

MEDIATION – A SOLUTION FOR THE LEGAL SECTOR CRISIS

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Our judiciary like most judiciaries the world-over, is facing a mounting challenge in terms of its credibility, its functional effectiveness, its standing vis-à-vis the other powers of the state, its contribution as a bulwark for the protection of human rights, its role in promoting a predictable institutional environment in the economic sphere and its obligation to provide a forum for the fair and effective resolution to disputes. Governments worldwide are embarking on programs to redeem the judiciary's image, recognising that a judiciary able to solve cases in a fairly and timely manner is an important pre-requisite for economic development.

It has been stated that any judiciary's functional inefficiency causes delay which in turn raises litigant related costs, higher costs in turn impede user access to the courts and thereby damage faith bestowed in a legal system. Further, a large backlog of cases stifles private sector growth and causes the erosion of individual and property rights.

Empirical indicators of our judiciary's functional efficiency paint a very grim picture: as at August 2004, Statistical Returns for the Milimani Commercial Courts, the High Court Civil and Miscellaneous Division and the Chief Magistrate's Courts show at the worst a negative curve as regards disposal of cases and at the best a waiting time of between 4½ and 10 years. Admittedly, judges may occasionally be corrupt, lazy, uncommitted to expeditious disposal of cases but mostly they are just overwhelmed with Daily Cause Lists that cannot reasonably be dealt with. Much the same goes for the registry staff, underpaid and overworked and open to any suggestion of additional inducements to do the jobs the Government pays them so badly to perform.

To this scenario, add the lawyers who two-time on court assignments, have no intention of getting early hearing dates and revel in many technical objections to cause delay. All the while, they expect their patient clients to pay through the nose for all these antics year after year in an average scenario of anything up to twelve years where you are looking at a High Court Case on Appeal to conclude. Compounding the problem is a huge oversupply of Advocates with far too little work. So what do they do? Make work for themselves by pushing disputants into litigation which they should never have entertained in the first place.

Our adversarial system too encourages two diametrically opposed and polarized positions. Costs in terms of money and time are invariably totally out of proportion to the subject matter or judgement in dispute. Clients are estranged and frustrated and indeed unnerved by the arcane practices of our courts and legal procedure. Business and social relationships may be irreparably soured after a bruising court case. Judgements are often meaningless and unenforceable by the time they are delivered, the judgement-debtors have long since died, left the country or become bankrupt or untraceable.

A fundamental requirement of the common good is speedy and affordable justice. For a long time already, the state through the Judiciary, has undertaken the sole responsibility of delivering legal and judicial services, leaving out individuals and intermediate bodies. The results are far from satisfactory, as the backlog of court cases awaiting hearing show. In Kenya, much discussion has been held on the Law Reform needed to speed up processes, by establishing small-claims courts without time-consuming procedures, by employing

more judges, building more courts, appointing acting judges etc. Little action so far has been taken. Can the citizenry contribute in this process?

The principle of subsidiarity suggests that smaller social bodies should be respected and encouraged to contribute to the common good. Only if these smaller bodies failed should higher bodies intervene – as much as possible without absorbing the smaller ones but by *subsidizing* them; hence the name “subsidiarity”. This concept fosters creativity and shared responsibility and is very congenial with the African tradition of the councils of elders in the clan system. The private sector must play its role in the resolution of our disputes more simply and cost effectively.

This paper seeks to show a response from the private sector - ADR: Alternative Dispute Resolution or sometimes Amiable Dispute Resolution. The legal sceptics are more fond of the epithet ‘Another Disastrous Result’ or an ‘Alarming Drop in Revenue’. It encourages the disputants to take the responsibility for the resolution of the disputes out of the hands of the judges and lawyers and back into their own. ADR covers any Dispute Resolution Proceeding that is not litigation and many, including the writer would add the process of Arbitration. The field of ADR offers a spectrum of choices with varying involvement of a third party in the process, formality, expense and duration. Mediation for example, is a non-binding procedure in which a neutral intermediary, the Mediator, assists the parties in reaching a settlement to their dispute. The Mediator is not a decision maker. Rather, he/she assists the parties in reaching their own decision either by ‘facilitative’ or “evaluative” mediation. The process remains confidential at all stages to encourage frankness and openness in the process.

Most disputes are appropriate for Mediation. However there are instances when it is not: where one party is intransigent in its position and manifests bad faith; where matters of law or public principle need to be publicly pronounced by a court; where interim measures of protection are needed and court sanction is requested. Mediation however, has shown itself to be an attractive alternative where the parties’ priorities are to minimize cost, ensure control over the process, effect a speedy settlement, maintain confidentiality and above all preserve underlying business relationships. It is low risk. There is nothing to lose except a day’s attendance and costs – far less than ten years’ worth of litigation.

Many jurisdictions are familiar with Mediation and have attempted to incorporate the process into their court systems including Canada, China, Singapore, Australia, Germany, Greece, Italy, Netherlands, Portugal, the U.K., Egypt, Nigeria, South Africa, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe. Statistics are fairly informative: an average mediation session takes 1.5 days. 80% of cases referred to mediation settle on that occasion. Of the remaining 20% a further 15% settle within a three week period after the adjournment of the initial session.

The legal sector is no different from so many Government-controlled sectors. It would certainly help if the Government could divest itself of arrogance and of its horror of privatization. Yet all it really needs to do is appreciate ADR, not as a threat to its privileged monopoly or dispute-settler, but rather as an aid to the fulfilment of its mission statement to be “For the Benefit of the People”. Then maybe the country can rise up out of its judicial slumber and finally make redundant the too often quoted adage that “Justice delayed is justice denied”. It will cost nothing to try, and the potential benefits are immeasurable.