ABSTRACT

Mediation and other alternative dispute resolution (ADR) processes have been increasingly relied on by many courts to increase access to justice and to mitigate the limitations of the formal adjudicatory system. ADR is seen as providing a form of "informal justice" that is more empowering and participatory, while also less alienating and costly. Against this backdrop, judicial mediation has emerged as an additional ADR option. Judicial mediation programs have emerged in varying forms – ranging from a trial judge mediating the dispute before trial, to having a dedicated judge mediate a dispute without hearing the trial – and with mixed reviews.

This paper focuses on appraising the judicial mediation model against the benchmark of increasing access to justice. The broader issue that will be explored is whether judicial mediation enhances access to justice more than other types of mediation programs, or conversely, whether it detracts from the promotion of access to justice. These issues are discussed with reference to the judicial mediation model that has been used in the Singapore State Courts. The paper argues that judicial mediation is most consonant with the broadening concepts of justice as well as the role of the courts, which are increasingly gaining traction globally. When designed with appropriate safeguards and contextualised to fit the societal preferences of the relevant jurisdiction, a judicial mediation program has immense potential to enhance access to justice. The current judicial mediation system in the Singapore State Courts illustrates the many benefits to be reaped from such a program, as well as some of the pitfalls that should be averted.

I. INTRODUCTION

Mediation and other alternative dispute resolution ("ADR") processes have been increasingly relied on by many jurisdictions to mitigate the limitations of the formal adjudicatory legal system and to enhance access to justice. The "Woolf Reforms" in the UK focused on early settlement of disputes through the use of ADR and other mechanisms. The 1976 Pound Conference in the USA led to the growth of many court-annexed mediation programs.

Against this backdrop, judicial mediation has emerged as an additional ADR option. Judicial mediation, very simply put, involves a judge acting as the mediator in the dispute. Judicial mediation programs have been introduced in varying forms – ranging from a trial judge mediating the dispute before trial, to having a dedicated judge mediate a dispute without hearing the trial – and with mixed reviews. The Quebec judicial mediation program has been described as heralding a new participant-centred normative order that is better adapted to the needs of the parties.[1] On the other hand, judicial mediation programs within some parts of China have been criticised as being fraught with internal contradictions.[2]

This paper focuses on *appraising the judicial mediation model against the benchmark of increasing access to justice*. The broader issue that will be examined is whether judicial mediation enhances access to justice *more than* other types of mediation programs or conversely, whether it detracts from the promotion of access to justice. These issues are discussed with particular reference to the judicial mediation model that has been used in the Singapore State Courts. It is argued that judicial mediation is most consonant with the broadening concepts of justice and the role of the courts, which are increasingly gain-

1. Louise Otis and Eric Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 Pepp Disp. Reso. L.J. 351 at 353.
2. Kwai Hang Ng and Xin He, "Internal Contradictions of Judicial Mediation in China" (2014) 39:2 Law & Soc. Inquiry 285.

ing traction globally. When designed with appropriate safeguards and contextualised to fit the societal preferences of the relevant jurisdiction, a judicial mediation program has immense potential to enhance access to justice. The current judicial mediation system in the Singapore State Courts illustrates the many benefits to be reaped from such a program, as well as the pitfalls to be avoided.

II. MEDIATION AND THE "ACCESS TO JUSTICE" MOVEMENT

Before examining judicial mediation, the relationship between the mediation process and "access to justice" movement will first be explored. In this connection, it is proposed that there are several facets to the concept of "access to justice".

A. Accessibility and the expanding role of the courts

The first aspect relates to *increasing accessibility to the justice system*. According to Cappelleti and Garth, who described three "waves" of the access to justice movement in the USA and the Western world, the main focus of the third wave from the late 1970s onwards was on addressing the drawbacks of traditional litigation procedures.[3] It is rather striking how mediation gained ascendency during this period in many jurisdictions. Apart from the Woolf Reforms and the Pound Conference, Australia's Access to Justice Advisory Committee recommended the use of ADR to improve access to justice, because of how ADR offers broader remedies, and was less costly and formal.[4]

The access to justice movement has indeed been concentrating on *reducing the negative repercussions associated with litigating in the court system, which collectively form barriers to accessibility of the justice system*. Mediation has proven to be popular due to its potential to resolve disputes in a timely manner without incurring prohibitive costs, thus ameliorating two key constraints inherent in the conventional adjudication process. Another common repercussion of litigation is the damage it often causes to the relationship between the litigants. Media-

3. M. Cappelletti and B. Garth, eds., *The Florence Access-to-Justice Project Series, Volumes I-IV* (Alphen aan den Rijin/Milan, Sijthoff and Norrdhoff/Giuffre, European University Institute, 1978); Nadja Alexander, "Global Trends in Mediation: Riding the Third Wave" in Nadja Alexander, ed., *Global Trends in Mediation*, 2nd ed. (The Netherlands: Kluwer Law International, 2006) 1 at 5.
4. Commonwealth of Australia, Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Canberra: Access to Justice Advisory Committee, 1994) xxiii.

tion, a consensus-based process, again offers a way to attenuate this drawback of litigation.

Apart from reducing the common barriers to access to justice, mediation is well-known for *increasing access by giving the disputing parties greater participation.* In this regard, the Canada Law Commission coined the term "participatory justice" to emphasize how processes such as mediation seek transformation through the active participation of parties involved in the conflict.[5] In marked contrast with the trial process, the mediation process is premised on party autonomy or self-determination. Individual disputants are empowered to play a more active role in the dispute resolution process and in determining its outcome. The popularity of mediation thus lies in its provision of a form of "informal justice" that is more empowering and participatory, while also less alienating.[6]

As the courts have increasingly explored a variety of dispute resolution processes, there has been a *steady re-conceptualisation of the justice system to include both adversarial and consensual processes*. Cappelleti and Garth have described this new paradigm as "co-existential justice", in which private dispute resolution processes have an expanded role alongside formal public models.[7] In a similar vein, Tania Sourdin and Naomi Burstyner in Australia have termed this global trend a "multi-option response" of locating dispute resolution services both within and outside courts, in line with a broader concept of justice.[8]

Together with these paradigmatic changes in defining the justice system, it is notable that *the roles of the court and the judge have also evolved*. In varying degrees, the courts' interaction with the court users has shifted from that of a detached adjudicator to a more pro-active and collaborative problem-solver offering a range of dispute resolution processes to fit the exact contours of the dispute. The emergence of problem-solving courts and the growth of therapeutic justice are apt illustrations of this evolution of the courts' role from their conventional adjudicatory functions. Furthermore, while there are differing views on

5. Law Commission of Canada, *Transforming Relationships through participatory justice: A report by the Law Commission of Canada* (Ottawa: Law Commission of Canada, 2003).
6. Andrew Woolford and R.S. Ratner, *Informal Reckonings: Conflict Resolution in Mediation, Restorative Justice and Reparations* (New York: Routledge-Cavendish, 2008).
7. Mauro Cappelletti, "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement" (1993) 56:3 Mod. L. Rev. 282 at 287 and 289.
8. Tania Sourdin and Naomi Burstyner, "Australia's Civil Justice System: Developing a Multi-Option Response" in Carol R. Flango *et al.*, *Trends in State Courts – 2013* (USA: National Center for State Courts, 2013).

the ambit of a judge's role, it is not uncommon for judges in many jurisdictions to take on case management and other functions apart from purely adjudicatory responsibilities.[9] Sourdin has observed in this regard that several countries' judges have combined adjudicative, advisory and facilitative functions to fit societal and individual needs.[10] This combination of functions is, incidentally, acceptable in many European and Asian civil law countries which utilize both inquisitorial and adversarial processes, and is increasingly being embraced in countries where elements of civil law and common law systems are converging.[11] The "access to justice" movement has evidently developed concurrently with the expansion of the justice system and the court's role beyond conventional lines. Accessibility has thus focused not only on overcoming the common barriers of time and costs of litigation, but also on giving the individual court user a greater degree of participation in the justice system.

B. The notion of justice

It is difficult to examine "access to justice" without delving into the concept of justice. Given the many jurisprudential issues involved in the notion of justice, this section does not exhaustively explore all of them but concentrates on the interface between justice and dispute resolution processes. For ease of discussion, the notion of justice is also categorised according to procedural justice and substantive justice, the latter referring more to the outcome of the process.

It is evident from the above trends that several contrasting elements have been converging within the justice system – adjudication as opposed to forging consensus; and a public forum in contrast to a private

9. See generally Tania Sourdin and Archie Zariski, eds., *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Australia: Thomson Reuters, 2013).
10. Tania Sourdin, "Five Reasons Why Judges Should Conduct Settlement Conferences" (2011) 37:1 Monash U.L. Rev. 146 at 148-149.
11. Vietnam's Code of Civil procedure provides that a judge in a civil case has a duty of conciliation (Articles 10, 31, 41, 64, 131; 180-188). In Indonesia, Article 130 of the Civil Law Procedure obliges the judges to try the amicable settlement before the civil proceeding starts. In France, Article 21 of the New Code of Civil Procedure for individual disputes requires that "[i]t shall be part of the duties of the judge to conciliate the parties". See also Archie Zariski, "Understanding Judges' Responses to Judicial Dispute Resolution: A Framework for Comparison" in Tania Sourdin and Archie Zariski, eds., *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution* (Thomson Reuters, Australia, 2013) at 48 (stating that civil law procedures are "judge-centric" compared to common law, and the judges who are more accustomed to active involvement in all stages of case may feel more comfortable intervening for the purpose of settlement; and that the increase of managerial judging in common law systems represents a convergence with civil law).