MEDIATION FOR DEVELOPMENT: Embedding Mediation in Legal Minds

By

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Introduction

Conflicts are an integral part of human relations. Their effective management and the resolution of ensuing disputes become critical to the maintenance of social order and the very existence of communal life. It is no wonder that conflict management and dispute resolution strategies have evolved over the centuries in response to the diverse social needs, norms and standards of fairness in their endeavor to balance and resolve competing interests in our social, cultural, economic and political life. To this end, ADR strategies, and mediation in particular, take a head start as most suitably designed to facilitate effective management of conflicts and resolution of disputes in ways that maximize party control, consumer satisfaction at minimal expense.

While modern-day ADR strategies reflect age-old practices common in local communities and traditional societies, they are slowly losing their efficacy as they take on the burdens perpetually borne by the conventional judicial system. Lawyers who delight in litigation to demonstrate their dexterity often to the financial, emotional and relational detriment of their contending clients have lately shifted their battlefields to the arena of commercial arbitration, not to mention the slow pace at which they are responding to the call to mediate.

As respects commercial arbitration, legal counsel have often transformed arbitral tribunals into private courts completely robed in dilatory conduct, complexity and disproportionate costs, which ADR seeks to purge. Likewise, other ADR mechanisms do not enjoy their fair share of popularity in the prevailing atmosphere of strife. These challenges are compounded by the apparent lack of enthusiasm to embrace and promote tested ADR strategies for conflict management and dispute resolution. The question

remains as to what holistic approaches are at our disposal to address the issues and challenges with which we are confronted in the attempt to cultivate ADR in the legal mind.

The Historical Development of Our Adversarial Justice System

The establishment of conventional judicial institutions in developing common law jurisdictions was closely linked to British colonial administrative strategies. They were founded on the English legal system with minor modifications to accommodate local circumstances.[1] The concept of legal justice as understood in the context of sociological jurisprudence of the day was locally adapted and applied to suit the colonial agenda and satisfy the demands of the emerging economies. The ensuing rapid growth in the private-sector-driven commerce and industry in the urban centres coupled with the complexity of the ever-changing social-economic environment began to make pressing demands for effective management and resolution of increasing conflicts. The ensuing complexity of social-economic relations was characterized by competition and friction generating new demands, claims and wants[2] overwhelming the conventional judicial systems, which are largely viewed as outdated and incapable of expeditious and effective management, and resolution of conflicts. This has resulted in crisis in litigation.[3] Hence the urgent call for strategic review and reform to recreate "a competent, efficient and effective judiciary"[4] backed by ADR.

The historical development of our adversarial system of justice, coupled with the traditions in which legal counsel are schooled, explain the tenacity with which litigation has been embraced over the decades. It is true to say that counsels continue to stand in the way of change whose tide is turning towards ADR rather slowly, but surely. Nevertheless, the blame cannot be laid squarely on their shoulders in ignorance of our recent history and professional dictates.

Despite the history of our judicial system, recent developments shed a ray of hope that soon, and very soon, ADR will be the process of choice in comparison to civil litigation. In his article on ADR, Adam Campbell correctly observes that -
"Over the years, ADR has enjoyed varied degrees of popularity. Not too long ago, all civil disputes ended up in litigation, often with a great investment of time and expense."[5]

The Exponential Change Towards ADR

We all appreciate that by nature, change begets resistance. Happily, the desired change towards ADR as the strategy of choice in conflict management and dispute resolution is in view.In his article titled "The Mind of the Lawyer Leader," Dr. Larry Richard observes that "Few…today would argue with a

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[1] Kwach, R. O. (Hon. Mr. Justice) (1998) "Report of the Committee on the Administration of Justice" p.6.
[2] Pound, R. (1921) "A Theory of Social Interests" 15 Proceedings American Sociological Society, p.1.
[3] Kwach, R. O. (1998) at p.47 observes that there is "an increased growth of the Kenyan population and its urbanisation" (among other factors) resulting in delay and backlog of cases that bedevil the administration of justice.
[4] Kwach, R. O. (1998), p.7.
[5] Adam Campbell "Alternative Dispute Resolution – A Faded Fad or Viable Alternative for Business Disputes?" available at <raibarone.com/wp-content/upload/2013/08/alternative-dispute-resolution-a-faded-fad-or-viable-alternative-for-business-disputes-adam-campbel.pdf> (last accessed on 17th July 2018).

proposition that we are in the midst of continuous external, disruptive, accelerating and exponential change."[6]

According to evolutionary psychologists, "… exponential change is a state of existence to which we have not yet adapted." According to Dr. Richard, the exponential change overloads our coping systems and causes such reactions as passivity, increased irritability and other negative emotions, reduced cognitive capacity, to protect yourself and focus on your own needs and less inclination to collaborate, co-operate or team up with others.[7]

True, the legal fraternity is yet to adapt to the dynamic world of ADR. Legal practice characterized by tenacity for litigation still exists in the past. It is no wonder that the exponential change towards ADR appears to have overloaded the coping systems of most legal minds, which explains their

(a) passive attitude towards ADR;

(b) increased irritability and other negative emotions;

(c) reduced cognitive capacity to recognise the invaluable benefits of ADR;

(d) the tendency to protect the age-old ways of claim adjudication through litigation; and

(e) focus on their need to sustain one-track professional practice with diminished inclination towards collaborative strategies characteristic of ADR that facilitate co-operation and team spirit in the management of conflicts and resolution of disputes.

This is a time of great change, and we cannot afford to do business as usual. Engagement in civil litigation as though it were a sport from which we derive professional satisfaction without regard to the just outcomes and tangible benefits to our clients is tantamount to failure to deliver on our calling. "While a problem-focussed mindset is needed in our role as lawyers, it is devastating to us as human beings in a time of great change."[8]

Embedding ADR in the Legal Mind

To appreciate the value of mediation in development, and to successfully embed ADR in the mind of legal practitioners, one must internalize and subscribe to the words of Chief Justice Warren E. Burger of the US Supreme Court, who, with regard to the primary duty of legal counsel, had this to say:

[6] Richard L "The Mind of the Lawyer Leader" available at www.lawpractice.org (last accessed on 17th July 2018).
[7] ibid.
[8] ibid at p.4.

"The obligation of the legal profession is…to serve as healers of human conflicts…. We should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, with the minimum stress on the participants. That is what justice is all about."

Granted, not all cases are suitable for mediation or other ADR strategies which, in any event, are voluntary. However, you will all agree with me that court litigation does not heal, but instead exacerbates, conflicts. In effect, legal counsel fail in their ordained duty to heal human conflicts in cases where they needlessly recommend and facilitate litigation. While recognising the determinative authority of the Judiciary, ADR practitioners draw attention to market mechanisms best suited to facilitate the management of conflicts and resolution of civil disputes (a) expeditiously, i.e., in the shortest possible time; (b) with the least possible expense; and (c) with the minimum stress on the disputants. In the words of Chief Justice Warren E. Burger, "… that is what justice is all about". Yet, the tendency among our learned fraternity has been to put tradition and financial considerations ahead of quality procedures and quality outcomes that serve to equalise the opportunity to access justice.

The benefits of commercial mediation (and other ADR strategies) over commercial litigation have been stressed often enough. Flexibility, expedition, party control, cost-effectiveness, and the resultant satisfaction, stand out as the pillars of ADR strategies that deliver justice at the door of every user. To embrace these strategies, though, the user and their counsel must be conversant with their nature and form.

Farooq identifies commercial mediation as "assisted negotiation" in which the third party neutral does not impose a decision on the disputants. Its voluntary nature dictates that they can choose not to be bound by its outcome, unless it is reduced into a binding agreement. However, it can be "evaluative" where the mediator gives an assessment of the legal strengths of a case or "facilitative" where the mediator concentrates on assisting the parties to define and resolve the issues on mutually agreeable terms.[9] In effect, the parties are in control of their destiny, and they are happy that way.

Comparing mediation to arbitration (which is adjudicative), Simmel explains that "… the mediator [is]a non-aligned facilitator distinguished from a partisan supporter on the other hand and the arbitrator with determinative authority on the other".[10]

In order to successfully embed mediation in the legal mind, we must be persuasive in our answers to the following questions:

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[9] Bilal Farooq "The Advantage of Using Commercial Mediation Over Commercial Litigation" available at <uobrep.openrepository.com/uobrep/bitstream/10547/252415/1/Farooq.pdf> (last accessed on 17th July 2018).

[10] Greorg Simmel Soziologie (1908) in Simon Roberts and Michael Palmer *Dispute Processes, ADR and the Primary Forms of Decision-Making* (Cambridge University Press 2008).

(a) What is mediation, and how does this ADR strategy spur our social, cultural and economic development?

(b) How does mediation and other conflict management and dispute resolution strategies compare with litigation?

(c) What is the degree of awareness as respects the nature and form of ADR mechanisms among the legal fraternity and their clientele?

(d) What challenges impede on mediation as the strategy of choice in the bid to manage conflicts and resolve our civil disputes?

(e) Finally, what are you and I doing about it?

Table 1 is a summary of the advantages and disadvantages of various ADR strategies in comparison to civil litigation.[11]

Advantages of Negotiation and Mediation	**Disadvantages**
Speedy and informal resolution of disputes (generally less stressful)	May be used as a stalling tactic
Confidentiality and the avoidance of publicity	Parties cannot be compelled to continue negotiating or mediating
Improved communication between parties thereby preserving or enhancing relationships between them	Do not produce judicial precedents
High degree of party control (the parties craft their own process and settlement agreement)	Exclusion of pertinent parties may weaken the settlement agreement
Flexibility	Parties have limited bargaining authority
Legal and/or other standards of fairness may be used in crafting settlement agreements	Little or no check on power imbalances between the parties
Increased satisfaction and compliance with settlements when parties have directly participated in crafting the mediated agreement	Disclosure of information and truthfulness of communications depend on the parties' good faith
May assist in clarifying and narrowing issues by fostering climate of openness, co-operation and collaboration even if a settlement is not reached	In negotiation, lack of a third party neutral may reduce the chance of reaching agreement, particularly in complex disputes or in disputes involving multi-parties
Risk-free (communications are without prejudice and, if no agreement is reached, parties can pursue other options)	May not adequately protect parties' legal rights
In mediation, parties may appoint a skilled mediator with substantive knowledge	A strong-willed or incompetent mediator can exercise too much control to the detriment of the process
Mediation (i.e., a facilitated discussion) is useful if	

[11] Blaney McMurtry "Advantages and Disadvantages of Dispute Resolution Process" available at aorlando@blaney.com (last accessed on 17th July 2018).

negotiations are broken down or if strong emotions are expressed in the process	
The process is voluntary (except where mandated by contract or legislation)	
The settlement agreement is binding on the parties	

To complete the picture of ADR, let us briefly examine the advantages and disadvantages of arbitration and other adjudicative ADR processes. Table 2 is a summary drawn from Blaney McMurtry's article cited above.[12]

Advantages of Arbitration and other Adjudicative Processes	**Disadvantages of Adjudicative ADR Processes**
Parties create their own process to suit their procedural needs and interests	Success or quality of the outcome largely depends on the skills and qualities of the arbitrator/adjudicator
The arbitrator may be selected on the basis of substantive knowledge of the issues in dispute	Time and costs are affected by poor co-operation and poor process design
The proceedings are confidential	The right of appeal is limited
Formality compels proper behavior and may minimize bad faith	Confidentiality is not suitable for certain disputes
The rules of procedure may be tailored to the adjudicative process	The quality of outcome is uncertain in binding arbitration
Less backlog than in courts	
Final decision is binding	
The proceedings are usually shorter and less expensive	

Finally, it pays to give credit where it is due. A look at the court process reveals a number of advantages and disadvantages in comparison to ADR. Table 3 is a summary of the advantages and disadvantages of court litigation.[13]

Advantages of Litigation	**Disadvantages of Litigation**
It is formal and with less opportunity for abuse of process	It is time-consuming
The parties are compelled to attend	The parties are not in control of the process or the ultimate decision and, therefore, the outcome is uncertain

[12] ibid.
[13] Blaney McMurtry "Advantages and Disadvantages of Dispute Resolution Process" available at aorlando@blaney.com (last accessed on 17th July 2018).

The institutionalized process allows safeguards	The process is exposed to publicity
The final decision is binding	The process is characterized by onerous evidential burdens
The judicial process establishes legal precedents to guide future decisions in similar cases	Available remedies are limited

Conclusion

Granted, the choice between court litigation and mediation, or other ADR process, is personal. However, any legal counsel who puts their clients' needs and interests first will weigh the advantages of ADR in comparison to litigation and make the right decision when advising their client. Indeed, inculcating ADR in one's mind serves to benefit the client and legal counsel alike. Regrettably, though, not all legal practitioners are familiar with ADR processes with respect to which this paper highlights the advantages and disadvantages to aid in decision-making. Margaret Doyle offers this timely advice:

"Before you start – what are your alternatives?" "When you think about whether to use mediation or another type of ADR to sort out a dispute, it is helpful to think about your other options. Are you considering ADR because you think it will be better than the alternative? If so, do you know what those alternatives are? Or are you wondering whether to try ADR because you do not seem to have any other choices?"[14]

And what options do we have? According to Margaret Doyle, we have an array of options. For instance, we could choose to (a) do nothing; (b) go to court; (c) negotiate and work it out yourself; (d) be forced to consider ADR.[15]

Finally, I urge you to ponder over the inspiring words of Sandra Day O'Conner (an American Judge), who had this to say:
"The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."

[14] Margaret Doyle "Why Use ADR? Pros and Cons" (Advice Services Alliance, London June 2012).

[15] ibid.