

Kluwer Mediation Blog

Mediation – A New Mode of Governance?

Ales Zalar (Ministry of Justice, Government of the Republic of Slovenia) · Thursday, September 1st, 2011

Disputes are like weddings or funerals: they require a serious resolution procedure. As such, mediation procedures have rapidly spread throughout the world. They travel without passport. The rapid evolution of mediation started as a court-annexed or connected procedure, and caused a revolution in the dispute system design of modern civil justice.

A multi-door courthouse with both, justice and (or) marketplace mediation modes, became an irreversible process of change within the third branch of government. Courts, like restaurants, increasingly offer a menu of dispute resolution processes with an almost mandatory appetizer – mediation. One Slovenian High Court judge reacted to the introduction of the duty of judges to consider the eligibility of disputes for referral to mediation (with the parties' consent) by saying: "I wasn't educated and trained in order to be a waitress."

This statement highlights the basic change in the dispute system landscape and legal philosophy, because the goal of mediation is to serve the interests of disputants and not the needs of state courts.

Could we expect similar changes within other two political branches of government – the executive and legislative? Adjudication as last resort is becoming increasingly popular among politicians. The tough times of "a down market" and the alleged savings of taxpayers' money as an added value of mediation seem to be main reason for this support. Some political players may also support mediation, because it is a fashionable, innovative step in a field that is full of tradition, but only a few believe that mediation is a superior instrument of conflict resolution in public policy matters.

The year 2011 could change this attitude of politicians and make them more committed to mediation, because this is a year when people throughout the world have given up on their governments, according to Chrystia Freeland, global editor-at-large at Reuters. The extreme erosion of the trust and confidence of people in those who rule them and the consequent decline of the state is a consequence of the inability and incompetence of public policy makers to cope with difficult problems and challenges, when interests of various groups are competing.

Conflict is an ongoing, constitutive feature of any political society. Political theory teaches that politics is not a matter of adjudicating between competing interests but rather a matter of negotiating a temporary peace, by addressing unmet interests. The golden rule for new modes of governance in public matters is to understand and satisfy the underlying interests (not the positions

through which they are expressed), as Professor Aragaki rightly pointed out in his article: “Deliberative Democracy as Dispute Resolution: Conflicts, Interests and Reasons”.

The adversarial confrontation model of aggregative democracy (driven by majority rule) or deliberative democracy (driven by reasoned decision-making) does not serve the interests of all members of our societies. Recent turbulent events in Europe, the US, Arab countries and elsewhere indicate rising demands for a new mode of governance. A consensus-building approach through interest-based dispute resolution process, such as mediation, could be the ultimate solver and savior of our political democracies, because of its shifting from a win-lose to a win-win approach. Mediation stands for more democracy, which we all need, because it understands that interests are the ones that drive conflicts in our daily life.

Political wisdom therefore calls for bringing mediation and mediators to the table when considering public policy issues and controversies. It is useless to change the political government without changing the mode of governance. Mediation as a new mode of governance promises better perspectives for both citizens and their political leaders. Every good politician must have a dream, a vision. However, the future is not so much something to predict as it is something to choose. Now it is the time to choose mediation. Tomorrow’s global political players could be those who take the initiative to refer political disputes to mediation today.

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