

Alternative Dispute Resolution: A viable solution for reducing Barbados' case backlog?

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In a presentation given a few weeks ago to the Barbados Workers' Union, Chief Justice of Barbados, Marston Gibson, strongly opined that alternative dispute resolution was a necessity for the survival of our country's judicial system in light of the massive case backlog crippling the court system. Indeed, casting our eyes to our sister states across the region, burgeoning case backlogs have forced many Commonwealth Caribbean countries to take a harder look at the promotion of alternative dispute resolution techniques as opposed to litigation to solving disputes.

Adversarial litigation is a hallmark of the English Common Law legal system bequeathed to our Commonwealth Caribbean territories by the colonial experience. The customary legal traditions of indigenous peoples which traditionally relied on mediation and conciliation techniques were forcefully supplanted by a justice system which emphasized a combative and less accessible style of dispute resolution.

As our societies have become more litigious, Commonwealth Caribbean court systems have found themselves teetering under the large and growing burden of cases before them, ranging the gamut from criminal to family and commercial matters. Case backlog is one of the indicators used to assess the quality of a country's judicial system. The Caribbean Human Development Report 2012 published by the United Nations Developed Programme (UNDP) highlighted that "[c]ase processing delays and backlogs have had a debilitating effect on criminal justice systems in the Caribbean".

A myriad of different factors potentially contribute to this large caseload faced by regional courts, including increased crime, limited staffing and technology in courts and deliberate delaying tactics by counsel which cumulate to slow the wheels of the judicial system to a tortuous grind which is frustrating to judicial officials and painful to justice seekers.

Several measures have been proposed and/or have been put in place in Barbados, including a backlog reduction and individual assessment committee and a case management system. However, verbal recognition of the need for ADR as one possible solution for helping to cure this backlog has come from the highest levels of the judiciary. While giving the feature address at the Barbados Workers' Union 71st Annual Delegates Conference at Solidarity House, Chief Justice Gibson remarked that ADR was a necessity in light of the backlog of cases plaguing Barbados' overburdened court system and termed its introduction as "a matter of survival". Statistics on Barbados' court cases are not easy to come by. However, Chief Justice Gibson

alluded in his presentation that Barbados had a backlog of 3,000 cases awaiting trial, with some undecided cases dating as far back as 1993. In some instances, cases had gone on so long that counsel had died, while the aggrieved still await justice. In light of this, it is little wonder that the CCJ in several recent decisions criticised this massive case backlog.

Alternative dispute resolution involves a paradigm shift in the way in which disputes are handled. Indeed, it is akin to the less combative dispute settlement techniques practiced in traditional cultures which the European colonizers once regarded as uncivilised. ADR refers to a number of techniques of dispute settlement outside of the more traditional litigation and includes negotiation, arbitration, conciliation and mediation. ADR recognizes that litigation may not be always the most appropriate method for resolving a dispute. It thus offers disputants the opportunity, through the help of an impartial third party, to come to a settlement among themselves in more efficient and cost-effective manner outside of judicial determination. Depending on the method employed, decisions could be either binding or non-binding.

In the matriarch of the English Common Law tradition, the United Kingdom, Lord Woolf's seminal "Access to Justice" Report of 1996, was the catalyst for the reform of their judicial system and heralded the passing of the Civil Procedure Rules of 1998. The report, which published the findings of an enquiry into the UK's civil justice system, advocated for greater use of ADR in the settlement of disputes and heralded the passing of the Civil Procedure Rules of 1998 which brought ADR into the mainstream of UK court procedure. The Civil Procedure (Amendment) Rules of 2011 further strengthened the framework in the UK. Several other countries throughout the Commonwealth, including Australia, have sought to modernize their court systems by giving the courts the opportunity of referring parties to mediation where considered appropriate and giving judges discretion to impose costs sanctions on litigants who unreasonably refuse to try mediation.

Turning home to the Commonwealth Caribbean, Jamaica has arguably the most advanced ADR system in the region, while nascent systems exist in Trinidad & Tobago, Guyana and the OECS territories which are growing in importance. The strength of the requirement for the use of mediation varies across the Region. Part 25 of St. Lucia's Civil Procedure Rules is less imperative and provides that the court may "encourag[e] the parties to use any appropriate form of dispute resolution including, in particular, mediation, if the court considers it appropriate and facilitating the use of such procedures". In Trinidad, Article 14(1) of the Mediation Act empowers the court with discretion to refer parties in any matters other than a criminal matter, to a certified mediator. Guyana's Mediation Act is stronger as it requires parties to certain types of dispute to use court-annexed mediation. Jamaica's Judicature (Resident Magistrates) Act and Part 74 of the Jamaica Civil Procedure Rules make it mandatory for parties in most disputes to attempt mediation before the matter could be heard in Court. Unfortunately in Barbados a formal framework for ADR remains undeveloped and there is no Mediation Act.

ADR is more suited in cases where a relationship exists between the disputants, such as in family, employment, landlord-tenant disputes and the like. Family matters make up a large part of Barbados' caseload and are matters which do not necessarily have to be resolved by judicial determination. By avoiding a long drawn out and often acrimonious court battle, ADR arguably affords the aggrieved party procedural justice and a less costly method of dispute settlement. There is also greater involvement by the parties in determining who hears the dispute. The net benefit to the court system would be a lower case load as the courts' attention would be focused on more serious matters which warrant the attention of the court and the resources of the State.

ADR is equally useful in commercial dispute resolution. Arbitration involves a situation where the parties take their matter before an impartial arbitrator, usually one of their own choosing and with experience in the field, with the resolve that they would be bound by the arbitrator's decision. Arbitration proceedings are generally shorter and quicker than litigation, meaning they are generally less costly in terms of time and money to the parties. Additionally, arbitration awards are final, which prevent parties from forum shopping if the outcome is adverse to them. Arbitration is confidential as proceedings are held behind closed doors and documents and awards are kept private which reduces the likelihood of damage to the parties' image which is more likely to occur in a long drawn out adversarial civil proceedings.

Naturally, ADR is not a panacea. As alluded to earlier, it is not in every case that ADR would be appropriate over litigation. The type of ADR technique to be employed would depend on the nature of the dispute. There will also be some instances where even after ADR is tried, the parties may still decide to litigate, which could be additionally costly to the parties. However, studies have shown that ADR has had a positive impact on court systems in countries where it has been effectively introduced. According to the Dispute Settlement Centre of the Australian State of Victoria, mediations conducted in that state had a settlement rate of 84%. Most studies show that in modern societies ADR is most effective as an adjunct, and not a substitute, for traditional dispute settlement processes.

So why is Barbados moving behind the times? Resistance to ADR among some members of the legal fraternity remains a big part of the problem. Some attorneys see ADR as competition to the traditional court system. Others opine that it might be less lucrative than litigation.

Happily, the Barbados judiciary has contracted the renowned CEO of the Jamaica Dispute Resolution Foundation, Ms Donna Parchment, to implement a court-annexed mediation programme here. Such a programme will hopefully not just draw on regional and international best practices but will also take into account Barbadian realities in order to arrive at the most efficient and effective system for serving the needs of justice in Barbadian society.

Critical to the success of any such system would be its acceptance by the legal community and the general population. Such acceptance would necessitate the development of a mediation culture through education and raising awareness of ADR and its benefits not just among

members of the legal community but also the wider populace. Thankfully, the ADR Association of Barbados is helping to raise awareness through, inter alia, its Mediation Week which takes place during the third week of October annually. Additionally, with ADR as a part of the Law School curriculum and with the immense popularity of the ADR course as a final year elective in the LL.B programme, it is likely that there will be greater enthusiasm among incoming legal practitioners about embracing ADR as part of the judicial system in years to come.

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