ADR — APPROPRIATE DISASTER RECOVERY

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The legal system may be as old as society itself. Since the dawn of civilization, man has incorporated law and judgment as primary tools to help regulate both civil and criminal aspects of social life. Both ancient and modern societies are often historically evaluated by the structure and quality of their legislative and judicial systems. People seem to have been caught in dispute ever since they began living together and effective dispute resolution was necessary for fundamental social structure and order.

Throughout history, and up until very recently, dispute resolution was primarily handled by the sovereign legal system, be it local, municipal, regional, national, federal or international; or by non-sovereign third parties, private agents that were either turned to by the parties in dispute or appointed by groups of interest to which the parties were subordinate or otherwise affiliated. Inherent in these various dispute resolution mechanisms is the externalization of decision by the parties. The parties waive their power to agree and mutually decide on the subject of dispute and subordinate themselves to the select tribunal, which in turn acquires authority and responsibility over the parties and the situation in which they have placed themselves. Indeed, when before a tribunal, parties are exempt from the need to directly communicate and spend the necessary intellectual and emotional resources on the personal interaction required for an internalized decision process, but it is their subordination that ultimately weakens them towards themselves and each other. This weakening of the parties can be tolerated so long as the tribunal supplies an outcome that is acceptable, leading to the preference of externalized decision for dispute resolution over that of internalized decision. In layman's terms, this could be considered "trusting the system."

When resolving a dispute, it is only natural and expected that the ruled-against party/parties are unhappy with the outcome and

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this should not, in itself, hinder the status of externalized decision as a preferred dispute resolution mechanism. But what if the tribunal's outcome leaves the party in whose favor the ruling was made unhappy as well? This would constitute a breach of trust between the tribunal and all parties, undermining their justification for externalized decision. Should this occur repeatedly on a large scale, the social basis for externalized decision would be jeopardized, giving rise to alternative mechanisms for dispute resolution. Apparently, such a large scale breach of trust between modern western societies and their legal systems has indeed occurred during the past few decades, inevitably leading to the birth of various forms of Alternative Dispute Resolution (ADR).

The impetus behind the rising of ADR is the failure of the legal system to fulfill its function as an efficient and effective dispute resolution mechanism in the growing and ever-developing modern world. Primarily, the legal system became much more accessible, causing a great increase in the number of disputes and volume of proceedings. However, the system itself grew at too slow a rate to keep up with this increase and thus lost its ability to adequately handle and resolve these disputes in a timely and reasonable manner. The resulting lengthy proceedings and lateness in the resolution of disputes led parties to search for a more efficient mechanism. As for the proceedings themselves, many people became alienated by them since they allowed people no opportunity to express themselves, let alone facilitate the emotional aspect of their dispute, which is in many cases the main aspect. By focusing on cold hard facts alone and excluding emotions, regardless of how meaningful they may have been to the parties, the legal proceeding ends up lacking emotional closure and leaves the parties with an inability to move on, let alone reconcile. This is true for almost all parties, regardless of their subjective views on the practical outcome.

This personal/emotional limitation of legal proceedings was further characterized by their general tendency to be retrospective without properly considering future implications of a resolved dispute. This kept the parties "stuck" in the past, dwelling over negative aspects of a dispute, unable to look into positive future prospects and plan ahead. It might be said that the legal proceeding posed a pathological approach to dispute resolution while parties were yearning for a constructive approach, a healing rather than a dissection. This problem became acute enough that the legal system itself began over-developing the pretrial stage of the

civil claim, allowing the tribunal itself to attempt an informal constructive approach to resolve the dispute before entering the rigid frame of civil procedure. Still, ironically, it is common enough for a judge to send the parties out of the room so that they may "talk it out" and settle the dispute by direct interaction, which is deemed inappropriate for a court of law. Such dynamics deepened the breach of trust with the legal system.

Understanding this background, it is naturally perceived how current ADR principles, mainly implemented in the mediation process, took shape. Consider the classic seven-stage mediation model: (i) opening statements; (ii) dispute presentation; (iii) intermediate summary; (iv) identification of subjects and interests; (v) creation of options; (vi) option evaluation; and (vii) drafting of agreement. This is a distinctively prospective process, which focuses mostly on how the parties themselves perceive their part in the dispute at hand and how they envision the future in light of its desired resolution. Rather than focusing on the precise, seemingly objective, retrospective ruling on facts as a base for external decision on fault and its consequences, this model gives priority to subjective perception, thought, belief and emotion as a base for prospective creativity of the parties themselves towards a desired productive internal decision, taking into consideration each one of the involved parties' interests and goals.

ADR, by being attentive to parties' subjective positions and validating their emotions, both elements considered integral to the factual basis of the dispute, offers the parties an empowering experience. It should be reiterated that emotions are indeed factual in a process where trust is substantial. Also, as simple as it may seem, the importance of attention, as an empowering agent, cannot be over-emphasized. This empowerment allows the parties to critically grasp the dispute from a balanced point of view and thus places each of them in a position from which they can take responsibility for the situation they are in and returns control over the outcome of the dispute into their hands, should they choose to take it.

A crucial element of ADR is the lack of authority of the process director, i.e. the mediator, over the parties. One of the first things clarified during the opening statements is that the parties' volition, and that alone, keeps them in the process and can bring them to finalize an agreement and commit to its execution. Not only is there no chance to force a decision upon a party, but also parties are not even obliged to remain in the process any longer than they wish to, and so the parties are not intimidated by the

mediator or the process. This extreme level of freedom induces a much needed peace of mind for the parties, ultimately leading them to trust the mediator and the process and hopefully be in a position to eventually trust each other. This comfort zone also helps the parties step out of their offensive/defensive positions and ease into a lucid and reflective mode that is necessary for the recognition of their own responsibility over the situation and the ultimate understanding that it is not only in their interest but also in their hands to resolve it.

In the context of gaining the parties' trust and maintaining it throughout the process, it should be stressed that ADR, when properly conducted, should not be suggestive, i.e. the mediator should refrain from presenting the parties with possible resolutions to their dispute. It is very important that the parties place themselves in a position of responsibility and create their own solutions, thus maximizing the probability of their long-term success, since no one can really comprehend what is best for the parties better than the parties themselves. Furthermore, the slightest insensitivity or carelessness on the mediator's part in presenting an optional resolution could result in a breach of trust with some or all of the parties.

Considering all the above, one might mistake the mediator for a therapist or a social worker, or just a "good-listener". It should be stressed that ADR is first and foremost an efficient and effective dispute resolution mechanism, not a therapeutic process. Based on the phrase "it's not what you say, it's how you say it," ADR supplies a very practical method for the parties to find the best solutions for them under their given specific circumstances, all within a controlled and reasonable timeframe.

It may be said that ADR does not actually resolve the dispute for the parties but rather hosts a nurturing process in which the parties themselves are given tools, first and foremost the regaining of balance, to achieve resolution on their own and enjoy a wide variety of positive side effects that will heighten the probability of long-term success of the resolution. ADR simply supplies the proper conditions in which the parties can supply the best resolution for their disputes.

ADR — Appropriate Disaster Recovery

The human dynamics common to most disputes, their emergence and resolution, are brought to extremes in times of disaster and require special consideration.

Humans are struck by disasters of various natures: natural and man-made; personal, local, national and international; foreseen and surprising; damaging to property and life-threatening; economical, medical, political and humane, etc. To a certain extent, all disasters are distinct in that they rob the inflicted persons of their control over basic aspects in their life. Disaster related loss of control has a profound effect on human behavior, throwing people off balance and into severe mental states such as "shock" or "survival mode" where all they can manage, if anything, is to deal with their basic needs, as directed and motivated by their primary instincts. When inflicted by disaster, a people show a strong tendency to deal with immediate concerns that are "here and now" and commit little, if any, resources towards future prospects. Furthermore, some disasters are so colossal and detrimental to human life or property, that the inflicted persons lose the ability to grasp the disaster itself or comprehend its scale. This is sometimes known as the "survivor effect."

Being in this acute state, the survivor has low levels of emotional resources required to deal with aspects of his life that are not essential for survival and so, for instance, has little or no capacity for constructive dispute resolution, the need for which tends to arise following a true disaster. Such disputes might take form between the survivors and their state or a foreign state, an airline or maritime company, an industrial or construction firm, or an insurance company of any of the above, and more. These disputes will often revolve around the various kinds of damage caused to the survivor, the liability of others for this damage and subsequently what would constitute adequate compensation, should the survivor be entitled to it.

The extremity of dispute resolution in disastrous situations has at least two inherent aspects. First, the sheer number of disputes requiring resolution poses a practical challenge to the system that hinders the quality of the process and might even render it virtually impractical. Second, being one of many in a similar situation, each survivor rightfully feels he is a part of a group and relates to his "disaster peers" and considers their specific resolutions as a reference point for his own, commonly doing so regardless of the special

circumstances of his own personal case and thus obstructing the ability to properly create and assess his own resolution options.

Considering the limitations that the legal system, with its current tools and resources, suffers from when dealing with its current case log, it seems obvious that any attempt to settle disaster-related disputes would be far from adequate, if not totally futile. Apart from the fact that the legal system could never complete the incredible volume of proceedings within a reasonable time span required for the rehabilitation of survivors, it lacks the basic tools required to deal with the plaintiffs' debilitating state, let alone to contain the large-scale emotional trauma caused to the group of survivors. Ultimately, litigation does not have the prospective ability to help the survivors regain balance and recreate their future.

ADR can be the mechanism needed to deal with this situation, first and foremost because it has the tools required to deal with the survivors in their special situation. As described above, giving the survivors attention and expressing empathy towards their situation can increase their emotional resources and help rebalance them so that they may function despite the disaster and regain their prospective abilities, necessary to plan ahead and ultimately recuperate. This is a crucial point, since when in "survival mode," survivors tend to lose capacity to take the required responsibility over the future course of their lives and make the proper decisions arising from the synthesis between logic and emotion, between heart and mind, the basis for consent as opposed to fear or confusion.

In order to appropriately recover from disaster, ADR requires several adjustments, both in principle and in practice. The fundamental element in ADR of having the parties take responsibility over the situation they are in, including how they reached that situation, must be carefully considered in light of an inevitable, true disaster, and the bona fide feelings of survivors that the sky simply "fell on them." Such feelings, apart from requiring large amounts of empathy, call for a shift from the aspiration to assume responsibility over the situation to an attempt to simply face the new reality upon which the future should be considered. Such a personal reality check of the present allows the survivors to eventually retake responsibility over their future, "get back in the driver's seat" and rebalance their lives.

Once he acknowledges reality and is able to come to terms with it, the survivor can state to relate to the ADR agent who must be presented and perceived as a neutral element, and who, al-

though sent by "the system," is not its representative but rather an independent agent who bears essentials required for the survivor to make a fresh start.

This independent identity of the mediator is especially important in light of the great difficulty the survivors have to identify, locate and confront who is liable for their disaster. In such a case, the survivors are required to deal with "the system," represented by the state, social security elements, insurance companies, et cetera, and the mediator must position himself between these two very distinct entities and attempt to understand the survivors' needs and requirements for rehabilitation.

Having defined the survivors' needs, it is now the mediator's job to bring them to abandon deliberations of past events such as damage assessment and turn their attention and focus towards the future and the required measures to be taken in their best interest, all in a realistic timeframe.

On the practical level, it is important that ADR agents perform strict reality checks for the proposed resolutions and lay out detailed plans for an efficient follow up on the execution thereof. This is due to the dangers of over-empathizing with the survivors, what might lead to careless and unrealistic resolutions that harbor the risk of not being upheld; ultimately causing a breach of trust with the worst possible implications, considering the delicate state of survivors.

The Gaza Eviction Disaster Recovery

Having decided to physically and politically disengage from the Gaza strip, the Israeli government issued a general eviction notice to all 8700 Israeli citizens settled in several points throughout the designated area of disengagement, doing so approximately one year in advance. For the Gaza residents, this eviction notice was a disaster–on a personal level, people were about to be forced to leave the home of many years; politically, idealists felt deeply betrayed by the government (that most of them voted for) of the country that sent them to this area many years ago with a mission to guard the homeland; economically, successful businesses were destined for liquidation.

While the eviction notice resounded throughout the country, causing a fierce political stir, it was the Gaza strip residents that were faced with its immediate consequences.

For them, it was a disaster about to happen, literally. Appointed to face the settlers was an *ad hoc* panel lead by Yonatan Basi, which succeeded in convincing seventy percent of the residents to leave the Gaza strip in return for monetary compensation and various statements of obligation to relocate and resettle whole families and even whole settlements. The strategy utilized by Basi and his team was to focus on "the day after" the eviction and the future to come, trying to get the settlers past the emotional resistance and into practical cooperation and consent.

The Gaza disengagement failed as an ADR attempt for two main reasons.

First, Yonatan Basi, the ADR agent in this case was never deemed trustworthy by the settlers and was constantly perceived as a messenger of the traitorous government. Basi failed to form an independent identity for himself as a true mediator and thus hindered his ability to shift the attention and focus of the survivors-to-be from dealing with the disaster itself to considering future prospects. This ruled out any chance for a trust-based process and there is evidence that interaction with the settlers was largely based on fear and suspicion.

Second, seemingly in an attempt to "smooth the process," promises were made and obligations were obtained that were obviously not realistic and were greatly not upheld, inevitably leading to a severe breach of trust and acute suspicion and disbelief. A much more strict evaluation of options could have prevented this but it seems that this failure can be viewed as a direct result of the ADR agent himself.

Added to this was a very fluid, almost non-existent follow up mechanism which ultimately left many people unattended, causing yet more suspicion and mistrust. The negative effects of this quasi-ADR failure are far from diminishing and it seems that this breach of trust might have gone beyond repair for many of the disputing settlers.

Prospects and Suggestions

Beginning to understand the challenges of dealing with disaster recovery and the requirements from the mediators involved, we now can modify the ADR processes accordingly. Considering that, when properly implemented, ADR in general and mediation in particular is a practical, efficient and effective process, the method

and its tools should be compatible to large-scale post-traumatic situations. For instance, who are we dealing with? What is the smallest surviving organic unit in need? Is it a person, family, building, neighborhood, community, et cetera? How do we decide which ADR process, if any, is appropriate for this given surviving unit? How do we identify the appropriate representative to deal with? Locating the person who has the mandate required to reach the best possible solution for the largest amount of survivors can help maximize the efficiency of the process as well as its effectiveness. During the process, how to we check whether the representative has the ongoing ability to maintain the required responsibility or whether there is a need to involve additional persons? How do we create interim agreements as trust-building steps in the process and identify opportunities for shifting to positive, future-oriented thinking? In order to minimize possible disappointments and breach of trust – how do we accommodate the survivors' needs within the given Zone Of Possible Agreement (ZOPA), maintaining the mediator's neutrality while keeping in touch with the relevant authority?

Deliberating these questions, and probably many more, will promote, construct and hopefully provide the best suited Appropriate Disaster Recovery method. Seeing the world today, what it has become and where it is going, should clearly urge us to confront and deal with the challenge of developing those tools and methods.

Author's Note

This article is based on the author's personal knowledge and experience as a mediator and crisis negotiator, dealing with various disaster-management situations. Some of the terms in this article are taken from the field of therapy and should be perceived literally and not in their original professional context.