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# Kluwer Mediation Blog

## Access to Justice and Conflict Mediation

Tania Almeida (Mediare) · Friday, November 25th, 2011

The evolution of society, its population growth and the consequent increasing complexity as to relationships made it necessary that the natural right to justice become a right guaranteed by the State. That came about due to the fact man used to make justice himself using physical violence and imposing his own interests.

Access to Justice is a theme which was significantly dealt with by Mauro Cappelletti and Brian Garth in the seventies in their book called Access to Justice – The Worldwide Movement to Make Rights Effective. They showed in the introduction that no modern judicial system is immune to criticism.

Since the 1980`s Brazil has taken steps based on Cappelletti and Garth`s reflections both through its New Constitution (1988) and The Judicial Reform which took place in the nineties. At the same time a misunderstanding came about – we mistook access to justice for access to the Judicial System.

Since then there have been movements focused on access to Justice. One of them was the signature of the Republican Pact of State by representatives of the legislative, executive and judicial systems on March 13, 2009. The Pact is about strengthening Mediation and Conciliation, encouraging conflict resolution by using self determination methods aiming at social pacification instead of the common practice of relying on legal Courts as a first step. Another one was Resolution #125 of November 29, 2010 which deals with the National Judicial Policy concerning the adequate treatment of conflict of interests in the Judicial System. Resolution #125 also strengthens the practice of Mediation and Conciliation.

In the past here in Brazil we engaged in making access to Justice easier. Anyone was able to rely on the Judicial System where free legal assistance was offered. Besides there were the Small Claim Courts dealing with less offensive causes or less expensive suits. Nowadays we are engaged in speeding up the consequent excessive number of causes, maintaining the efficiency in the process, though.

We see to judicial assistance to the poor, to collective interests and the drawing up of more participating forms of access to justice. It is clear that we need to work faster to shorten the time taken before the resolution of the legal suits and at the same time guarantee the efficiency of their results. The big number of law suits is an obstacle to the effectiveness of the Brazilian Judicial System. Guaranteeing access to justice is not enough. Having effective results is a must.

According to Professor Kazuo Watanabe, an outstanding Brazilian scholar, adequate timing, adequate means and effective results when dealing with conflicts are the tripod upon which Justice stands. Moreover in Brazil nowadays the great challenge is not only to guarantee access to the Judicial System but to ensure its effectiveness.

The legitimacy of Conflict Mediation brought by Resolution #125 and mainly the fact that choosing the appropriate means of resolution must be a result of its adequacy to the case tend to bridge the gap between Constitutional rights and legal norms and the effectiveness of the results.

Based on the principle of adequacy we can rely on Mediation to make interests and needs compatible and seen to, not simply guided by the law but by abiding by it. We can reinstate the role of the citizen as a protagonist – of course, lessened by that of the State as a judge – without having to give up rights or make mutual concessions. At the same time a multidisciplinary treatment as to conflicts and access to justice to all are guaranteed.

When one chooses the appropriate means of resolution the principle of adequacy allows the ample use of Mediation in questions that involve ever lasting relationships thus keeping citizens away from the common practice of relying on legal Courts as a first step. It is clear that the judicial sentence does not necessarily solve the conflict. On the contrary, it sometimes makes it worse which has a devastating effect on long lasting relationships.

Due to the more extensive use of Mediation – both privately and judicially, before or after a law suit is brought – we have the opportunity to explore the positive meaning of the conflict and avoid its destructive development pointing out that differences must be negotiated and changes made.

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