COMPARING MEDIATION PRACTICE IN NIGERIA WITH THOSE OF SOME SELECTED JURISDICTIONS: NEED FOR A NEW LEGAL REGIME FOR NIGERIA*

Abstract

Mediation is a form of dispute resolution through which a third party assist parties in achieving an amicable settlement of their dispute. This form of dispute resolution is not only of a very ancient origin but also exists in perhaps, every culture and every country. The Arbitration and Mediation Act 2023 was designed to spur Mediation Practice in Nigeria. However, the Act failed to release fully its potential by not paying attention to other jurisdictions to see how their own Mediation Act fits in and cures the mischief in their locality as so doing would have engendered a national framework that is fit for purpose. Using the doctrinal method of inquiry with a comparative approach, this paper explores Mediation practice in the Singapore, South Africa, United Kingdom and Kenya jurisdictions. It finds extending the ambits of the Act outside commercial dispute is a desideratum. Specifically, the integration of Mediation practice into certain Criminal matters, Electoral causes, Matrimonial causes, and most importantly, Mediation conducted by traditional rulers and institutions as done in the jurisdictions compared in this work, is not only a response to Nigeria's peculiar legal and cultural nuances but also a major leap in finding lasting solutions to the many ills plaguing the Nigeria justice system. The instant paper recommends a careful integration of the practice in these other jurisdictions as the only way to formulate a new national framework for mediation fit for purpose in Nigeria.

Keywords: Mediation Practice, Nigeria, South Africa, Singapore, United Kingdom, Kenya

Introduction

Mediation as a form of dispute resolution is an ancient practice through which parties to dispute find a solution to their problems. Wherever there is friction, people have included seeking a third-party intervention, to help resolve the dispute to avoid escalation. According to Obi Farinde,[1] there are four hierarchically related traditional/native ways of resolution of disputes in Nigeria. These methods of resolution of disputes are found in all the major cultures in Nigeria. Parties try to resolve disputes themselves as the first option and this is what we now know as negotiation. They seek assistance from their kinsmen, mutual friends or significant persons of their choice, this is mediation. If that fails, the dispute is taken to the Headman of the defendant's neighbourhood; what is now known as 'neutral evaluation'. As a final resort, the matter is then taken to the High Chief or King for a binding decision and this is now known as arbitration.[2] Ajayi and Buhari agree with the above classifications and submit these traditional means of dispute resolution offered parties the opportunity to interact with one another, promoted consensus-building, enabled social bridge reconstructions and restored order in the society. [3] The enactment of the Arbitration and Mediation Act 2023 was to become a watershed for mediation practice in Nigeria but for its failure to extend the scope of Mediation to address matrimonial, electoral and other customary nuances inherent in Nigeria's justice system. Through a comparative study, this work shows that such extension is not only possible but desirable. In the progress of this paper, Nigeria and four other jurisdictions namely, Singapore, South Africa, the United Kingdom and Kenya will be explored and examined. Furthermore, the specific contentious areas calling for urgent integration these nations have successfully addressed will be highlighted. The paper ends with a few recommendations calling for such integration as the only way to birth a national framework capable of adding value to Nigeria's jurisprudence.

2. Mediation Practice in Nigeria

Mediation practice is probably the oldest form of dispute resolution mechanism not only in Nigeria but around the globe. In Nigeria, Mediation existed as an integral part of the dispute resolution mechanisms largely practiced informally. In traditional settings, Mediation is promoted by traditional institutions such as community leaders, heads of families, town union authorities, market union leaders, age grades and other institutions including friends clubs. In religious settings, it is promoted by heads of religious institutions and organizations and in business settings, it is championed by business leaders and even government agencies to ensure social cohesion and promote economic growth.

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[1] M Obi-Farinde, 'The Growth of Mediation in Nigeria' (2021) Available Online at: https://mediate.com/the-growth-of-mediation-in-nigeria/#_ftn5. Accessed on 2 July 2024.

[2] See also K Aina, *Commercial Mediation: Enhancing Economic Growth and the Courts in Africa* (Lagos: NCMG International and Aina Blankson LP, 2012) p. 11

[3] AT Ajayi and LO Buhari, 'Methods of Conflict Resolution in African Traditional Society' (2014) 8:2 *African Research Review.* Available Online at: https://www.researchgate.net/publication/290233437_Methods_of_Conflict_Resolution_in_African_Traditional_Society. Accessed on 20 July 2024.

However, over time, mediation institutions started springing up as a result of globalization. These institutions started developing rules of mediation to guide their members and formalize mediation practice. Some of these institutions include the Chartered Institute of Arbitrators, the Institute of Chartered Mediators and Conciliators, the Mediation Training Institute and a host of others. In all of those, there is no legal framework for the enforcement of mediation settlement agreements. Some laws such as the Criminal Code Act,[4] the Matrimonial Causes Act[5] and Electoral Act[6]. Yet, under this harsh political landscape, mediation continues to grow. Mediation settlement agreements were seen as gentlemanly agreements in most cases such that there is no single reported case on the propriety or otherwise of the mediation settlement agreement. Where any party refuse to keep to the terms of the agreement the other party simply files a suit and may seek to enforce the agreement as a contract.

Respite, however, came with the enactment of the Arbitration and Mediation Act 2023. The Act in a significant manner revolutionized and institutionalized the practice of mediation in Nigeria such that five major kinds of mediation now exist in Nigeria viz:-

a. Customary mediation
b. Mediation under the Act
c. Mediation laws of various states
d. Court annexed Mediation
e. International Mediation (Mediation under the Singapore Convention).

While customary mediation which is one administered by traditional institutions is not recognized under the Act but covers all manner of disputes, the Mediation conducted under the Act is enforceable but relates only to commercial disputes thereby excluding all other types of disputes such as tenancy matters, chieftaincy matters, land matters and even nuisance. However, some states have mediation laws. These laws,[7] where they exist, gave omnibus jurisdiction to the Centre[8] to handle any subject matter the Courts in the State have jurisdiction over,[9] and mediation settlement agreements emanating from mediation conducted under those laws are enforceable as a judgement of the court just like one from Mediation under the Act. The Court Annexed ADR/Mediation is a deliberate response by various states to provide alternative dispute resolution and ensure that matters not suited for litigation are resolved through other methods. In this wise, the High Courts of various states have provisions in their laws and rules, which enable them to facilitate the settlement of disputes. States with Multi-Door Court Houses either have separate rules for ADR[10] and/or have ADR/Mediation provisions contained in its rules.[11] International Mediation, on its part, relates to the enforcement of mediation conducted in respect of transactions that are international under the Singapore Convention.[12] Since the Arbitration and Mediation Act 2023 which created both mediation under the Act and International Mediation are barely one year old, one can only wait and see how it coexists with customary mediation and mediation under the laws of various states in Nigeria.

3. Mediation Practice in Singapore

It is no longer news that Singapore is the most popular seat of Arbitration in Asia and the third most popular seat of Arbitration in the whole world.[13] It is also common knowledge that the United Nations Convention on International Settlement Agreements Resulting from Mediation is generally called the Singapore Convention[14] having been approved and adopted by the United Nations General Assembly through Resolution 73/198 and was opened for signature in a ceremony hosted by the Government of Singapore on 7 August 2019.[15] It will not therefore be surprising that a nation with this enormous interest in other dispute resolution mechanisms outside litigation will be, perhaps, one of the first

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[4] See section 127 of the Criminal Code, Nigeria
[5] See ss. 25 and 25 of the Matrimonial Causes Act 1970
[6] See paragraph 30(b) of the 1st Schedule to the Electoral Act 2022.
[7] The Anambra State Mediation law is contained in a law called The Anambra State Citizen's Right Directorate Law 2008 while the Enugu State Mediation law is contained in the Enugu State Citizens' Rights and Mediation Centre Law 2004.
[8] This refers to the centre created under the aforementioned laws (Citizen's Right Directorate Law 2008 and Citizens' Rights and Mediation Centre Law 2004 respectively).
[9] See s. 5 of the Anambra State Citizen's Right Directorate Law 2008.
[10]States like Anambra, Akwa Ibom, Delta and Lagos States have elaborate Multi-Door Court House Rules separate from their High Court Rules.
[11] States like Imo, Benue, Nasarawa, Ebonyi etc. have Mediation/ADR provisions contained in their High Court Rules.
[12] See s. 87 of the Arbitration and Mediation Act 2023.
[13]*See the Queen Mary University of London Website. 2018 Queen Mary University of London International Arbitration Survey, A*vailable Online at <http://www.arbitration.qm ul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration. PDF> Last accessed on 3 June 2021.
[14] See the Convention Website: https://www.singaporeconvention.org/. Accessed on 3 May 2022.
[15]C Bárbara & F Fernandes, 'History and general background of the Singapore Convention', Available Online at:https://drf.novalaw.unl.pt/history-and-general-background-of-the-singapore-convention/. Accessed on 3 July 2024.

countries in the world to have a robust Mediation Act as far back as 2017. The law is not only clear but contains certain provisions worthy of emulation.

In the first place, the Act set out 'to promote, encourage and facilitate the resolution of disputes by mediation and for connected purposes[16] without limiting its operation to commercial disputes only like the Nigerian Arbitration and Mediation Act 2023. As such, all disputes can be submitted to mediation unless it is contrary to public policy.[17] This implies that a mediation panel shall have jurisdiction to deal with all sorts of matters, be it civil or criminal.[18] However, a Court may refuse to record, that is enforce, a mediation settlement agreement if

> the agreement is void or voidable because of incapacity, fraud, misrepresentation, duress, coercion, mistake or any other ground for invalidating a contract; (b) the subject matter of the agreement is not capable of settlement; (c) any term of the agreement is not capable of enforcement as an order of court; (d) where the subject matter of the dispute to which the agreement relates involves the welfare or custody of a child, one or more of the terms of the agreement is not in the best interest of the child. [19]

With regards to matrimonial courses, there is an elaborate provision contained in the Act for it.[20] Family Justice Rules, made pursuant to s. 46 of the Family Justice Act 2014, applies to regulate proceedings and ensure that mediation is compulsorily conducted where a matrimonial dispute has anything to do with the interest of a child.[21] Praising this development, Chan remarked that families with children under the age of 21 have to attend mediation which focuses on child arrangement and parenting issues and that the practice has integrated mediation with the Family Justice Courts (FJC) in Singapore in a manner that facilitate cooperation and communication between parties, rather than merely provide a place for families to litigate.[22]

Before these laws came to be, Singapore had as far back as 1997 established what is now known as the Community Mediation Centre where disputes among family, relatives, neighbours, disputes between stall holders, shop owners, landlord and tenant issues are resolved.[23] In this centre, the traditional institutions or community leaders receive training and support to resolve disputes. These members of traditional institutions or community leaders, work under the supervision of the Ministry of Law.[24] Because this centre is designed to handle minor disputes between community members to ensure social cohesion, the centre refers typical commercial disputes, family violence and other criminal matters to the ministry while still referring the matter to mediation done by a professional if the subject matter of the agreement is capable of settlement'.[25]

One may be tempted to think that 'the subject matter of the agreement is not capable of settlement' refers to something extraneous or specifically, criminal matters where offences like compounding felonies prohibit settlements. However, that is not the case here. Perhaps, Singapore is the only jurisdiction with clear provisions on compounding of offences. The act of settlement of a charge without entering a conviction is popularly known as composition in Singapore. Composition works this way: an accused person, either in person or through his lawyer, with the consent of the prosecutor, approaches the victim and offers to make a monetary compensation and apology to the victim. In another instance, a public prosecutor, drawing from its powers to compound offences, can collect from an accused person a sum of money, which shall not exceed one-half of the amount of the maximum fine that is prescribed for the offence or 5000 dollars whichever is lower. Where this is accepted, it effectively terminates the legal proceeding against the offender and he *ipso facto*, becomes entitled to an order of acquittal. Remarkably, the Singapore Criminal Procedure Code (CPC) in its 4th schedule as well as sections 241 and 242 provide for the compounding of offences.[26] One would have expected that compounding offences would result in high crime rates which is one of the strongest public policy arguments against

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[16] See preamble to the Mediation Act, 2017

[17] See s. 11(a) of the International Arbitration (Amendment) Act, 2020.

[18] P Aston & S Meiklejoin, 'Singapore: International Arbitration Laws and Regulations 2020', Available Online at: https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/singapore. Last accessed on 3 June 2021.

[19] S.12 (4) of the Mediation Act 2017.

[20] See s. 14 of the Mediation Act 2017.

[21] See paras 11(2) and 12 (4) of the Family Justice Courts Practice Directions 2015 read in conjunction with s. 50(1) of the Women's Charter (Cap 353, 2009 Rev Ed) and R 26(9) of the Family Justice Rule 2014. For a detailed discussion on this see also LV Chan Chu Kit, 'Divorce Mediation in Singapore: Bringing the Voice of the Child to the Table', (2018) Available Online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787257. Accessed on 20 July 2024.

[22] LV Chan Chu Kit, 'Divorce Mediation in Singapore: Bringing the Voice of the Child to the Table', (2018) Available Online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787257. Accessed on 20 July 2024.

[23] See Community Mediation Center Act (Cap. 49A), 1998.

[24] For a detailed discussion on the operations of the Community Mediation Centre in Singapore, see HBA Khan, 'Community Mediation in Malaysia: A Comparison Between Rukun Tetangga and Community Mediation in Singapore' (2013) 3:3 *Journal of Literature and Art Studies*, pp. 180 - 195

[25] See S.12(4) of the Mediation Act 2017

[26] See also *PML (Nigeria) Limited v Federal Republic of Nigeria* (2018)7 NWLR (pt. 1619) 485.

arbitrability. Paradoxically, Singapore has the lowest crime rate, the world over. For Reynolds, this low crime rate is thanks to the large latitude given to prosecutors to have all the parties to an offence participate in the resolution of the dispute in the interest of the community.[27]

There are a few more takeaways from Singapore which directly impacts the development of Mediation in that jurisdiction. One is intentionality. The Mediation Act enacted in 2017 has been updated three times between 2017 and 2024.[28] The second is funding. Apart from hosting the Singapore Convention on Mediation, Singapore Convention Week has been organized and hosted every year since 2019 in Singapore to serve as a key platform for thought leaders, experts, practitioners and policymakers, to discuss emerging trends, address common issues, deliberate on innovations, and drive change.[29]Finally, the Singapore Act placed premium attention on the qualification of a mediator. For the court to recognize and enforce a mediation settlement agreement, it must emanate from a mediation conducted by a certified mediator[30] and the law charges the Minister with the responsibility of overseeing accreditation and certification processes.[31] There are concerns that a mediator without skills may not respect the legal safeguards designed to ensure a fair process. Many are worried that the cloak of confidentiality the mediation processes enjoy may lead to abuse but with appropriate training and qualifications, these concerns may well be alleviated.

4. Mediation Practice in South Africa

In 2014, the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa were amended[32] to regulate the referral of opposed matters and the conduct of mediation. Rule 71 stipulates that the main purposes of mediation, are, inter alia, to promote access to justice, promote restorative justice and preserve relationships between litigants. This declaration betrays a national mindset poised to institutionalize mediation as a way to promote access to justice. Although mediation is still voluntary in South Africa, the rule provides that once the intention to defend a matter is evinced, mediation ensues.[33] The case is not any different in the High Court where the Uniform Rules of Court requires that Mediation be considered seriously before litigation is explored. In this wise, a Plaintiff or applicant is required to serve along with his summons or motion, on each party to the action, a notice of his intention to commit or not commit to exploring mediation. [34] However, this choice of whether to mediate or not to mediate does not apply to matrimonial disputes where the interest of a child is involved.[35] In a number of decisions[36] where a child is involved, the Courts have consistently maintained that a greater satisfactory justice outcome is achieved in using mediation to determine the future. Unfortunately, the Nigerian legislation does not have any such provision.

A beautiful provision in the Mediation rules of South Africa is the time frame for mediation. Rule 41(a) stipulates that where the parties agree, Mediation must be completed within 30 days from the date of agreement to submit to mediation. Unfortunately, there is no such provision in the Nigerian provision. The 30-day rule is to ensure that Mediation proceedings do not by themselves constitute another source of delay, where it is unsuccessful. In Nigeria, a debtor who wants to delay payment may elect to submit to mediation and get the process to last for as long as he wants, employing any form of delay tactics since 73 and 78 of the Arbitration and Mediation Act 2023 do not provide for such timeframe.[37] Furthermore, the Children’s Act of South Africa[38] contain a vital provision addressing one of the major planks of concern in this work. It is a recognition of the existence and role of traditional institutions in resolving disputes even if the matter is already in Court. The Act provides thus: ‘The children's court may, where circumstances permit, refer a matter brought or referred to a children's court to any appropriate lay forum, including a traditional authority, in an attempt to settle the matter by way of mediation out of court’.[39]

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[27]Z Reynolds, ‘Intertwining Public Morality, Prosecutorial Discretion, and Punishment: Low Crime and Convictions in Singapore’, (2017) *Chicago Unbound International Immersion Program Papers*, available online at <https://chicagounbound-uchicago-edu.ezproxy.wlv.ac.uk/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1060&context=international_immersion_program_papers> Last accessed on 3rd June 2021.

[28] There are amendments in 2019, 2020 and 2022. See https://sso.agc.gov.sg/Act/MA2017. Accessed on 20 July 2024.

[29] See Singapore Convention Week 2024. Available Online at: https://www.singaporeconvention.org/news-events/scweek24. Accessed on 20 July 2024.

[30] See s. 12(3)(a) of the Mediation Act 2017.

[31] See s. 7 of the Mediation Act 2017.

[32] Rule 183 of the Rules Board for Courts of Law (Act 107 of 1985) amendment of Rules Regulating the Conduct of Proceedings of the Magistrates’ Courts of South Africa GG 37448 of 18 March 2014.

[33] AE Boniface, Ibid.

[34] See Rule 41(A) of the Uniform Rules of Court of South Africa.

[35] See ss 21, 33(2), 49 and 71 of the Children's Rights Act 38 of 2005 of South Africa.

[36] See *G v G [2003] 5 SA 396 (ZH)* and *Townsend-Turner v Morrow [2004] 1 All SA 235(C)*

[37] See s. 73 and 78 of the Arbitration and Mediation Act 2023.

[38] Children’s Act 38 of 2005

[39] See S. 71 (1) of the Children’s Act 38 of 2005.

In subsection 2 however, the Act provides that in cases of abuse of a child, mediation will not be suitable. Paleker hails this derogation stating that 'the best interest of the child can never be served if an abuse or a sexual abuse case is referred to mediation'.[40] Other authorities agree that mediation may be the best for the child in ensuring that when the child is already between 6 and 12[41] he is heard.[42] However, Nigerians are not eligible to participate in this debate as our Arbitration and Mediation Act 2023 is bereft of the basic provisions, first recognizing the use of Mediation in matrimonial action and two, recognizing the importance of defining a role for traditional institutions and delineating territory for community mediation which South Africa have entrenched. The beauty of this provision is that the South African legislation did not shy away from recognizing that mediation has now come in two shades.

Discussing Mediation development in South Africa, Boniface made a remarkable observation noting that mediation has now come in two shades: African style and Western style.[43] While the African style is that mediation is conducted by traditional institutions where the mediator is not necessarily aloof from the dispute, the Western mediation is designed to discard Mediation's original social context and re-engineer a slant of Mediation suited to the needs of industrialized urban societies.[44] For Boniface,

> Ubuntu-style values are found in African-style mediation as the restoration of harmony is more important than stating the rule of law and the essence of resolving a dispute is reconciliation. The nature of the proceedings is informal and flexible and this allows participants to feel that justice has been done and leads to social harmony.[45]

Boniface,[46] Skelton,[47] and Briggs[48] all share a hope for a confluence of both African-style and Western-style Mediation. They share the belief that if the end of justice is to engender a harmonious coexistence that promotes peace and progress, then both shades of mediation have something to offer. For instance, African-style mediation may learn the benefits of training to equip 21st-century mediators better to handle conflicts that are peculiar to this age. In family mediation, a little more empathy, and a little more personal involvement with the social context of the dispute may be learnt from the African style by the Western style to ensure that parties resolve on terms that will be adjudged as fair to all concerned.

5. Mediation Practice in the United Kingdom.

Although Mediation has become entrenched and fully integrated into the civil justice system (CJS) in the United Kingdom, there is no single legislation integrating it as seen in other jurisdictions. The integration of mediation into the CJS was therefore a creation of the common law done gradually over time. The following factors are the chief drivers of mediation development in the United Kingdom: (a) the Woolf's report (b) the Civil Procedure Rules (c) the attitudes of judges as seen in the development of some case laws (d) the government policies and (e) activities of mediation institutes. We shall explore these anon. The Wolf's report of 1999, widely adjudged as 'the most radical programme for the modernisation of the civil justice system in England and Wales for 120 years'[49] in its conclusion stated that the Courts should be used only as a last resort. In this wise, it made two key recommendations. One is that courts should have the power to direct the parties in a dispute to attempt mediation. Secondly, the court could deny the cost to a party who unreasonably refused to attempt mediation.[50] This recommendation is reflected in the Civil Procedure Rules which creates an overriding objective for courts to deal justly with cases by using active case management, which includes encouraging and assisting the parties in the use of ADR in appropriate cases'.[51]

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[40] M Paleker, 'Mediation in South Africa's New Children's Act: A Pyrrhic Victory' (2008) *Asia-Pacific Mediation Forum Conference.* Available Online at: https://www.asiapacificmediationforum.org/resources/2008/7-Mohamed_Paleker.pdf. Accessed on 2 August 2024

[41] LV Chan Chu Kit, 'Divorce Mediation in Singapore: Bringing the Voice of the Child to the Table', (2018) Available Online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787257. Accessed on 20 July 2024.

[42] JM Lowry 'Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases' (1997) 31 Univ Mich J L Reform, 69.

[43] AE Boniface, 'Family mediation in South Africa: Developments and Recommendations', (2015) 78 *Journal of Contemporary Roman-Dutch Law.* Available Online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714802/ Accessed on 1 August 2024.

[44] See J Faris, 'From alternative dispute resolution to African dispute resolution: Towards a new vision' cited in AE Boniface, Ibid.

[45] AE Boniface, Ibid.

[46] AE Boniface, Ibid.

[47] A Skelton 'Family group conferencing in the proposed Child Justice Bill: Implications for the child care system' in Sloth-Nielsen and Du Toit (eds) Trials and tribulations, trends and triumphs: Developments in international, African and South African child and family law (2005) 175–187.

[48] J Brigg, 'Mediation, Power and Cultural Difference' (2003) *CRQ* 287–306.

[49] A Brady, 'Mediation Developments in Civil and Commercial Matters within the European Union' [2009] 75 *Arbitration, p.390*-399.

[50] Ibid.

[51] P Brooker and A Lavers, 'Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom (2005) 5 *Pepperdine Dispute Resolution Law Journal.* Available Online at: <http://digitalcommons.pepperdine.edu/drlj/vol5/iss2/1> Accessed 20 October 2022. It does appear that this overriding objective has now been more elegantly worded as, 'to promote the use of alternative dispute resolution'. See Civil Procedure (Amendment No. 3)

After the rules were made, the judges were unsure how to treat this provision in other to entrench Mediation. In *Cowl v Plymouth City Council*[52] determined by Lord Woolf himself, he warned that 'over-judicialising' which was part of a litigation culture has to give way. He further advised the parties on the need to embrace Mediation which meets the 'needs of the parties and the public and saves time, expense and stress'.[53] In *Dunnet v Railtrack*[54] which followed, Lord Brooke stated that failure to try mediation, especially, when suggested by the court would be followed by some uncomfortable cost consequences. He went further to commission lawyers to 'warn' their clients accordingly. Lord Blackburne in *Shirayama Shokusan Co Ltd v Danovo Ltd*[55] after *Dunnet* took the matter further. He warned that even if a party considered their case as a water-tight legal issue, they are bound to attempt mediation, especially if the court has recommended it. Many people wondered if this implied compulsory mediation. Justice Lightman in *Hurst v Leeming*,[56] however, said it does not. He clarified that compulsory mediation[57] has no place in the CJS. Lord Justice Dyson in *Halsey v Milton Keynes*[58] said compulsory mediation would fetter to a right to access to justice' and consequently violate fundamental human rights (Art.6).[59] Unfortunately, this reason has been both widely criticised and also subsequently clarified by the European Court.[60]EU further issued a directive which recognised and approved the possibility of compulsory mediation.[61] Mediation proponents faulted this. Scholars however agreed with Lord Dyson that compulsory mediation can add to the general cost of litigation[62] and can even affect the quality of the agreement so adversely.[63]

There were insinuations that the decision of the Court of Appeal in *Halsey* casts a slur on the court's power to order mediation. As would be expected, this near affront on the power to refer to mediation was resisted and defended by other senior judges.[64] One person was the Master of Rolls at that time, Sir Anthony Clarke - who unequivocally called for complete integration of ADR into the CJS and also wanted mediation to be part of civil justice culture as 'our second nature.'[65] He argued that it is a pessimistic reading of *Halsey* to understand that it ruled against court-ordered mediation. For him, the discussion on that subject was simply an *obiter dictum*.[66] Yet, evidence abounds that after *Halsey*, the courts have been unwilling after *Halsey* to mandate unwilling parties to use mediation.[67]

Remarkably, Sir Alan Ward, who was one of the judges in *Halsey*, said in *Wright* v *Michael Wright* that it would take a 'bold judge' to take a fresh look at *Halsey*.[68] 10 years later, such a 'bold judge' surfaced. In the recent decision of the Court of Appeal in *James Churchill v Merthyr Tydfil Borough Council*[69] the Court established that the courts can order parties to mediate or engage in some other form of alternative dispute resolution (ADR), thereby 'overturning what was thought to be a long-standing English law prohibition on courts compelling ADR.[70] Even before this recent decision of the Court of Appeal, the United Kingdom through its government policy recognizes the importance of Mediation in

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Rules 2024 and the 171st PD Update which will come into force on 1 October 2024. Available Online at: https://www.justice.gov.uk/courts/procedure-rules/civil. Accessed on 2 August 2024.

[52]*Cowl* v *Plymouth City Council* [2001] EWCA Civ 1935

[53]Ibid, Para.1

[54]*Dunnett* v *Railtrack* [2002] EWCA Civ 302

[55]*Shirayama Shokusan Co Ltd* v *Danovo Ltd* [2004] All ER (D) 442

[56]*Hurst* v *Leeming*[2002] EWHC 1051 Ch.

[57]D Pliener, 'At Last, Clarity for Mediation' [2004] 154 *NLJ* 878- 890.

[58]*Halsey* v *Milton Keynes General NHS Trust* [2004] EWCA 3006 Civ 576

[59]Article 6 of the Human Rights Act 1998 protects the right to a fair trial.

[60]*Rosalba Alassini* v *Telecom Italia SpA* (C-317/08)

[61]Article 3.2 of its Directive on Mediation that the encouragement it offers to mediation is made without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede the right of access to the judicial system. See the European Code of Conduct for Mediators and Directive 2008/52 on certain aspects of mediation in civil and commercial matters (the 2008 Directive)

[62]H Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24 *Yale JL & Human* 397- 418.

[63]Ibid.

[64] They included Sir Gavin Lightman, Lord Philips and Anthony Clarke among others. For details of their criticisms see P Beatie, 'Mediation and the Courts: Developments in 2008 and 2009' Available Online at <.http://www.google.co.uk/url?sa=t&rct=j&q=lord%20philips%20speech%20in%20india&source=web&cd=4&ved=0CEoQFjAD&url=http%3A%2F%2Fwww.saam.org.za%2Fuploads%2FRecent%2520developments%2520in%2520mediation.doc&ei=FYthUcykBY3APPiIgMAP&usg=AFQjCNFG2u05GT-CpVKkuF0PRoVEQ6aJmQ&bvm=bv.44770516,d.ZWU> accessed 15 April 2013.

[65]A Clarke, 'The future of Mediation' [2008] *The Second Civil Mediation Council National Conference.* Available Online <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr_mediation_conference_may08.pdf.> Accessed 7 February 2013.

[66] Ibid.

[67]*Rolf* v *De Guerin* [2011] EWCA Civ 78.

[68]*Wright* v *Michael Wright Supplies Ltd &Anor* [2013] EWCA Civ 234.

[69][2023] EWCA Civ 1416

[70]See 'UK Compulsory Mediation Ruling Still Leaves Courts Leeway' Available Online at: https://www.herbertsmithfreehills.com/notes/adr/2023-12/article-published-uk-compulsory-mediation-ruling-still-leaves-courts-leeway. Accessed on 2 August 2024.

improving access to justice and saving time, money and businesses. A country which prides itself as the most attractive international dispute resolution hub,[71] continuously search for ways to improve the use of mediation clearly and unambiguously. For example, the law office in the Ministry of Justice on its website outlined all manner of disputes where mediation applies including professional negligence, personal injury, breach of contract, money disputes, bankruptcy, wills and probate disputes, trust disputes, charities disputes, guardianship disputes, land or property disputes, landlord and tenant disputes, neighbour disputes, intellectual property disputes and defamation.[72] The office engages in periodic consultation with professional associations, legal practitioners, and academics from across the UK to ensure sync between the law and practice.[73]

Outside the civil matters, the United Kingdom practice mediation in family matters,[74] and certain criminal matters. As detailed in a commissioned study,[75] a greater utilitarian value proceeds from such criminal matters settled through mediation.[76] The conclusion from the study among other things is that 'victims and offenders who participated in mediation were more likely to have expressed satisfaction and a perception of fairness in the justice system's response to their case than victims and offenders who were referred to the programs but never participated'.[77] Of course, the practice of community mediation in the United Kingdom makes the neighbourhood safer and more positive.[78] In the United Kingdom, it is common for conflict to arise in the community between neighbours due to issues such as noise nuisance, anti-social behaviour, parking or boundary disputes, misunderstandings and breakdowns in communication.[79] In resolving these matters, the community groups and mediators do not bother if the said infractions constitute a crime or not but rather focus on restoring harmonious relationships among the people.

Finally, the role of mediation professional bodies such as the Chartered Institute of Arbitrators and the Centre for Effective Dispute Resolution in maintaining professional standards, training of their members and ensuring optimum quality of mediation practice cannot be over-emphasized. For example, quite recently, CEDR (The Centre for Effective Dispute Resolution) has undertaken a survey of the attitudes of civil and commercial mediators to a range of issues concerning their personal background, mediation practice and experience, professional standards and regulation, and priorities for the field over the coming years.[80] With initiatives such as this, real numbers from the field are gathered which enables all the parties including government, professional bodies, users of mediation and policymakers to optimize the use of mediation given its numerous benefits.

6. Mediation Practice in Kenya

There are several statutes which exist in Kenya to entrench Mediation practice in Kenya. The Constitution of Kenya, explicitly prompts courts and tribunals, exercising judicial authority, to promote resolution of disputes using reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[81] The Constitution further provides for the exploration of alternative dispute resolution mechanisms such as mediation and arbitration in settling inter-

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[71] See Government response to the Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation. (2023). Available Online at: https://www.gov.uk/government/consultations/the-singapore-convention-on-mediation/outcome/government-response-to-the-consultation-on-the-mediation. Accessed on 2 August 2024.

[72] See 'A Guide to Mediation',(2023) *Ministry of Justice Website*. Available at: https://www.gov.uk/guidance/a-guide-to-civil-mediation#what-kind-of-disputesare-suitable-for-mediation. Accessed on 2 August 2024.

[73] In the last two years, there have been more than 3 consultations on varying issues impacting on mediation practice. One is a consultation on the domestication of the Singapore Convention. The outcome of that exercise is also published for further input. There is another consultation going on to discuss how best to react to the Court of Appeal decision ordering mandatory mediation. For further details see the UK Ministry of Justice Website.

[74] For a detailed discussion on the role of the Family Mediation Council in the UK in the resolution of marital disputes see A Tan, 'Navigating Family Disputes with Sensitivity and Care: Mediation in Instances of Family Violence in the UK and EU' (2023) Available Online at SSRN: https://ssrn.com/abstract=4393093 or http://dx.doi.org/10.2139/ssrn.4393093. Accessed on 2 August 2024.

[75] The study was commissioned by the United States of America Department of Justice to conduct a study of victim/offender mediation involving four programs in the United States, four programs in Canada, and two projects in England.

[76] For a detailed discussion on this see MS Umbreit and AW Roberts, 'Mediation of Criminal Conflict in England: An Assessment of Services in Coventry and Leeds -- Executive Summary' (2006) Available Online at: https://www.ojp.gov/ncjrs/virtual-library/abstracts/mediation-criminal-conflict-england-assessment-services-coventry. Accessed on 2 August 2023

[77] Ibid.

[78] See 'Community Mediation Helping to Build Positive Communities'. Available Online at: https://www.scmc.sacro.org.uk/sites/default/files/resource/COMMUNITY%20MEDIATION%206.pdf. Accessed on 6 August 2024.

[79] See The Civil Mediation Council Website. Available Online at: https://civilmediation.org/community-mediation/. Accessed on 6 August 2024.

[80] See 'The Tenth Mediation Audit: A survey of Commercial Mediator Attitudes and Experience in the United Kingdom' (2023). Available Online at: https://www.cedr.com/wp-content/uploads/2023/02/Tenth-CEDR-Mediation-Audit-2023.pdf. Accessed on 10 July 2024.

[81] Article 159(2)(c) of the Constitution of Kenya 2010.

governmental disputes.[82] By a combined reading of Articles 47 on fair administrative justice, 48 on access to justice and 159(2) ADR processes are included in methods of dispute resolution of electoral disputes.[83]

In the bid to give effect to this Constitutional provision, both the Criminal and Civil procedures contain provisions promoting and integrating ADR and particularly Mediation into the Justice System of Kenya. In the Civil Justice system, the Civil Procedure Act [84] provides not only for the use of Mediation in the resolution of disputes but also establishes a Mediation Accreditation Committee tasked with training and certification mediators, maintaining of register of qualified mediators as well and enforcing a code of ethics for mediators.[85] Quite recently, the same Civil Procedure Act has been amended[86] to accommodate the newly introduced Mediation (Pilot Project) Rules 2015.[87] In the Criminal Justice system, on the other hand, the Criminal Procedure Code requests Courts to promote reconciliation and facilitate settlement not in all offences, but for common assault or any other offence of a personal or private nature not amounting to a felony.[88] However, the line may not be perfectly drawn between the nature of offences where mediation may be employed as the Victim Protection Act 2014 made as a response to the demands of The Constitution of Kenya (2010)[89] made no distinction between felony and non-felony in requiring for safeguarding of rights and well-being of victims of offences.[90] The Victim Protection Act demands that in appropriate cases, a restorative justice approach may be employed as a way of protecting the dignity of victims.[91] Of course, reference to restorative justice loosely translates to reference to Mediation as victim-offender mediation is, perhaps the longest-established approach to restorative justice.[92]

Furthermore, the law recognizes the use of Mediation in the settlement of labour disputes to the extent that exploration of mediation may be a condition precedent for adjudication of labour disputes before the Industrial Court.[93] In this wise, 7 sections in the Labour Relations Act contain provisions for Mediation and Conciliation giving a large latitude to the parties and the Minister to explore settlement using those mechanisms.[94] When it comes to matrimonial causes, the need to hear a child in matters that concern him[95] and the need to preserve the sanctity of marriages[96] make mediation a *sine qua non.* The Marriage Act of Kenya recognises the role of church leaders in Christian marriages, traditional institutions in customary marriages and civil marriages in ensuring that matrimonial disputes are resolved and makes attempting settlement through them a precondition for formal divorce.[97] Furthermore, there is a bill for a mutual-consent divorce waiting to become law so that marriages can be dissolved on a no-fault basis through mediation.[98] All these show how much premium, the public policy of Kenya places on non-rancorous divorce/family dispute resolution.

If the above provisions integrating mediation into the justice system of Kenya are not exceptionally significant, then the employment of Mediation in resolution of electoral dispute is, beyond doubt, both innovative and inspiring. The Elections Act 2011 of Kenya tasks the Independent Electoral and Boundaries Commission (IEBC) peace committees to use

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[82] See Article 189(4) of the Constitution of Keny*a* 2010.

[83] See Articles 48, 49 and 159 of the Constitution of Kenya 2010. For a more detailed discussion on this see K Karanja, The Role of Alternative Dispute Resolution in Solving Electorate Disputes: A Case Study of Electoral Justice in Kenya (2021) Available Online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841271. Accessed on 28 July 2024.

[84] Section 59(b) (1) Civil Procedure Act (Act No 3 of 1924).

[85] Section 59(a) (4) Civil Procedure Act (Act No 3 of 1924).

[86] See Section 59 (b) Civil Procedure Act (Act No 3 of 1924). See also the new Order 46 Rule 20 which promotes Mediation as any other appropriate means of dispute resolution (including mediation) for the means of attainment of the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act.

[87] For a detailed discussion on the Mediation (Pilot Project) Rules 2015. See KC Chepkurui, 'Mediation and the Resolution of Private Misdemeanours in Kenya' (2019) Published Thesis. Available Online at https://su-plus.strathmore.edu/bitstreams/f766d5a9-d7d8-4440-bb38-88e68efa3803/download. Accessed on 20 July 2024.

[88] Section 176 *Criminal Procedure Code* (CAP 75). In the case of *Ceretta Merdardo v Republic (2004) eKLR,* the Court held that knowing a person against the order of nature contrary to section 162(A) of the Penal Code is a felony and incapable of settlement by mediation.

[89] See s. 50 of the Constitution of Kenya 2010.

[90] Ibid.

[91] Section 3(b)(iii), *Victim Protection Act* (Act No 17 of 2014).

[92] See J Dignan, *Understanding Victims and Restorative Justice,* (England: Open University Press, 2005), p. 111.

[93] Section 12 (9) of the Labour Institutions Act (Act No. 12 of 2007).

[94] For a detailed discussion on the use of Mediation in the settlement of labour disputes, see K Muigua, 'Overview of Arbitration and Mediation in Kenya' (2011) Available Online at: https://kmco.co.ke/wp-content/uploads/2018/08/Overview-of-Arbitration-and-Mediation-in-Kenya.pdf. Accessed on 3 August 2024.

[95] See S.4 of the Children's Act 2008

[96] See s. 45 of the Constitution of Kenya 2010

[97]See W Ngaruiya, 'Divorce Mediation in Kenya Today' (2020). Available Online at: https://sdrcentre.wordpress.com/2020/09/11/divorce-mediation-in-kenya-today/ Accessed on 2 July 2024.

[98]See http://www.parliament.go.ke/sites/default/files/2023-08/THE%20MARRIAGE%20%28AMENDMENT%29%20BILL%2C2023.pdf Accessed on 30 July 2024.

mediation to manage disputes between political parties.[99] Giving effect to this provision, Mr Chebukati, Kenya's Elections Regulatory Agency Chairman reports compliance in these words:

> In Kenya, we have adopted alternative dispute solutions to supplement and enhance formal judicial processes by providing an alternative avenue for parties to resolve disputes and conflicts. What we have in the election management body in Kenya is a framework that is grounded in the Constitution of Kenya 2010, which mandates the commission to, among others, exercise responsibilities that relate to the resolution of disputes.[100]

Mr Chebukati, further compared Mediation processes with the regular litigation process and made a far-reaching conclusion. He confessed that 'mediation is better, especially for an election management body, it defuses any potential matter that will ordinarily go the court'.[101] Chebukati is correct as election matters birth political decisions incapable of forming coherent precedence. Thus, if litigation exists to clarify the law,[102] political decision exists more often than not to confuse the law. [103]

7. Conclusion and Recommendations

It is said that good artists copy while great artists steal. To compete favourably among nations, Nigeria needs to steal and integrate bits and pieces of practices in these other jurisdictions discussed above. Nigeria needs to learn how to make the Nigerian Mediation Act all-encompassing by setting out clearly an objection to the quick dispensation of justice without limiting its operations to commercial transactions. To do this, there is an urgent need to rejig the law around matrimonial disputes, electoral disputes and dispute resolution by traditional institutions to allow Mediation blossom outside commercial disputes. On Matrimonial causes, we noted that in Nigeria, matrimonial causes are only determined in the regular courts with a cosmetic requirement for attempting reconciliation. The only consideration given to the interest of a child is to have the matter heard in chambers. But this is not enough. In the four jurisdictions we considered, we saw how these other jurisdictions have elaborate provisions for the resolution of family/divorce matters, especially where the interest of a child is concerned. A new national framework for mediation in Nigeria must necessarily amend our Mediation Law to incorporate these considerations.

On electoral disputes, Nigeria needs to pay attention to Kenya considering the shared history, culture and predicaments. In history, Nigeria and Kenya were former British Colonies and therefore have a common heritage in terms of common law background. Nigeria and Kenya share the same background of cultural diversity as both nations are made up of people of more than 100 cultures and languages in each nation. Both cultures place a strong emphasis on traditional institutions and practices associated with them including respect for elders. Members of both countries maintain strong family ties and practice communalism in the native communities. Both countries are African countries and are bedevilled by the African predicament which shapes all African countries. Election rigging, violence and crude manipulations are common features of elections in both countries. It is against this background that their adoption of mediation in the resolution of electoral disputes is germane for Nigeria.

On criminal disputes, as was evident in the foregoing, parties employ mediation to resolve issues such as noise nuisance, assault, anti-social behaviour, parking or boundary disputes, misunderstandings and breakdowns in communication in the United Kingdom, Kenya and Singapore. Of course, this is carefully done to ensure that public policy of preservation of law and order is pressured while enabling social cohesion.

In recognition of dispute resolutions conducted by traditional institutions, we saw how the practice of Community Mediation flourished in Singapore, South Africa and the United Kingdom. In the three countries, the focus is the restoration of harmonious relationships in the neighbourhood. Remarkably, what passes as community mediation in these jurisdictions is not alien to Nigeria. As we saw in the review of the institutional framework of mediation in Nigeria, community mediation is done here in Nigeria but does not have a former name nor does it have a law to back it up. In

[99] Section 17 (3) of the Elections Act 2011

[100] See W Chebukati in 'Mediation Support in Electoral Processes or Crises Notes', *European Centre for Electoral Support*. Available Online at: https://www.eces.eu/template/CoP22%20Panel%20Mediation%20support%20in%20electoral%20processes%20or%20crises%20Notes.pdf. Accessed on 29 July 2024.

[101] Ibid.

[102] O Fiss, 'Against Settlement' (1984) *The Yale Law Journal*. Available Online at <https://www-jstor-org.ezproxy.wlv.ac.uk/stable/pdf/796205.pdf>. Accessed on 3 August 2024.

[103] See M Cerar, 'The Relationship Between Law and Politics' (2009) 15:1 *Annual Survey of International & Comparative Law*. Available Online at: https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1126&context=annlsurvey. Accessed on 8 August 2024. Here, Cerar correctly posits that where politics interprets the law as an obstacle on the way toward the realization of certain political goals, politics either prevails over the law or vice versa. In Nigeria and other developing countries, evidence exists to suggest that politics nearly always prevail.

South Africa, its community mediation practices are imbedded in its various laws and the most remarkable is contained in the Children's Act where reference of certain disputes to the traditional institutions is a matter of law.

There are at least, four other things we can learn from these other jurisdictions for better growth of Mediation practice in our jurisdiction. One, Nigeria needs to change its mindset and laws to allow certain criminal disputes to be resolved through mediation as done in the four jurisdictions considered above. Two is intentionality to make Mediation practice blossom. We saw how Singapore has updated its law three times between 2017 and 2024 and saw how the United Kingdom is already consulting to update its law in light of a recent court decision. Being deliberate about these changes helps the growth of mediation. Third, both Singapore and the United Kingdom deploy resources to maintain their status as choice locations for Arbitration and ADR processes. There is no doubt that funding mediation has immediate benefits as it attracts investments both locally and internationally. Finally, the Singapore Act placed premium attention on the qualification of a mediator and so did the United Kingdom. In South Africa, there is a limit to what a non-qualified mediator can do. There is a need to ensure that for the court to recognize and enforce a mediation settlement agreement, it must emanate from a mediation conducted by a certified mediator as a man of passion without skills is dangerous.

The integration of the best practices as seen in the four jurisdictions compared is not difficult at all. After all, despite the harsh provisions of the law in those regards, people still find their way to resolve those matters without admitting it. The integration of those areas into our laws is just to achieve sync between the law and practice and send a signal to be counted among the progressive nations with laws in touch for the demands of justice in the 21st Century. We finally submit that unless this integration is done, Nigeria cannot boast of having a Mediation law capable of addressing the wishes and aspirations of the people it seeks to order.