amending section 278 of the Code of Civil Procedure. Section 278 had always laid down that judges should try at every stage of the proceedings to get the parties to reach a settlement. Now it became law that every court procedure should begin with a settlement conference. It seems that, as a consequence of this provision, the settlement rate increased at the expense of the judgement rate. In addition, a new paragraph no. 5 was added to section 278 which authorized the courts to propose to the parties that the court proceedings should be suspended in favour of an external mediation hearing. Contrary to what would be expected from the law's wording, the courts organize in-house mediation proceedings in which judges act as mediators. The court administration offers volunteer judges mediation training and reduce their regular workload if they do mediation work. If the parties agree to participate in mediation they are not charged. In addition they get reimbursed part of the regular court fees if the mediation is successful. Pilot projects in six courts with different jurisdictions started in 2002. The projects soon reported a good response, and success. From evaluation reports we learn that the mediation carried out by judges is successful even as regards reducing the courts' workload, as on balance it saves judges' working hours (Greger 2007; Spindler 2005). However, so far only a few German courts have introduced court-connected mediation. Thus it cannot have an impact on statistics.

This kind of court-related mediation kills three birds with one stone. First: it overcomes unwillingness to accept mediation with soft pressure. Second: it pays for professional mediation. Third: if mediation fails, the court procedure is resumed and will bring the conflict to an end. The parties can try mediation without risk, and if the outcome is not satisfactory, they can still hope for a favorable judgement. In a manner of speaking it is the cunning of reason that in most cases a settlement is reached if the parties engage in mediation.

Criticism of ADR

Legal writers in Germany have responded surprisingly positively to the many appeals for ADR (see e. g. von Bargen 2008). The extended discussion does not question the value of mediation but circulates around the question whether it is necessary to regulate mediation. Very soon after the courts took up judicial mediation some caveats were made. The question was raised as to whether mediation as a legal service should be offered by courts. This question is followed by doubts as to whether the courts should offer mediation free of charge. On the one hand free mediation is the incentive to the parties to go into mediation. On the other hand mediation offered by judges free of charge may prevent independent mediators

from finding business. Political criticism comparable to the objections made by Laura Nader (1997) is unknown in Germany. Also absent in Germany has been any such criticism as that of Owen Fiss (1984) and others, who argue that the rise in alternative dispute resolution, and the corresponding increase in confidential settlement agreements, were problematic because potentially damaging to the rule of law.

The Second Mediation Paradox

Faster, Cheaper, More Satisfactory but Unused

What can be called “the natural law of mediation” works in Germany too. As regards reaching an agreement during a mediation session ADR is very successful. About two-thirds of all cases where the opponents participate in the mediation process are settled. This is true even in cases where participation in the alternative procedure is not voluntary. This particular phenomenon is known as the mediation paradox (McEwen and Milburn 1993). However, ADR programs, despite their overwhelming success in settling disputes, have failed to be adopted on a widespread basis by litigants. This is what constitutes the second mediation paradox.

Almost all authors who talk about ADR are convinced it is a success story. They rely on personal experience and on numerous evaluation reports which, almost without exception, are positive. There is consensus, not only on mediation’s effectiveness with regard to settlement, but also on its popularity. The advocates of mediation – there are almost no opponents – assert in unison that the use of mediation is steadily growing. However, they do not talk numbers. The impact of ADR on society, however, cannot be appreciated without looking at quantitative aspects. The German Federal Ministry of Justice commissioned the Hamburg Max Planck Institute for Comparative and International Private Law with an investigation into mediation in over 20 states. The resulting volume of almost 1200 pages is subtitled "Rechtstatsachen, Vergleich, Regelungen". However, the legal facts provided are meager. The editors, in their introduction, declare statistics on the use of mediation irrelevant.

"… dass sich die Mediation nicht statistisch erfassen und bewerten lässt. Ihre Wirkung und Bedeutung für die Rechtspraxis ergibt und erklärt sich vielmehr erst im Zusammenspiel mit dem Rechtsumfeld und der Streitbewältigungskultur, in der sie eingebettet ist. Eine für diese Zusammenhänge unempfindsame Addition und Division der in den Länderberichten erfassten Daten brächte daher keinen Erkenntnisgewinn." (Hopt and Steffek 2008, 77).

Solid figures are offered only for China. From China we learn that popular tribunals in 2004 dealt with 4.492,157 cases while the courts handled 4.332,727 cases (Pißler 2008, 627-631). If one does not understand Chinese it is very difficult to evaluate these figures.

In Germany we at least have semi-official statistics on victim-offender mediation which claim to be complete (Kerner and Hartmann 2008). This started in 1993 with a caseload of 1,238, reached its peak level of 5,177 cases in 1999; since 2003 the caseload has remained well

under 3,000. Compared to about 800,000 court sentences passed every year these figures are not really impressive. From a technical point of view victim-offender mediation as a separate procedure seems superfluous because eligible cases are handled at an administrative level. Whenever the defendant accepts responsibility and is willing to pay damages the prosecutor's office will drop the charges.

Concealing the Mediation Paradox with the Mediation Receptivity Index

Accumulated figures are lacking for the US too. Prause (2008) talks about measuring the immeasurable. He suggests indirect measuring with the help of a Mediation Receptivity Index (MRI) analogous to the Corruption Perceptivity Index of Transparency International.

The MRI goes back to an idea of Sander (2007). Prause has operationalized this proposal. The promise sounds impressive: "*Mediation Receptivity* describes the level of *use* and *awareness* of mediation as a means to resolve disputes in a particular environment and the level of supporting *infrastructure*." (Prause 2008, 139). The MRI uses "objective" and "subjective" indicators about the institutionalisation of ADR. The "objective" indicators are the following:

- Number of community mediation centers
- Number of companies offering mediation services
- Number of members of ADR organisations
- Number of citations of ADR-publications according to the Academic Citation Index
- Implementation of the Uniform Mediation Act
- Existence of a State ADR Office

Caseload figures are totally absent, and expert assessments are added as subjective indicators. Thus the states of the US shall be ranked according to their mediation receptivity on a scale from 1 to 10. If we tried to classify Germany with the MRI it would get a high ranking. In the US, the number of institutions for ADR probably can be found in the low five digit range. Given the size of the country, and compared to Germany, this is not a high number. In Germany more than 5,000 local arbitration agencies lie idle. In Northrhine-Westphalia alone, 1,258 Schiedspersonen offer their services. All over the country mediation experts meet at conferences and symposia and proclaim their positive evaluation. The production of papers is considerable and the media coverage is very good. All this, however, cannot hide the facts: everybody praises mediation, but nobody decides against going to court.

The Vanishing Trial

In the US, the widespread notion that ADR is not just accepted but also growing in popularity seem to be supported by the fact that the number of trials has fallen to such an extent that there is even concern about the "vanishing trial". Marc Galanter has done research on this development. Here is his summary of his findings:

"The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the 60 percent decline

in the absolute number of trials since the mid-1980s. The makeup of trials shifted from a predominance of torts to a predominance of civil rights, but trials are declining in every case category. A similar decline in both the percentage and the absolute number of trials is found in federal criminal cases and in bankruptcy cases. The phenomenon is not confined to the federal courts; there are comparable declines of trials, both civil and criminal, in the state courts, where the great majority of trials occur. Plausible causes for this decline include a shift in ideology and practice among litigants, lawyers, and judges. … Within the courts, judges conduct trials at only a fraction of the rate that their predecessors did, but they are more heavily involved in the early stages of cases. Although virtually every other indicator of legal activity is rising, trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy." (Galanter 2004, 459-460).

A similar development can be observed in State courts. However, there is no parallel decline in case filings. On the contrary, filings rose until the late nineties and have since receded only modestly. So what has changed is just the mode of disposition. One might assume that this change can be attributed to a growth of ADR. The link, however, is not clear. The statistics themselves do not give decisive support, because what increased as trials disappeared was the earlier involvement of judges in case processing and non-trial adjudication (Galanter 2004, 484; Stipanowich 2004). The numbers which are mentioned – e.g. 24,000 referrals in the Federal system – are not really impressive. This number equals about 10 % of the annual filings. Florida, the state that relies more than most others on ADR, seems to be the only one with a solid ADR statistic (Reshard 2007). It reports about 90,000 annual referrals to mediation but about 4.5 million state-wide filings.

In Germany no comparable dwindling of the judgement rate can be observed. In civil proceedings, the judgement rate dropped in one single year by 5 % from about 30 % to 25 %. At the same time the settlement rate increased to match. This happened during 2001 and 2002, seemingly as a consequence of an amendment of the Code of Civil Procedure which asked the judges to start every procedure with a conciliation session. The number of criminal verdicts compared with reported crimes remained unchanged. An explanation for the divergent development can certainly be found in the fact that the obstacles that must be overcome before a judgment can be reached are much smaller than in the US.

Court Independent Mediation

Court independent mediation could only capture a niche market. This is made up of family and divorce cases, and perhaps some probate disputes. There is only a very small clientele, comparable to but even smaller than the group which shops in health food stores and pays an extra charge for alternative energy. The actual numbers involved are unavailable, and this situation is not restricted to Germany. Mediation services are widely available allover the world, but the number of mediations actually taking place is very disappointing (Barendrecht 2009:13). The supply of willing mediators by far exceeds the demand for their services. Thus very few registered mediators can make a living from it (Velikonja 2008).

Professional mediation is a costly procedure and only a few conflicts seem worth the expenditure. Therefore independent mediators direct their offering to two areas where there is both conflict and money. One of these is environmental disputes: the mediation industry recommends its services for these, but there have been only a few cases, and those have scarcely been mediated successfully (Jansen 1997; Weiss 2004). The second is commerce: a huge amount of literature praises commercial mediation, and there is no shortage of assertions that mediation in commercial matters is becoming increasingly important. There are, however, hardly any reports of concrete cases and statistical information is lacking. A survey done by Pricewaterhouse Coopers in 2005 says that businesses are showing growing interest in mediation, but at the same time underlines the blatant discrepancy that businesses first try to settle disputes by negotiations, but if they fail, they immediately go to court. Even if we take into account the fact that official statistics are lacking, and that concrete procedures take place in private, the advocates of business mediation should be able to give some more information on the kind and number of cases it deals with. The conclusion is obvious: these are few and far between.

Explanations for Reluctance to Use Mediation

There is no obvious explanation for the reluctance clearly felt both by the general public and bybusiness people to use mediation. Different hypotheses are offered, and all probably have some merits. The ignorance hypothesis seems to be the weakest. This argues that the public are not sufficient knowledgeable about the advantages of mediation, but court administrators work hard to spread information about ADR, and media coverage is both extensive and positive, and should have made an impact. As early as 1984 Merry and Silbey stressed that people with problems show a readiness to look for alternatives, and shop around a wide range of helping and service agencies. According to McEwen and Milburn (1993, 25) the ignorance hypothesis serves in the first place to "buttress the central ideology of mediation as a volontary procedure". If people were ignorant, they could be forced into mediation because if they were better informed they would have gone voluntarily.

The gatekeeper hypothesis holds that judges and lawyers prevent their clients from using ADR. For lawyers, filing a law suit is still basic routine. As a consequence of their professionalization, lawyers have an interest in law and justice that goes beyond the particular case, and in addition, they have personal opinions about the law. This translates into a professional interest in reviewing the factual and legal position of the case, even if mediation would be more advantageous to the interests of the client. For a lawyer it may be rewarding to prove his knowledge and competence. The most obvious way to do this seems to be to make a prediction of how a court would decide the case, and then to put this prediction to the test by litigation. The rhetoric of lawyers has undergone changes, but they still do not engage with each other as mediators, probably due to competition structures within the profession (Jost and Neumann 2010). The gatekeeper hypothesis is to some extent plausible, but it certainly cannot explain the reluctance of individuals to seek mediation before getting into contact with lawyers (McEwen and Milburn 1993:26).

The cultural barrier hypothesis asserts that modern societies like the US are affected by a general cultural disposition against mediation and compromise. Germans in particular are said to be cantankerous. The advocates of mediation in Germany therefore stress that the effort to promote mediation has as its goal the formation of a new disputing culture. The argument sounds like a cheap consolation. McEwen and Milburn (1993) make the objection that cultural explanations run the risk of circularity, because a disputing culture is explained by observing disputing behavior.

The leverage hypothesis was promoted by McEwen and Maiman, even if only incidentally in the conclusion of their 1984 article. They ask, "why, if mediation is so much more satisfactory than adjudication, do so few disputing parties choose it without first beginning court proceedings" (1984:45). They agree with Christie (1977) that for most people and organisations, negotiation and bargaining are the preferable forms of dispute handling because they leave the parties in control of the conflict and its resolution. However, usually only one party can expect to gain from negotiation, and has therefore an incentive to negotiate. To induce negotiation, the other party needs to impose some cost on the opponent. For the weaker party there is not much left besides criminal complaint or filing a law suit. Thus, McEwen and Maiman argue, the threat of legal processes helps to mobilize consensual settlement. Formal and informal justice operate as symbiotic rather than alternative processes. This leverage hypothesis fits very well with the phenomenon of the vanishing trial.

Economic analysis contributes a transaction cost hypothesis. Barendrecht (2009) looks at the variety of options for obtaining redress in a conflict situation as a market for justice services. Those services come with production and transaction costs. Barendrecht argues that costs of production cannot explain why many people are not able to satisfy their justice needs: "in most disputes basic negotiation processes and third party interventions can provide reasonably fair solutions at low costs. A skilled mediator or lower court judge will be able to settle most family, employment, and neighbor disputes in a few hours. The technologies of providing justice are not prohibitively expensive." (2009, 7) However, he continues, the market for justice has substantial imperfections. In the abstract of his article he promises that this perspective could explain why ADR has had little success in attracting clients, but this point is not elaborated in detail. Barendrecht identifies five justice services of which the first – getting the parties to meet – seems to be the most relevant for mediation. We learn that the parties have to conclude an ex post dispute agreement which seems to be difficult because they encounter a second order negotiation problem which is burdened with psychological problems. We are told that plaintiffs are unlikely to succeed in making defendants cooperate because defendants mostly prefer the status quo. We are also told that mediation is an experience good which makes it difficult for the parties to evaluate information on this topic.

McEwen and Milburn developed a conflict dynamics hypothesis. They point to "the fact that disputes have histories and that those histories tend to work against voluntary entry into mediation" (1993, 26). Conflict dynamics work out in processes of selection and transformation. Conflict selection is produced by a cultural barrier to making a grievance into an interpersonal conflict, a barrier resulting from strong notions of individual responsibility and from social pressure toward harmonious relationships that make complaining socially unacceptable. The barrier is overcome only by parties with strong views about the problems at

issue. Confrontation with the other party adds to the original conflict a meta-dispute about the other party's conduct, their culpability and reasonableness, while the complainant tries to preserve their credibility and righteousness. As self-perception and moral integrity are at risk, meta-disputes are fought with high emotional involvement which reduces the attention given to anything else. The meta-dispute is further aggravated if one party tries to employ some third party pressure on the other. The result is what Merry and Silbey (1984, 153) observed about the residents of the urban neighborhoods they studied: "by the time a conflict is serious enough to warrant an outsider's intervention, disputants do not want what [mediation has] to offer. At this point the grievant wants vindication, protection of his or her rights … an advocate to help in the battle, or a third party who will uncover the 'truth' and declare the other party wrong." Or, as McEwen and Milburn phrase it: "The paradox of mediation, consequently, is that it offers disputing parties precisely what they do not want when they most need it" (1993, 31).

None of these hypotheses points to an effective means to overcome reluctance to try mediation, apart from pressure. The leverage hypothesis, however, suggests providing court proceedings with a mechanism leading to mediation.

Concluding Remarks

Conflicts are ubiquitous, and mediation works. But it seems difficult to divert conflicts from the courts and direct them immediately into institutionalized mediation. Therefore a wide dissemination of mediation capabilities becomes important, because a mediative attitude could probably help to settle many disputes at the behavioral level. In the long run, for many occupations mediative capabilities will become part of necessary social skills. Larger organisations, associations and unions, schools and universities, business operations and professions or religious groups (Condlin 2008, 197) are sensitive to conflicts and tend to settle upcoming disputes on their own. These days it seems as if organisations try to use mediation to deal with in-house conflicts. Schools and colleges educate students for peer mediation programs. Mediation techniques find their way into administration agencies and business offices where employees are encouraged to resolve work place disputes and conflicts through voluntary, confidential early intervention. Thus mediation may eventually gain some societal impact, but this will hardly lead to a massive renunciation of legalized dispute.

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