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THE CONTRIBUTION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN ENHANCING ACCESS TO JUSTICE AND THE ADMINISTRATION OF JUSTICE IN SEYCHELLES

18 Dec 2012

Speech delivered by Chief Justice Fredrick Egonda-Ntende on the 28th August 2012 at the Symposium on Access to Justice & Alternative Dispute Resolution held at the Kempinski Resort, Mahe, Seychelles.

The Contribution of Alternative Dispute Resolution Mechanisms in Enhancing Access to Justice and the Administration of Justice in Seychelles.[\[1\]](#)

[Fredrick Egonda-Ntende, Chief Justice of Seychelles]

Access to Justice is a fundamental right that is enshrined in the Seychellois Charter of fundamental human rights and freedoms in article 19(7) of the Constitution. It provides,

'Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; **and where the proceedings for such a determination are instituted by any person before such court or other authority the case shall be given a fair hearing within a reasonable time.**'

Access to Justice is a key right that unlocks the lock or removes the possible obstacles to the enforcement of not only all the other fundamental rights and freedoms set out in the Seychellois charter of fundamental rights and freedoms but the maintenance of the whole constitutional framework that underpins the existence of the rule of law in our society. Given its cardinal importance it behoves us to pay special regard to the existence of any threats to this right be such threats systemic or otherwise and to the promotion of its observance.

Lord Woolf in his Final Report identified the following elements as being essential to a civil justice system worth its salt. '

- '(a) be *just* in the results it delivers;
- (b) be *fair* in the way it treats litigants;
- (c) offer appropriate procedures at a reasonable cost;**
- (d) deal with cases with reasonable speed;**
- (e) be *understandable* to those who use it;
- (f) be *responsive* to the needs of those who use it;
- (g) provide as much *certainty* as the nature of particular cases allows; and
- (h) be *effective*: adequately resourced and organised.' [\[2\]](#)

The foregoing in my view form some universal standard or norms with regard to what jurisdictions world wide seek to ensure permeate their civil justice systems. Seychelles is no

exception. Litigants in this jurisdiction are entitled to the same.

The Situation in Seychelles

We have recently adopted a computerised case administration that has allowed us collect case data in such a manner that we now have a clearer impression of the caseload before the courts. Though we are still populating the data base and therefore current data may not be fully accurate or reliable nevertheless it affords us an opportunity to have a fairly good idea of the current case data and whether or not our performance is in accord with the constitutional standards. While reviewing the latest information, I find that the following civil cases are pending hearing before the Supreme Court.

Table No. 1

| Backlog of Civil Cases Before the Supreme Court of Seychelles | | |
|--|--|---|
| Year of Filing | | Pending Cases Before the Supreme Court as at 31st July 2012 |
| 1998 | | 1 |
| 1999 | | 2 |
| 2000 | | 4 |
| 2001 | | 9 |
| 2002 | | 15 |
| 2003 | | 12 |
| 2004 | | 24 |
| 2005 | | 16 |
| 2006 | | 40 |
| 2007 | | 48 |
| 2008 | | 54 |
| 2009 | | 70 |
| 2010 | | 102 |
| Total | | 397 [363 cases were 2 or more years older as at 31 July 2012] |

The Judiciary has adopted some service standards set out in the Delay Reduction Measures and Establishment of Time Standards of 8th September 2010. These measures established that civil cases commenced by way of plaint should be brought to determination not later than 2 years from filing. The above table 1 does illustrate the number of cases still pending before the Supreme Court that are 2 or more years old. These are approximately 363 civil cases as at 31st July 2012. This could be referred to as the extent of civil case backlog before the Supreme Court for cases of that category.

While the Seychellois Charter of Fundamental Human Rights and Freedoms requires that cases brought before the Courts be determined within a reasonable time it does not define what reasonable time is. This is left to the Courts for interpretation. Though we have established a standard such as the one for civil cases commenced by way of plaint, it does

not necessarily mean that any case that has not complied with this standard is necessarily out of the constitutional latitude of being determined within a reasonable time as each case is bound to be considered on its own merits to determine whether or not it has met the constitutional imperative. Nevertheless for purposes of considering whether or not a court is meeting this constitutional imperative and therefore affording people access to justice it is a useful standard to provide guidance of how near the court is to meet that constitutional imperative.

In the case of the Supreme Court of Seychelles it is clear that there is considerable ground for concern given the age of the pending caseload as noted above; the population of Seychelles (83,000.00) and the judge/population ratio that has Seychelles as having one of the highest ratios of judges per 100,000.00[20 judges per 100,000.00 people]! Delay in bringing cases to conclusion is one of the key obstacles to access to Justice in Seychelles. Delay has a number of pernicious effects upon litigants. Apart from tying them down for so long it increases their expenses on litigation both in terms of attorneys' appearance fees, their transport to and from court and other expenses. A determination 7 years down the line will not adequately provide against inflation or it may disproportionately hurt the unsuccessful in terms of payment of interest that would not have become due had the decision been made in a timely manner. Such a decision may turn out to be neither just nor fair.

Lord Woolf identified delay in concluding litigation as one of the problems afflicting the English and Welsh Civil Justice System. He noted in his final report,

' The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; **too slow in bringing cases to a conclusion and too unequal**: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: **the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants.** Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.'^[3]

Lord Woolf proposed the amendment of the Civil Procedure Rules in order among other things to ensure that the following would follow in the handling of civil disputes.

'(a) People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available.

(b) Information on sources of alternative dispute resolution (ADR) will be provided at all civil courts.

(c) Legal aid funding will be available for pre litigation resolution and ADR.

(d) Protocols in relation to medical negligence, housing

and personal injury, and additional powers for the court in relation to pre litigation disclosure, will enable parties to obtain information earlier and promote settlement.

(e) Before commencing litigation both parties will be able to make offers to settle the whole or part of a dispute supported by a special regime as to costs and higher rates of interest if not accepted.

Litigation will be less adversarial and more co operative.

(a) There will be an expectation of openness and co operation between parties from the outset, supported by pre litigation protocols on disclosure and experts. The courts will be able to give effect to their disapproval of a lack of co operation prior to litigation.

(b) The court will encourage the use of ADR at case management conferences and pre trial reviews, and will take into account whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.'

The Recommendations by Lord Woolf, or the Woolf Reforms as they became to be known, were adopted in England and Wales with the promulgation of a new set of Civil Procedure Rules of 1998. Literature that I have examined on the success of the reforms has been laudatory. Are there any lessons for us in Seychelles?

It is clear that the Woolf reforms espoused ADR as one of the major methods or avenues of dispute resolution that must be ingrained in the new Civil Procedure Rules for England both as a pre litigation option and in the course of litigation at a fairly early stage in the proceedings.

What is Alternative Dispute Resolution?

Generally Alternative Dispute Resolution refers to the possible of settlement of disputes other than through a trial in the ordinary courts of each jurisdiction. It is not available as of right, save if provided for by an agreement, like access to a court system is for many jurisdictions. It is alternate to the ordinary system of adjudication of disputes. Some commentators on the subject assert that it is a misnomer to refer to it as alternative, believing that it is the more appropriate method of dispute resolution than the adjudication through the court system. They propose that it should be referred to as the Appropriate Dispute Resolution, thus maintaining the acronym of ADR

There are about five modes of alternative dispute resolution, which I wish to mention. These are,

1. Negotiation
2. Mediation
3. Neutral case evaluation
4. Rent a Judge
5. Arbitration.

Starting with the last **arbitration** should not be unfamiliar. On our statute books arbitration

is permitted both under the Seychelles Code of Civil Procedure as well as the Commercial Code of Seychelles. Arbitration is grounded in contract. Parties to a contract agree at the time of making the contract or after that any dispute or a class of dispute that may arise during the performance of the contract shall be settled by arbitration. That is the decision of a third party chosen by parties or appointed in accordance with the agreement or law who hears the parties and renders a binding decision. An arbitration clause may amount to waiver of the parties right to proceed to a court of law with that dispute save for enforcement of the arbitral award, which when filed in court, and confirmed by the court, may be enforced as a judgment of the Court.

Negotiation is a matter that must be familiar with members of the bar. This involves the parties and their counsel agreeing to resolve the dispute between the parties at different stages of the dispute, before and after the filing of the dispute in the courts. This is one area of alternative dispute resolution that I think members of the bar would be well advised to consider in advising their clients. There are a substantial number of matters that are filed in the courts, which of course cannot be settled by negotiation, for different reasons. But there are a large number of cases that could be settled by negotiation. Of course you are aware that one of the purposes of a letter notifying the other side that you intend to file an action in court within a certain number of days is to set in motion the process of negotiation, where possible. I feel that counsel and parties have not paid enough attention to this method of resolving disputes. There are considerable benefits to counsel, the litigants, and of course the court system. The savings in costs and time would be considerable. Conversely, the cost of not negotiating in appropriate cases is considerable. This is not only to the parties or at least one of the parties, and the courts, but also to counsel in the case. Counsel is probably diverted from paying attention to other business. The un-disposed of business, or work in progress, assumes a distorted position in the business of the firm.

Mediation is a method of resolving a dispute where a third party helps the parties to agree to settle their dispute. The third party does not impose a solution. He or she does not impose his or her own views on the parties. The parties must be willing to let the third party assist in this regard. Mediation offers some promise in Seychelles just as we shall hear of how it has taken route in many other jurisdictions both in the region and outside the region. Both the members of the bar and the bench may help in this area. On the commercial list we are trying to encourage counsel and the parties to make use of the possibilities offered by this method.

I wish to say that my very short experience in Seychelles [three years now] makes me hopeful that it may be possible to take more steps in this area. This will depend on a number of factors. Members of the bar must appreciate and support this development. I am hopeful that activities of this nature, that is, this symposium, will help in this regard. On our part, in the judiciary, we have started to train your judges in this and other areas so as to increase their effectiveness and efficiency. I would like to call upon the Bar Association of Seychelles to consider training their members in mediation techniques. I am prepared to support such endeavour in different ways including obtaining faculty for such programmes. It is not only judges who can act as mediators. Many years ago I met an attorney in Reno, Nevada, USA who was starting a practice in mediation. Two years later I met him again in Reno. He told me that his practice was extremely successful.

I now wish to refer to **neutral case evaluation**. This involves the parties to a dispute, by

agreement, seeking the opinion of a third party, usually an expert in the area of the dispute. The third party neutral will evaluate the dispute for the parties. Upon that evaluation the parties will be able to make a decision. I am not aware whether or not this mode is in use in Seychelles. I invite you to consider its applicability in appropriate situations.

Rent a Judge is what it exactly says. The parties with a dispute agree to rent, mainly a retired judge, to hear their dispute outside the court system. In California, USA, I understand this is common practice. Legislation has allowed judgments in such cases to be enforced in the ordinary way. You do not have to wait long in the queue. Just rent a judge in cases where it is appropriate. This is very akin to Arbitration.

ADR and Access to Justice: What is the connection?

As noted earlier there are about 363 civil cases older than 2 years which are undecided and have now descended the category we refer to as backlog. In the majority of those cases it can safely be assumed that the litigants' right to a trial within reasonable time has been breached. The right to access to justice is in jeopardy with other attendant effects. These litigants are suffering obstacles to access to justice. These include delay in the courts caused by congestion, lack of adequate resources, and at times, improper conduct on the part of both the bar and the bench.

Divine authority for alternative dispute resolution is in the Gospel of ST.MATHIEW; chapter 5 verses 25 to 26. Our Lord Jesus said,

"Settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way, or he may hand you over to the judge, and the judge may hand you over to the officer, and you may be thrown into prison. I tell you truth, you will not get out until you have paid the last penny."

As members of the bar it would be appropriate if you advised your clients accordingly. Alternative dispute resolution can not address all the ills of the system. But it can, in appropriate cases, provide access to justice in a more expeditious manner. Alternative dispute resolution can save time and expense of the parties, counsel, and relieve the courts of some congestion, thereby releasing the courts to attend to the other pending cases.

There are other benefits as well. When parties fashion their own solution it is asserted that a win-win situation is created leaving the parties without the rancour that follows a loss in the courts. Quite often there is no need for enforcement of the agreement as the parties will perform what they have agreed to perform.

Arbitration is limited only to those cases where parties have agreed to arbitration either prior to the dispute arising or after the dispute arises. This involves, often in practise, a very limited number of cases that come before the courts. On the other hand the majority of cases filed before the courts have the potential for mediation to resolve them. Though parties can settle and do settle cases by way of negotiation it is clear that this happens often only with the active encouragement of the court pointing in effect to the potential for mediation with a third party assisting the parties. Neutral case evaluation by its very nature is likely to be applicable to a narrow class of cases and is therefore unlikely to have a

significant impact on a court's caseload. In effect we are left with only mediation as offering the best avenue at tackling a significant caseload.

I therefore commend to you court annexed mediation as offering the best avenue out of the ADR options to offer an opportunity to all of us to improve access to justice for our people. Given the provisions of section 131 of the Seychelles Code of Civil Procedure, there lies in existence the legal means to convert a mediated agreement between the parties into an order of court by way of judgment by consent. Section 131 states,

'131. The parties may at any stage of the suit before judgment, appear in court and file a judgment by consent signed by both parties, stating the terms and conditions agreed upon between them in settlement of the suit and the amount, if any, to be paid by either party to the other and the court, unless it see cause not to do so, shall give judgment in accordance with such settlement.'

The basis of mediation is the agreement of the parties and an opportunity to understand that through mediation you can be able to defend or secure your interests in a dispute, rather than limit yourself to the rights based approach which is the epitome of the traditional court adjudication process. An ordinary action seeks to enforce rights and that is what the court rules upon. To the contrary mediation has the potential to look at a party's current and future interests in resolving a dispute. It may be to maintain a business or social relationship. This interest based approach makes mediation quite suitable to resolving disputes be they of a business / commercial or family nature.

Pre requisites to the Success of Mediation

In spite of its potential for mediation to succeed in a jurisdiction there are certain prerequisites now recognised as essential to the success of any mediation project.

Firstly in order to create incentives for parties to embrace mediation there ought to be certainty about the alternative to mediation. This is **trial date certainty** in case mediation fails. If one or the other of the parties who probably thinks he or she benefits most from delaying resolution of the case knows that once he returns to the adjudicatory process in the court system there is no likelihood of an early hearing and resolution of the case he will have no incentive to mediation. If the court system is inefficient in its listing, hearing and determinative functions this will be a disincentive for the success of mediation.

Secondly the support of key stakeholders such as judges, attorneys, government law officers, and others is essential to the success of the project. It is important that a group of champions in support of mediation emerge, especially in the courts where it may be introduced and in the leadership of the Bar, the Judiciary, Ministry of Legal Affairs and Attorney General's Chambers, and Civil Society.

Thirdly though mediation is voluntary in so far as reaching agreement is concerned the agreement once reached which solves the dispute must be enforceable by courts.

Fourthly to ensure that all parties are on the same page and to provide for standard practices, and certainty with regard to the mediation process, it is important that rules

governing mediation and mediators be promulgated.

Fifthly there must be resources that will be devoted to the implementation of mediation.

Sixthly attorneys must know that mediation helps to improve profitability of their own practice rather than deny them fees. They are still entitled to fees even if the case has been successfully mediated. Attorneys' throughput [disposal] of cases will increase. So will ultimately their own earnings. The savings in terms of time spent on any one particular matter will increase considerably!

Lastly there must be private sector demand for mediation or awareness creation in the private sector of the benefits of mediation for the private sector to embrace mediation and create a demand for it.

Assurances of the Chief Justice

For my part I would like to assure the legal profession, the bar, the bench, and users of the courts that I am committed to the introduction of a court annexed mediation programme that will enhance access to the Justice for our people. I am prepared to promulgate the necessary rules once we achieve a consensus at this Symposium.

I am prepared to seek resources and devote them to the training of mediators, creation of awareness of mediation to the private sector, or such other needs as may be identified, as I have done in the past.

In short I am prepared to be a champion of the movement to establish mediation in our civil procedure and process so that it is part of the menu available for resolution of disputes in this country. The question I pose to the other stakeholders is: **Are you prepared to be a champion in supporting mediation?**

I would invite you to become the champions upon which we shall build the new system. Together we can make a difference.

Next Steps

We already have some judges and magistrates trained as mediators. It is possible to start with a mediation week once a very term or a mediation day every month whereby counsel and their parties are summoned to the court for mediation in respect of cases which are now in backlog and are thought to be amenable to mediation by the trial judge or the parties and their counsel. This may be a special exercise targeting the backlog.

At the same time rules would be promulgated that apply mediation to the current caseload. One of the issues that I wish to leave with you for your consideration is whether reference to mediation should be mandatory or optional at the instance of either a party or judge assigned to the matter. Many jurisdictions have opted for the mandatory referral which appears a contradiction in terms given the voluntary nature of mediation. In essence there is really no contradiction. Mediation itself continues to be voluntary in terms of the exercise itself. It is the pre mediation process that compels a party to submit to it. Mandatory reference has its drawbacks as well as advantages. The percentage of successful mediations as against referrals is lower than where referrals are optional.

On the other hand optional reference at the instance of either one of the parties or the court on its own motion in appropriate cases may attract much fewer cases to mediation but past experience suggests that it yields greater success in terms of successful mediation in relation to the number of referred cases.

In a situation where you have a significant case backlog it might nevertheless be worthwhile to apply mandatory referral and effort is made to mediate as many of the backlog cases as possible. I leave it to you to advise as to what would be appropriate for Seychelles.

I propose that a deadline be agreed upon when we would be able to put in effect what will be agreed upon in this Symposium. 31st October 2012 may be appropriate.

Courts that have successfully adopted court annexed mediation programmes have reaped the following benefits: **reduced backlog; increased level of in court settlements facilitated by judges; an improved legal culture; improvements in Civil procedure; reduction of formality and complexity of existing processes; inculcated lessons for judges on elements of case management; supported case management and court reforms; modified dispute resolution culture and hostile mindsets within courts and created a model for further reform.**[\[4\]](#)

I am confident that if you take several bold steps and decisions in this Symposium and beyond mediation will truly make a significant contribution to access to justice in Seychelles.

I thank you for listening to me.

[\[1\]](#) Keynote Address to the Bar/Bench Symposium on the Role of ADR in Access to Justice in Seychelles, Kempinski Hotel, Baie Lazare, Seychelles 28-29 August 2012.

[\[2\]](#) Accessed on 16 August 2012 at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/overview.htm>

[\[3\]](#) Accessed on 16 August 2012 at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/overview.htm>

[\[4\]](#) Lukasz Rozdeiezer et al, Alternative Dispute Resolution Manual: Implementing Commercial Mediation, Page 23