

AN ANALYSIS OF MANDATORY MEDIATION

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DECLARATION

I, BAWAZIR MALIHA SWALEH of registration number 072476 do certify that this Dissertation is my original work. It is a reflection of my personal research. I declare that this Dissertation has not been presented anywhere else before

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Ms Linet Njeri

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ABSTRACT

This paper aims to research on mandatory mediation and the various schemes used in different countries specifically the United Kingdom, Italy and the United States so as to inform Kenya's approach. The research aims to cover the various attributes of mediation and contrast them according to the attributes found in mandatory mediation. This will be done by analysing the pros and cons of making mediation mandatory.

The research uses the qualitative approach in its study of the trends in the jurisdictions. The research heavily relies on secondary data from books, journals, online resources, case law, legislation, treaties and news articles to analyse the current systems.

Pursuant to the secondary data obtained in this research, the shortcomings that come along with mandatory mediation shall be dealt with and the various arguments put forward by legal scholars. This is due to denial of access to justice. The denial of access to justice has been deliberated upon by various jurists who include Lord Woolf, L.J Dyson among others. As such the denial of access to justice is an affront to the principles of natural justice. As was established in the case of *Halsey V Milton Keynes* the honourable L.J Dyson stated that it is one thing to encourage parties or even encourage them strongly to mediate and another to compel them to do so. He further stated that it could lead to a denial of justice which is against the spirit of the courts.

For the Kenyan scenario what should have been legislated is the encouragement and voluntary referral as provided for in the Constitution and Civil Procedure Act as an Alternative Dispute Resolution. However mediation should remain as an alternative to litigation and not as a compulsory referral system within the litigation process. The court system consequently should have an encouragement to mediation rather than a compulsion backed by sanctions in the form of fines. This will enhance access to justice from the onset by choice of dispute resolution and provide a variety of choice for dispute resolution mechanisms.

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CHAPTER I. RESEARCH PROPOSAL

1.1 BACKGROUND OF THE STUDY

Mediation is an alternative dispute resolution mechanism where a neutral third party facilitates negotiation and guides disputing parties to arrive at a solution. Mediation can either be voluntary or “mandatory”. Voluntary mediation occurs when parties consent to enter into mediation. Mandatory mediation on the other hand occurs whereby parties are referred to mediation either through the provisions in legislation or by the courts system so as to settle the disputes. Various countries have different approaches as to how mandatory mediation occurs.

Mandatory mediation is being practised in many jurisdictions in the world and various authors have given their sentiments regarding it, both positive and negative as will be seen later in this chapter. Legal scholars have expressed their take on mandatory mediation. While some are strongly for it, others are against it. For example, some have said that it is against the European Human Rights Convention on the right to access justice. LJ Dyson stated that it does go against the fundamental right of access to justice to order mandatory mediation as it takes away one’s freedom to seek justice.¹ However, in Italy, recently a decree was passed refuting this argument by stating that it does not go against the right of access to justice.²

As it happens in the UK, if the case involves a dispute that requires party to go into mediation, the parties then have to go to mediation or are penalised for not doing so. The consequence for not going to mediation is that the party which refused to do so shall bear the costs of both parties in litigation. Another aspect is that with regards to family law matters e.g. divorce and children matters have to be dealt with through the mediation process. Parties are first required to solve their dispute through mediation, if they agree on certain issues at the end of the mediation they apply to the court so as to make the agreement binding.

Mandatory mediation mechanism has been hailed by some as a much-awaited change in the apparatus of civil justice whilst at the same time it has caused an outcry from others, particularly with respect to the way these changes are being implemented.³ The arguments by many scholars is that mandatory mediation is in itself an oxymoron as it is a contradictory

¹ Halsey v. Milton Keynes Gen. NHS Trust, [2004] EWCA (Civ) 576

² In the case of *Rosalba Alassini v Telecom Italia SpA (C-317/08) ECI*, it was held that a domestic law with regard to mandatory mediation shall preclude EU law.

³ Antoine Cremona, *Forced to Mediate: Critical Perspectives on Court-Annexed Dispute Resolution Schemes* (2004), Chamber of Advocates (Malta) paper, p.1

term.⁴ Mediation in its definition brings about the concept of voluntariness, however, mandatory mediation takes away the voluntariness of this process by taking away the parties freedom of choosing a dispute resolution mechanism from the onset.⁵ Others however argue that the aspect of voluntariness is taken away at the beginning of the process before commencing that is, but parties retain their voluntariness throughout.⁶

Roscoe Pound in his 1906 speech on popular causes of dissatisfaction in the administration of justice, stated that a common misconception is that the administration of justice is an easy task, hence most look over it. He even went on further to state that there is no single school on its own offering studies on this solely. Unfortunately, this remains the case to date, because magistrates and judges learn the law and after that go through a short training program to administer justice. Roscoe Pound indicated that there ought to be need of acknowledgment of administration of justice as a specialised area and therefore need for special schools to teach the same. Administration of justice is still being taken lightly. There is therefore need to take into account the seriousness of the court process for the sake of justice.

Kenya recognizes mediation in its Constitution and even before this, local communities have been known to practise mediation whereby disputing parties go to an elder who helps them reach a solution.⁷ However, the judiciary recently rolled out a pilot scheme and legislated the mediation pilot project rules 2015⁸ which give assertion to court mandated mediation which was earlier briefly touched on in the Kenyan Civil Procedure Act, 2010.⁹ Kenya has also been successful in implementing Article 33 of the United Nations Charter which directs parties to go into mediation in international matters. This was spearheaded by the former Secretary General to the United Nations after the post- election violence in Kenya¹⁰. As set out in the mediation pilot project rules 2015, the Kenyan system of court mandated mediation is in the

⁴ Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 *Cardozo Journal of Conflict Resolution*

⁵ This has been argued by some scholars including, Melissa Hanks, Dr. Kariuki Muigua and others as will be seen later in the chapters.

⁶ This is a counter argument that is used to dispute the aspect of coercion by dividing voluntariness into the process and during the process. Voluntariness has been divided into two: voluntary into the process and voluntary in the process.

⁷ The local communities in Kenya used to practise mediation as a settlement mechanism whereby parties used to approach an impartial elder when having a dispute and the elder would listen to both parties and eventually come to a settlement.

⁸ <https://sdrcentre.wordpress.com/tag/mediation-pilot-project-rules>, accessed on 10/03/2016

⁹ Section 1A, 2 and 59, Civil Procedure Act (CAP 21 Laws of Kenya)

¹⁰ Former Secretary General, Kofi Annan used mediation to reconcile the two parties that vied for presidential elections in Kenya in 2007.

form of referral of parties to a dispute regarding civil matters after being screened by the deputy registrar or those found suitable.¹¹ Non-compliance shall subject the party involved in refusing to comply a fine of costs that may be deemed fit.¹²

The importance of this research is to give an insight on the practise of mandatory mediation (highlighting the attributes of mediation and whether it hinders access to justice) in the various jurisdictions and compare them to Kenya and probably draw some lessons. This paper shall also analyse the various arguments by regarding mandatory mediation and shall attempt to reconcile the differences.

1.2 STATEMENT OF THE PROBLEM

The Constitution 2010, Article 159(2) (c) recognises alternative forms of dispute resolution, among them being mediation. Mediation in itself is a voluntary process whereby parties agree to go into it so as to avoid the complexities involved in litigation. The Civil Procedure Act, in its objective states that it is the Act's objective to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.¹³ The judiciary has been enjoined to ensure that in its exercise of power, it meets the objectives of the Act.¹⁴

Despite recognition by the Constitution and the Civil Procedure Act, its application as a mandatory mechanism of resolving disputes distorts the uniqueness of mediation by taking away its attribute of voluntariness.¹⁵

This study shall analyse the unique attributes of mediation and whether access to justice is hindered when they are done away with.¹⁶

¹¹ Section 4, Kenya Mediation Pilot Project Rules 2015

¹² Section 11, Kenya Mediation Pilot Project Rules 2015

¹³ Section 1 A (1) CIVIL PROCEDURE ACT KENYA

¹⁴ Section 1 A (2) Civil Procedure Act Kenya

¹⁵ This has been argued by some scholars who include but are not limited to: Antoine Cremona, Dr. Kariuki Muigua, and Melissa Hanks. These will be dealt with in the later chapters.

¹⁶ LJ Dyson asserted that mandatory mediation takes away one's freedom to access justice in the case of *Halsey v Milton Keynes Gen. Trust, 2004 (EWCA)*

1.3 RESEARCH QUESTIONS

What issues arise from mandatory mediation?

Does mandatory mediation hinder access to justice?

1.4 RESEARCH OBJECTIVES

To draw lessons from other jurisdictions to inform Kenya's approach towards mediation and mandatory mediation.

To explore the shortcomings that come along with legislating mediation and making it mandatory.

1.5 THEORETICAL FRAMEWORK

Principles of Natural Justice:

Natural justice has two facets: the first being that no one shall judge his own case and the second being the right to a fair hearing. The parties right to fair hearing is taken away from them by subjecting them to mandatory mediation even though they will be asked to determine and propose a solution.

"A court that makes available a judge or a registrar to conduct a true mediation is forsaking a fundamental precept upon which public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of a court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of natural justice..."¹⁷

Mediation in itself is a voluntary process which involves party autonomy. However, mandatory mediation since includes forcing the parties to go into, takes away a unique feature of mediation i.e. voluntariness and party autonomy. This thereby violates a fundamental principle of natural justice which is the right to fair hearing. It is violated in the sense that the moment the parties are forced into mediation, their liberty on the process of acquiring justice is taken away from them. Their right to access a fair hearing is therefore taken away from them by forcing them to go into mediation. The parties' right to fair hearing is therefore hindered to the extent of making mediation mandatory whilst they preferred litigation.

¹⁷ Sir Laurence Street, "Mediation and the Judicial Institution", Australian Law Journal, Vol. 71, 794-6, Oct. 1997)

When mediation is mandated whether for the benefit of the parties or to reduce the backlog in the judiciary, it takes away from the very essence of mediation which is a more voluntary process. The effect then is hindrance to a fair hearing as the parties do not get to choose on the method used to acquire a fair hearing.

Access to justice

Article 6 of the European Court of Human Rights guarantees the right of access to justice. The purpose of mediation, among other forms of ADR, is to enhance access to justice and not to deny one access to justice. By courts forcing parties into mediation however the coercion takes away from the parties' rights to choose their justice mechanism. The Kenyan Constitution 2010, Article 48, states out rightly, "The State shall ensure access to justice for all persons, and if any fee is required it shall be reasonable and shall not impede access to justice." This Article guarantees that there shall be access to justice and no hindrance on the same. Article 159 also assures that no form of dispute mechanism shall be used that will be repugnant to justice and morality or that which results in outcomes which are repugnant to justice and morality or the bill of rights.¹⁸

Various legal scholars have opined that mandatory mediation does go against the right to access justice. Lord Woolf, in his review of the English and Wales Courts stated that it is wrong to deny citizens their entitlement to access civil courts. Lord Justice Dyson also stated that mandatory mediation goes against article 6 of the European Human Rights which guarantees the right to access justice. In his explanation he states that there is a fundamental difference between encouraging parties into mediation and forcing them to do so. Forcing them to mediate would lead to a fundamental breach of the principles of human dignity which are on the various freedoms with regard to getting justice.

Following this therefore, mandatory mediation in itself is a contradiction and takes away from the originality of mediation, regardless of its purpose which may be argued is to make the process more expedient.

¹⁸ Article 159 (3) Constitution of Kenya, 2010, Government Printers

CHAPTER II: MEDIATION ANALYSIS

2.1 INTRODUCTION

Mediation is a unique alternative dispute resolution method which occurs whereby parties to a conflict try to resolve the conflict in the presence of a third party (mediator). Its success has influenced scholars and law makers to think that if mandated, its success will be noted as well. Due to the backlog of cases in the judiciary among other influencing factors, States like Italy and the US have pushed for its legislation and thereby making it a mandatory mechanism. This chapter, shall include an analysis of mediation as a voluntary mechanism and other attributes that make it unique together with the impact that is caused by making it mandatory.

There are 3 types of mandatory mediation as observed by Melissa Hanks¹⁹ on the perspectives of mandatory mediation. There are countries which have adopted the strict mandatory approach whereby parties go to court and there is automatic and compulsory referral of certain matters to mediation as in the case of South Wales with regard to debt recovery mediation scheme and later adopted in Italy. The second is court-referred mediation whereby parties are referred to mediation with or without their consent on certain matters with the discretion of the judges, this is done in Australia. The third type is the quasi-mandatory mediation where a party bears the costs of litigation if he/she decides to abandon mediation and go into litigation in certain matters. This is done in the UK especially with regards to family and divorce proceedings.

The distinguishing attributes that make mediation unique include voluntariness, party autonomy, flexibility and informality. These attributes are what distinguishes mediation from other dispute mechanisms like arbitration and litigation. Mediation is voluntary and seeks to encourage parties to find solutions that are agreeable to all of them and, as such, yields a win for all parties and preserves the relationship between parties. The salient features of mediation are that it emphasises interests rather than (legal) rights and it is cost - effective, informal, private, flexible and easily accessible to parties to conflicts.²⁰

¹⁹ Melissa Hanks, *Perspectives on mandatory mediation*, *UNSW Law Journal*, volume 35(3),2012

²⁰ Kariuki Muigua- "Overview of Arbitration and Mediation in Kenya", p. 2

Kariuki Muigua²¹ takes mediation to have two facets. A political facet and a legal facet. The political facet according to him has more qualities of mediation as opposed to the legal facet which he opines has less of the mediation attributes which include: party autonomy, voluntariness, flexibility among others. He goes on to describe legal mediation as that which occurs whereby parties have been coerced to go into the process therefore feel like they have little say over the outcome so as to avoid prejudice in the case it fails and court referral is proved necessary. He differentiates this type of mediation from political by pointing out that political mediation is informed by voluntariness, party autonomy both in the process and the outcome.

I shall therefore undertake to analyze the distinguishing attributes of mediation one by one and determine how these attributes are eroded or even to an extent taken away when mediation is connected to the court processes and thereon coerced upon parties in one form or another. This will be followed by an analysis of access to justice and whether mandatory mediation hinders the same.

2.2 VOLUNTARY

Mediation is a voluntary process.... *Voluntary* refers to freely chosen participation and freely made agreement.²² Knowledge of the options, open willingness and the desire to accept a compromise are the main factors contributing to a real and voluntary agreement.²³ Voluntariness exists in two aspects, one is whether the parties agree to enter into the mediation and the second one is the voluntariness of reaching an agreement. Nolan – Haley echoes the same approach and classifies voluntariness in two categories: “front- end participation consent” and “back- end participation consent”.²⁴ Dorcas Quek also uses the same approach to classify voluntariness into two: “into” and “within” mediation.²⁵ Once voluntariness into mediation has been taken away parties seem to enter the mediation with a negative attitude and therefore this could hinder the efficiency of the process because the spirit of mediation is taken away from.²⁶ However, voluntariness can also be taken away once in the mediation already but the mediator intervenes and proposes a resolution to the conflict. This aspect of coercion is questionable according to Melissa Hanks, “The traditional

²¹ Kariuki Muigua, “Overview of Arbitration and Mediation in Kenya”

²² Christopher Moore, “*The mediation Process*”, p.27

²³ Galligan D.J, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996) p. 383

²⁴ Nolan-Haley, ‘*Mediation Exceptionality*’, 1251.

²⁵ Dorcas Quek, ‘*Mandatory Mediation: An Oxymoron?*’

²⁶ An example of an instance where bad faith mediation affected the process is in the case of *Doe v Francis* No. 5:03cv260-RS-WCS, 2003 whereby the defendant acted in an absurd manner because he felt that he was forced to mediate. This resulted in payment as fines to the plaintiff and being incarcerated.

role of a mediator is to act as a neutral third party and thus, this approach raises questions as to whether such a system can be classed as mediation at all".²⁷ She goes on further to state that the approach of coercion in Italy is more of med-arb than mediation as med-arb resorts to arbitration after a failed mediation.

On the other side some scholars differ with the above by classifying voluntarism into and within the process. They argue that the coercion is only in the form of choice of forum but they are not necessarily forced to settle their dispute.²⁸ They therefore argue that the parties haven't been denied access to courts only that it may be delayed in the case where mediation fails. These scholars therefore maintain that the parties still have voluntariness in the process as they decide the outcome.

Some studies indicate that there were lower settlement cases in mandatory mediation as compared to cases where parties entered into mediation voluntarily.²⁹ Mediation in its very essence is a voluntary mechanism, this is evident in its many definitions which do not fail to mention or imply it as a voluntary mechanism. Introducing mandatory mediation is first of all a contradiction and as widely criticized by many an oxymoron. Secondly making it mandatory goes against the very spirit of mediation which is entering into a settlement mechanism voluntarily. One of the defining attributes of mediation is voluntariness, hence going against it makes one wonder whether the dispute resolution settlement (mandatory mediation) still qualifies to be mediation. Therefore, once the voluntariness aspect of mediation especially "into" is taken away, the settlement scheme should be given a different name because mandatory mediation as explained above is a contradictory term that goes against the essence of mediation. This research mainly deals with voluntariness from the core because it occurs at the very base and acts as a stepping stone to the entire process.

2.3 PARTY AUTONOMY

What makes mediation unique from other dispute mechanisms is the role of a mediator as a neutral third party who has no authority to make a resolution for the conflicting parties but rather should play the lead role towards guiding the parties to reach a settlement. In essence, mediation is a consensual conflict resolution mechanism in which a third party with no

²⁷ Melissa Hanks, Perspectives on Mandatory Mediation, p. 950 vol. 35(3)

²⁸ Sander, Allen & Hensler; George Nicolau, *Community Mediation: Progress and Problems*, in MASSACHUSETTS ASSOCIATION OF MEDIATION PROGRAMS (1986).

²⁹ Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE Law Review p.581

decision making authority attempts to bring the conflicting parties to end their dispute by agreement.³⁰

Mediation is a conflict resolution process in which a mutually acceptable third party, who has no authority to make binding decisions for disputants, intervenes in a conflict or dispute to assist involved parties to improve their relationships, enhance communications, and use effective problem-solving and negotiation procedures to reach voluntary and mutually acceptable understandings or agreements on contested issues.³¹

Autonomy thus exists if both parties are able to make real and free choices based on effective participation in the mediation process and where the resulting outcome is not based on coercion or pressure.³² Mediation is distinguishable from other mechanisms of conflict resolution in that the resolution framework is owned by the parties who drive the process of reaching a negotiated settlement.³³

“...Since mediation is often closely linked to the entire court process, parties could easily associate coercion from the judge with a reduction in the level of autonomy that they may exercise within the mediation process.”³⁴

However others argue that party autonomy is still maintained since the mediator is only in control of the process and not the outcome.

2.4 FLEXIBILITY

What makes mediation special and an alternative dispute resolution is the fact that there are less stringent rules and no formal structure as it strives to create a comfortable environment for parties to settle their conflict. This comfortable atmosphere encourages parties to have a positive attitudes towards the proceedings and will be more likely to settle the dispute faster than in the case of litigation. There are minimal rules to abide by while in the process as opposed to the structured nature of litigation. The fact that mediation tends to be efficient and faster compared to litigation probably influences legislators and other scholars to advocate for mandatory mediation. However, what is not appreciated is that once mediation is mandated

³⁰ Mordehai Mironi, “From Mediation to Settlement and From Settlement to Final Offer Arbitration: An analysis of Transnational Business Dispute Mediation”, 73 (1) Arbitration 53 (2007)

³¹ Christopher Moore, *The Mediation Process*, p.8

³² Claire Baylis and Robyn Carroll, “Power Issues in Mediation”, *op. cit.*, p.135

³³ Mercedes Tarrazon, “The Pursuit of Harmony: the Art of Mediating, the Art of Singing”, 73 (1) Arbitration 49 (2007)

³⁴ Dorcas Quek, “Mandatory Mediation, an oxymoron?” p.488

and legislated, it appears to be more stringent on the parties and the fact that their autonomy had already been lost, makes it worse. This comparison of autonomy and flexibility has also been highlighted by Dr. Kariuki Muigua in his book “Resolving Conflicts Through Mediation In Kenya”.³⁵

Therefore once flexibility is lost in the process (mandatory mediation), it influences the parties to lose interest in incentivising as opposed to where there is no structure or strict procedures to follow hence making it less effective than in mediation. Also, the more there are stringent rules and procedures to be abided by, the riskier it is for them to be broken. This is as opposed to where there is no structure but a system of reasonableness is used that pushes parties to do what is required than try to look for cunning ways to manoeuvre the set procedures.

2.5 INFORMALITY

Mediation derives its flexibility and expeditiousness from this informal and ad hoc nature because the parties can agree on how they want their disputes resolved within convenient time schedules. In the traditional African social set up, it was customary for disputants to just sit down informally and agree over certain issues such as access to water resources and allocation of other resources.³⁶ Formality is eschewed within mediation because this mode of dispute resolution emphasizes self-determination, collaboration and creative ways of resolving a dispute as well as addressing each party’s underlying concerns.³⁷ Any attempts to impose a formal and involuntary process on a party may potentially undermine the *raison d’être* of mediation. In view of this danger, there must be *compelling* reasons to introduce mandatory mediation.³⁸

Mediation as it is, is efficient and its positive results that make it stand like a stable building are seen due to the attributes that are like its bricks that hold it together. Once the bricks are taken off one by one the building collapses and ceases to be a building. It is therefore clear that once mediation maintains its informality it will maintain its success since it will push it

³⁵ Dr. Kariuki Muigua, *Resolving Conflicts Through Mediation In Kenya*, p.49 he offers a comparison between autonomy and flexibility. Once autonomy is lost, flexibility is also lost.

³⁶ Dr. Kariuki Muigua, *Resolving Conflicts Through Mediation In Kenya*, p.50

³⁷ Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 308 (1971);

³⁸ Mandatory Mediation: An Oxymoron? Examining The Feasibility Of Implementing A Court-Mandated Mediation Program, *Dorcas Quek*, at p.481

to be quicker due to the less formalities hence more productive than in the case of introducing unnecessary formalities and calling it mandatory mediation.

2.6 ACCESS TO JUSTICE

Some argue that mandatory mediation hinders access to justice.³⁹ Some have also argued that the parties incur additional litigation costs against their will.⁴⁰ Others have argued on the line of paying for it as unfair since one has been compelled and is asked to pay for it.⁴¹ Legislating and institutionalizing mediation reduces the alternatives of dispute resolution since it no longer serves as an alternative.⁴²

Considering the backlog of cases, it may be easy to recommend mediation, however, if this is viewed from a less utilitarian way whereby the issue of justice is viewed from an individualistic way, no one should suffer denial of justice at the expense of the larger community. This can be justified by the fact that the backlog of cases may reduce but at the cost of justice.

Denying parties to access the courts and referring them to mediation instead is what could hinder justice since justice delayed is denied. This is also because it may be more costly therefore appear as a burden to the parties which is not the intended purpose of mediation which advocates for less costs, less time and generally more efficient.

2.7 CONCLUSION

The attributes of mediation are what make up mediation and what differentiates mediation from other dispute resolution mechanisms. They are once put together, the ones responsible for the success of mediation. However, mandatory mediation takes away these vital attributes of mediation.⁴³ Mandatory mediation introduces new aspects to mediation, for example, coercion, rigidity, formality and takes away the control aspect of parties towards the process. This essentially erodes the mediation in its entirety as it destroys the spirit of mediation. The effects of this is that firstly mediation will lose its meaning as an alternative dispute

³⁹ U Dyson in the Halsey Case argues that forcing parties to mediate hinders access to justice. Dr Kariuki Muigua also points out the same in his paper "Heralding a new dawn"

⁴⁰ Holly A. Streeter Schaefer, "A Look at Court Mandated Civil Mediation"

⁴¹ Frank E. A. Sander, *Paying for ADR*, 78 A.B.A. J. 105 (1992)

⁴² Frank E. A. Sander, *Paying for ADR*

⁴³ This has been observed by various scholars, including Dr Kariuki Muigua and *Samara Zimmerman* "Judges gone wild: why breaking the mediation confidentiality privilege for acting in "bad faith" should be re-evaluated in court-ordered mandatory mediation"

resolution mechanism. Secondly, before it is likely to contravene justice through its inefficiency, it can be argued that it has already done so since it is enshrined in law as an alternative and not as a coerced option.

CHAPTER III: LEGAL FRAMEWORK

3.1 INTRODUCTION

This chapter shall first entail a look at Kenya's regime with regards to mediation, the law governing mediation and mandatory mediation and the law providing for the same.

Mediation is a voluntary, non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated settlement which, when reduced into writing and signed by all the parties, becomes binding.⁴⁴ Mediation previously existed as a customary law dispute resolution mechanism in some communities. For example, when individuals had a dispute, they would go to a clan elder who would then act as a mediator and try to reconcile the parties by hearing each side of the dispute and thereby coming to an agreed settlement.⁴⁵

An advancement towards mediation has been globally recognized in terms of court sanctioned mediation. As Dr Kariuki Muigua rightfully points out that court sanctioned mediation takes two forms: court mandated and court sanctioned mediation. Court mandated mediation as envisaged in the Kenyan legal framework arises where after parties have lodged a dispute in court, the court requires them to have their dispute mediated after which the outcome of that mediation is tabled in court for ratification.⁴⁶

Court-annexed mediation may arise where parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment. It has also been defined as the mediation of matters which a judicial officer has ordered to go to mediation or which are mediated pursuant to a general court direction (e.g. a procedural rule which states that parties to a matter make an attempt to settle the matter by way of mediation before the first case management conference).⁴⁷

In Kenya, there are various sources of law that give recognition and recommendation for mediation. These include: the United Nations Charter⁴⁸ Article 33, the Constitution of Kenya 2010 (Article 159 and 189), the Civil Procedure Act (Section 1A, 2, 59 A, B and D, 88), Civil Procedure Rules (Order 46) and the Judiciary Pilot Project Mediation Rules 2015.

⁴⁴ P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), p.10

⁴⁵ Dr Muigua, "The Lawyer as a Negotiator, Mediator and Peacemaker in Kenya"

⁴⁶ *Court Sanctioned Mediation in Kenya-An Appraisal*, Kariuki Muigua p. 10 of 25

⁴⁷ Kathy, "What is court-annexed mediation?" Available at <http://www.janusconflictmanagement.com/2011/10/q-what-is-court-annexed-mediation>

⁴⁸ The United Nations Charter

3.2 Charter of the United Nations

The Charter of the United Nations spearheads recognizing mediation as a dispute resolution mechanism and further recommends to it to both individuals and States. It also goes on further in Article 33 (2) to state that the Security Council shall when it deems appropriate call upon parties to solve their disputes by such means.

Article 33 of the United Nations Charter⁴⁹, *“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”*.

This therefore forms a basis for mediation among other dispute resolution methods that are mentioned above. Article 33 is thus a legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals.⁵⁰ An example of a success in practise of this provision in Kenya is the 2008 mediation with regards to the post-election violence that was headed by the former secretary General of the United Nations, Kofi Annan.

3.3 Constitution of Kenya, 2010.

Mediation is now anchored in the Constitution vide Article 159 (2) (c).⁵¹

Article 189(4) of the Kenyan Constitution also provides for mediation as a form of alternative dispute resolution:

“National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including mediation and arbitration”.⁵²

Following the above, the Kenyan Constitution does provide for mediation in disputes involving individuals (A. 159 (2) (c)) as well as those involving the State (A. 189(4)).

⁴⁹ Chapter Six of the Charter of the United Nations signed in San Francisco, California on June 26, 1945

⁵⁰ Dr. Kariuki Muigua, *“Resolving Conflicts Through Mediation In Kenya”* p.2

⁵¹ *“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*
(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).

⁵² Constitution of Kenya, 2010, Government printers

Institutes such as the Chartered Institute of Arbitrators (CI Arb (K)), and Mediation Training Institute (MTI) offer training for mediators⁵³.

3.4 Civil Procedure Act (CAP21)

The Kenyan Civil Procedure Act⁵⁴, defines mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto.⁵⁵ Section 1A (1) of the Civil Procedure Act provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. This as read together with Section 1A (2) which enjoins the judiciary in realizing its overriding objective thereby implies that the courts shall use alternative dispute resolution mechanisms (mediation being one of them) so as to achieve the Act's objective.

In addition to the above, in the same Civil Procedure Act, Section 59B gives mandate to the courts to refer matters to mediation and outlines the procedure thereof.

“(1) The Court may— (a) on the request of the parties concerned; or (b) where it deems it appropriate to do so; or (c) where the law so requires, direct that any dispute presented before it be referred to mediation....”

This thereby implies that the court has been given authority to refer disputes to mediation with the consent of the parties or without. This Section also gives power to parties to agree to a mediator and thereon abide by the mediation rules. This Section also mentions of a Mediation Accreditation Committee which is provided for under Section 59A of the Act. The Mediation Accreditation Committee as provided for under the Act consists of members appointed by the Chief Justice and to whose functions shall include: to determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.

⁵³ <http://ciarbkenya.org/assets/overview-of-arbitration-and-mediation-in-kenya.pdf> accessed on 15/01/2016
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⁵⁴ Section 2, Kenyan Civil Procedure Act CAP 21

⁵⁵ Section 2, Kenyan Civil Procedure Act CAP 21

The clamor to introduce court-annexed mediation has borne fruit and is now evident under section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009. Section 81 (2) (ff) provides for the selection of mediators and the hearing of matters referred to mediation under this Act. Thus, parties who have presented their cases to court may have their matter referred to mediation by the court for resolution.⁵⁶

The Civil Procedure Act also regulates court sanctioned mediation by providing that “all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.”⁵⁷

3.5 Civil Procedure Rules 2010

Pursuant to Order 46 rule 20 (3) it is only after a court-mandated mediation fails that the court shall set the matter down for hearing and determination.

“The aforesaid amendments to the Civil Procedure Act are not, really introducing mediation per se, but merely setting up a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for ratification. These amendments have introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the high court.”⁵⁸

Judiciary Pilot Project Mediation Rules 2015

Pursuant to the Civil Procedure Act sections 59 A and B, 81 (2) (ff). These rules provide for civil and family matter cases in the High Court to be referred to mediation. Section 2, “*The Rules shall during the Pilot Project apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi during the Pilot Project*”. These rules make it a mandatory requirement that once a case has been “*screened*”⁵⁹ and it is found suitable for mediation the parties shall be notified and informed of the mandatory requirement of the mediation.

⁵⁶ Court Annexed ADR in the Kenyan Context, Kariuki Muigua, p.3 of 5

⁵⁷ Section 59D Civil Procedure Act, Kenya cap 21

⁵⁸ Court Annexed ADR in the Kenyan Context, Kariuki Muigua p.4 of 5

⁵⁹ Mediation (Pilot Project) Rules, 2015: “screening” means the process by which the Mediation Deputy Registrar or the Court reviews civil actions for suitability for mediation or otherwise;

Following the above, the Civil Procedure Act amendments introduce a new concept to mediation in Kenya. This concept is the coercion by courts to introduce parties to mediation. Mediation as is widely known is a voluntary process, moreover in its very definition the term voluntary is evident. By regulating it and introducing it to the courts distorts its very nature as a voluntary process and tends to declassify it as an alternative dispute resolution mechanism since it is no longer an alternative but rather a coerced alternative. However, this is not to imply that Kenya is the first country to use this approach but rather to show Kenya's position taking into consideration its unique circumstance. This is also not to discredit the judiciary's effort towards introducing court mandated mediation to reduce the backlog of cases, but rather to study mandatory mediation within Kenya's context. The voluntariness and the autonomy over the process and the outcome are not present in this kind of mediation because it is pursuant to an order of the court where the settlement has to be returned back to court for ratification.⁶⁰

The judiciary pilot project rules provide strict measures towards mediation by removing party autonomy, voluntariness and flexibility that normally come along with mediation.

3.6 CONCLUSION

Regulation and legislation of mediation in Kenya is a positive attempt towards achieving the objective set out in Article 159 of the Constitution of Kenya 2010 which is to enhance justice through the various alternative dispute resolution methods. However, one needs to be careful to ensure that the regulation and legislation of mediation towards making it a mandated process progresses towards enhancing justice and not depriving it. It is easy for parties to be denied justice when deprived of litigation and being mandated to mediate and subsequently fail to achieve the desired just outcome. By the time the parties are finally sorted out through litigation as a result of failed mediation causes justice delayed hence justice denied.

⁶⁰ Court Sanctioned Mediation in Kenya-An Appraisal, Kariuki Muigua, p. 7 of 25

CHAPTER IV: A COMPARATIVE STUDY (UK, ITALY AND US)

4.1 INTRODUCTION

This chapter shall entail a comparative study of the US, UK and Italy. It entails a comparative study of these different jurisdictions because various countries have different approaches to mandatory mediation which is influenced by the System of law (civil or common law), membership to regional or international organizations also impact on a state's legal framework⁶¹, time it takes for cases to reach trial, the cost of litigation, the prevailing legal culture and political climate, and the attitudes of the legal profession, judiciary and general public.⁶²

These countries will be dealt with specifically because they belong to different jurisdictions of different systems of law i.e. the US practises civil law whereas the UK practises common law and Italy falls under the European Community Countries which ascribes to the European Community laws. The choice to do a comparative study of these different countries which fall under diverse regions is important in the study of mandatory mediation for the purposes of critical analysis and to inform Kenya's approach as discussed earlier in Chapter II.

4.2 THE U.S

The central ideology of American mediation is its voluntariness. Most ethical codes and practice standards define mediation as a voluntary process grounded in party self-determination.⁶³ In an effort to promote and legitimize compulsory mediation, the Law and Public Policy Committee of the Society of Professionals in Dispute Resolution (SPIDR) issued a report in 1990 stating that "mandatory participation in non-binding dispute resolution processes often is appropriate."⁶⁴ This is considered the first step of promulgation of mandatory mediation in the US.

In 1990, the United States Congress passed the Civil Justice Reform Act ("CJRA"). It states that each United States District Court "shall consider . . . principles and guidelines of

⁶¹ Dissertation, "Compulsory mediation: A contradiction?" By Tsormpatzoglou Stavros at p.4

⁶² Melissa Hanks, Perspectives on mandatory mediation, UNSW Law Journal, volume 35(3),2012 p.929

⁶³ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (2005).

⁶⁴ SPIDR, Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts, Report 1, reprinted in Stephen P. Goldberg et al., Dispute Resolution: Negotiation, Mediation and Other Processes 402-03 (5th ed., 2007). In 2001 SPIDR joined two other organizations to form the Association for Conflict Resolution (ACR).

litigation management and cost and delay reduction,” and allows the District Courts “. . . to refer appropriate cases to alternative dispute resolution programs . . . including mediation.”⁶⁵

“In short time, the United States Congress passed the Alternative Dispute Resolution Act of 1998 (“ADR Act”),⁶⁶ making a series of findings and ordering each District Court to authorize the use of alternative dispute resolution processes.”⁶⁷

Congress asserted that:

“[A]lternative dispute resolution . . . has the potential to provide . . . greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements . . . [and] certain forms of alternative dispute resolution . . . may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, . . . allowing the courts to process their . . . cases more efficiently.”⁶⁸

Congress concluded that “mediation had shown special promise and should be considered, in particular, for inclusion in each district’s ADR program.”⁶⁹ After mediation was implemented as an antidote for the ineffectiveness of the justice system, compulsory mediation programs were adopted in numerous contexts, particularly for custody and divorce disputes.⁷⁰ In 1983, Rule 16 of the Federal Rules of Civil Procedure was amended to exhort courts to consider the “possibility of settlement” or “the use of extrajudicial procedures to resolve the dispute” at pre-trial conferences.⁷¹

Florida is leading the way in the United States with its comprehensive court-connected ADR program.⁷² It has been estimated that more than 100,000 cases are diverted from court

⁶⁵ US Kuhner *ILSA Journal of Int’l & Comparative Law* Vol. 11:3, Civil Justice Reform Act of 1990, Pub. L. No.101-650

⁶⁶ Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315 § 1, 112 Stat. 2993 (1998)

⁶⁷ US Kuhner *ILSA Journal of Int’l & Comparative Law* Vol. 11:3, at p.9

⁶⁸ Alternative Dispute Resolution Act § 2(1-3).

⁶⁹ Alternative Dispute Resolution Act § 2(3) (“the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs”).

⁷⁰ Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 *Fam. & Conciliation Cts. Rev.* 335, 337 (1999).

⁷¹ 1983 amendments to FED. R. CIV. P. §16(c) (7) and Advisory Committee Notes.

⁷² Bruce A. Blitman, *Mediation in Florida: The Newly Emerging Case Law*, Fla. B. J., Oct. 1996, at 44; J. Sue Richardson, *Review of Florida Legislation; Comment: Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators*, 17 *Fla. St. U. L. Rev.* 623 (1990) (“Florida is leading the way in the establishment of alternative dispute resolution procedures.”)

process to mediation each year.⁷³ The Federal Rules of Civil Procedure also have encouraged courts to promote court connected ADR programs.⁷⁴ This system in Florida as many have argued is that its success is attributed to a number of factors one of them is that parties have a choice of mediators.⁷⁵ While the parties' autonomy over the mode of dispute resolution has been impinged upon, the parties are given considerable self-determination and flexibility concerning the way they would like mediation to be conducted. This is a prudent move to soften the blow of the mandatory mediation regime.⁷⁶

California was the first state to enact a statute that required mediation of child custody and visitation disputes.⁷⁷ California's mandatory mediation law, which first became effective in 1981, requires that all custody and visitation disputes be mediated prior to being considered by the county Superior Court. The court is required to appoint a mediator, who may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or some other person or agency the court decides is appropriate.⁷⁸

In the US various states vary in how they carry out their mandatory mediation programs this could be attributed to their experiences. For example due to power imbalances such as in the cases of domestic violence, courts have refrained from mandating mediation.⁷⁹ This is a result of increase in domestic violence cases sparked by mandatory mediation in California. "Mandatory mediation cases were marginally less likely to settle (46%) than were voluntary mediation cases (62%)".⁸⁰ This empirical study clearly indicates the success rate of mandatory mediation. It will be therefore wise not to tread on the same path.

⁷³ Sharon Press, Florida's Court-Connected State Mediation Program, in *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* 57 (Ed Bergman & John Bickerman eds., 1998).

⁷⁴ Anne C. Morgan, Thwarting Judicial Power to Order Summary Jury Trials in Federal District Court: Strandell v. Jackson County, 40 Case W. Res. L. Rev.. 491, 491 (1990).

⁷⁵ Mandatory Mediation: An Oxymoron? Examining The Feasibility Of Implementing A Court-Mandated Mediation Program, *Dorcas Quek p. 506*

⁷⁶ Mandatory Mediation: An Oxymoron? Examining The Feasibility Of Implementing A Court-Mandated Mediation Program, *Dorcas Quek p.506*

⁷⁷ Deis, California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes, 1 OHIOS T. J. DISPUTER ESOLUTION1 49, 152 (1985)

⁷⁸ Trina Grillo, The Mediation Alternative: Process Dangers for Women, *The Yale Law Journal*, Vol. 100, No. 6 (Apr., 1991), pp. 1545-1610 ,at p.1552

⁷⁹ Roselle Wissler, "The effects of mandatory mediation: empirical research on the experience of small claims and common pleas courts"

⁸⁰ Roselle Wissler, "The effects of mandatory mediation: empirical research on the experience of small claims and common pleas courts"

4.3 THE UK.

*"In England there is a somewhat different mediation story to tell. Parties must consent both to participate in mediation and to any agreements that are reached in mediation. But if a party refuses to give front-end, participation consent, and the refusal is deemed unreasonable by a court, then costs sanctions may be imposed."*⁸¹ As a result of general dissatisfaction with the delays, inflexible proceedings, and general malaise of the civil justice system, the Lord Chancellor directed Lord Woolf to examine the civil justice system and offer proposals for reform. Lord Woolf's findings described what one scholar has labelled "a rather depressing picture of the English civil justice system which is incomprehensible to litigants, costs significant sums of money and makes no or little use of modern technology."⁸² The Final Report concluded that despite the crisis in the English civil justice system, England was not ready for a mandatory ADR regime since the problems in England were not as great as to require a compulsory referral system.⁸³

"The problems in the civil justice system in this country, serious as they are, are not so great as to require a wholesale compulsory reference of civil proceedings to outside resolution".⁸⁴ The report formed the basis of a uniform Civil Procedure Rules (CPR) for England that took effect in April 1999. The CPR empowered courts to encourage parties to use ADR methods to resolve disputes, and to penalize litigants who failed to engage in appropriate ADR processes.⁸⁵ In *Dunnett v. Railtrack plc*⁸⁶ parties were encouraged to mediation however this turned to be more of a compulsion than an encouragement as the court made it clear that even a successful party could be deprived of costs that it would otherwise be awarded because of a refusal to mediate. After this case, there was confusion whether the courts really set a precedent as to compulsory mediation. In the case of *Halsey v Milton Keynes General NHS Trust*⁸⁷ the court clarified the following: that it (the court) should not require truly unwilling parties to mediate their cases, because compulsory referral would violate a litigant's fundamental rights to have access to the courts and run afoul of Article 6 of the European

⁸¹ Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 Fordham L. Rev. 1247 (2009), p.1256

⁸² Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT'L ARB. 167, 170 (2001) at 178

⁸³ Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 Fordham L. Rev. 1247 (2009), p. 1257

⁸⁴ LORD WOOLF, ACCESS TO JUSTICE-INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995) hereinafter LORD WOOLF, ACCESS TO JUSTICE REPORT], available at <http://www.dca.gov.uk/civilU>

⁸⁵ Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 Fordham L. Rev. 1247 (2009), p. 1257

⁸⁶ [2001] EWCA (Civ) 1935

⁸⁷ *Halsey*, [2004] EWCA (Civ) 576,

Rights.⁸⁸ The court also went on further to state that it was its duty to encourage ADR but not to compel parties to it.

Five weeks before *Halsey* was decided, a pilot quasi-compulsory scheme had been established in May 2004 in Central London County Court that involved the automatic referral of selected cases to mediation with an opportunity to opt out. If parties failed to mediate and the judge did not accept their reasons, they would be liable for cost sanctions under Part 44 of the CPR.⁸⁹

In the UK therefore, there is an automatic referral system whereas parties are required to go into mediation before litigation in specific matters⁹⁰ and whichever party that refuses to mediate without a “reasonable excuse”⁹¹ shall be liable to the costs of the litigation whether he/ she is successful or not. This also exists in the case of appeals whereby parties are asked to go into mediation before proceeding.

Mediation has proved to work in the UK specifically regarding family matters due to their confidential and private nature⁹² however some parties seem to point out that they agreed so as to satisfy the courts and not to incur costs.⁹³

4.4 ITALY

A categorical mandatory mediation scheme was first introduced in Italy in 1998 with three laws, which entitled consumers and required subcontracting and employment disputes to go to mediation before trial.⁹⁴ Italy has implemented Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters with Legislative Decree No. 28/2010, which was implemented by Ministerial Decrees No. 180/2010 and No. 145/2011.⁹⁵

In 2010, there was a scheme introduced which introduced a categorical mandatory mediation regime for disputes in real property; insurance, banking and financial agreements; division of

⁸⁸ Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 Fordham L. Rev. 1247 (2009), p. 1259

⁸⁹ Jacqueline Nolan-Haley, *Mediation Exceptionality*, 78 Fordham L. Rev. 1247 (2009), p. 1261

⁹⁰ For example divorce proceedings since they are considered private matters.

⁹¹ The court offered a non-exhaustive list of six factors in determining the reasonableness of a party's refusal to participate in mediation: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success- *Halsey V Milton Keynes* (2004)EWCA (Civ)

⁹² Laurence Bouelle, “mediation principles practice”, p.226

⁹³ Laurence Bouelle, “Mediation principles practice” p. 67, parties agreed to compromise their rights so as not to incur costs.

⁹⁴ Perspectives on Mandatory Mediation, Melissa Hanks, *UNSW Law Journal*, Volume 35(3), p.937

⁹⁵ http://www.concilia.it/getting_the_deal_mediation_2013_Italy.pdf

assets; inheritance; family law; tenancy law; neighbour disputes; gratuitous loans for use; compensation claims for car or boat accidents; medical negligence claims; and defamation in the press and other media.⁹⁶ For the purpose of such disputes, mediation becomes a *condizione di procedibilità* (i.e., a precondition for proceeding with the case). Thus, the court may not consider and decide a case unless the parties have previously tried to resolve the dispute by mediation.⁹⁷ This scheme came into effect in 2011 March, it however gave exception to civil and commercial cases as they were legislated under a non-mandatory mediation procedure.

“If parties go to court without attempting to mediate, the law requires that the court stay the proceedings for not longer than four months so that mediation can be attempted. It permitted a mediator, in the event that no settlement is reached, to propose a solution to the dispute which must then be either rejected with reasons, or accepted by the parties; this applies even if the parties do not require the mediator to issue a proposal, and even if one of the parties does not appear. The traditional role of a mediator is to act as a neutral third party and thus, this approach raises questions as to whether such a system can be classified as mediation at all.”⁹⁸

The legislative decree outlines a mediation procedure which begins with a party filing a claim before a mediation body. The mediation body in question must be registered with the Ministry of Justice under Decree 180/2010, which sets out the criteria and terms of a mediator’s admission to such a body. After the filing, the chairman of the mediation body appoints a mediator to seek a solution to the case. He or she must arrange a first meeting with both parties within 15 days. During the meeting the mediator assists the parties in clarifying their positions potentially in separate sessions with each party – before asking them to formulate a range of options for resolving their dispute.⁹⁹

4.5 CONCLUSION

As seen above, the 3 countries have different regimes with regards to mandatory mediation in the U.S various States have different approaches however, Florida and California have been highlighted due to their unique process. Florida is among the first one to spearhead mandatory mediation however its success is notable due to the fact that parties have a choice of mediators,

⁹⁶ Nicolo Juvara, *Italy Introduces Mandatory Mediation for Insurance Disputes* (15 April 2010) Lexology

⁹⁷ By Micael Montinari and Lucia Ceccarelli „A new scenario for Italy: the compulsory mediation of civil and commercial disputes, p. 2

⁹⁸ Dissertation, *Compulsory mediation: A contradiction?* By Tsormpatzoglou Stavros

⁹⁹ By Micael Montinari and Lucia Ceccarelli „A new scenario for Italy: the compulsory mediation of civil and commercial disputes, p. 2

there is more confidentiality and party autonomy as opposed to other systems of mandatory mediation which are more rigid. In California, matters of child custody and visitation were the first ones to be promulgated as to be under mandatory mediation. This is despite of the out roar that it encourages domestic violence in the long run. This is as discussed in the earlier chapters by quoting different scholars.

In the UK, on the other hand the history of compulsory mediation is quite unique as it started off with being discouraged but then later turned out to be preferred and a sanction in the form of bearing legal costs was imposed on whichever party that refused to mediate despite the party's win in the case. This however depends on whether the party failed to satisfy the court of a reasonable excuse to refuse mediation and opt for litigation instead.

In Italy, it also started off by being held unconstitutional and parties that were forced to mediate won damages but later on it was promulgated into the Italian laws.

What we learn from these different systems is that each country has its unique history, circumstance and traditions that affect how mediation works in that particular jurisdiction. Lifting an entire system from one jurisdiction and applying it to another country can prove to be fatal since what works in one country will not work in another. As pertaining Kenya, Kenya has a unique and diverse mix of cultures that include traditions and norms that have rich history and mean much to those who ascribe to it. Before applying a scheme, intense research should be made and a unique scheme suiting the findings should be applied so as to avoid conflict.

CHAPTER V: CHALLENGES, RECOMMENDATIONS AND CONCLUSION

5.1 INTRODUCTION

As seen in the earlier chapters, in the various jurisdictions, they have different approaches to mandatory mediation which are more or less underlined by the same factors which include: coercion, lack of or limited party autonomy and inflexibility of the process. The challenges that come along with making mediation a mandatory mechanism include but are not limited to: the erosion of the mediation itself since the vital attributes of mediation are taken away by the mandated scheme, the mandated scheme could lead to a delay of justice once it fails and parties are referred back to litigation, once forced the attitude of parties could be negative depending on how they take it, this could affect the process of mandatory mediation and even its outcome.

5.2 CHALLENGES

There is a clear disconnect between the courts and the parties when it comes to mandatory mediation. Courts are primarily concerned with institutional efficiency while parties are interested in satisfying their own needs and goals. Given that the parties may not always be able to achieve what they want quickly or cheaply through a process like mediation (which does not aim to explore legal rights and positions), it is difficult to accept that mandating attendance will always promote justice. It may be that the only way justice is done in some cases is for the matter to be determined by the courts.¹⁰⁰ As seen some scholars¹⁰¹ contest mandatory mediation on the basis that mediation is a different concept from litigation hence cannot be integrated into the court system. Mediation is classified under alternative dispute resolution and the purpose of ADR is to increase the variety of methods of settling disputes and thereby sort of declassify as an alternative and making it similar to litigation. Alternative dispute resolution methods are meant to offer another opportunity *that is less lenient and formal to as opposed to litigation and not another form of litigation.*

¹⁰⁰ Green, Cameron (2010) "ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process," ADR Bulletin: Vol. 12: No. 3, Article 2. Available at: <http://epublications.bond.edu.au/adr/vol12/iss3/2>

¹⁰¹ Dr Kariuki Muigua

*Mandatory mediation would: 1) create another costly procedure; 2) unfairly impede the public's right of free access to the courts; 3) achieve statistically lower success rates. The central ideology of mediation is voluntariness. Tampering with this principle could easily be misinterpreted as a denial to access real justice.*¹⁰² What mandatory mediation essentially does is erode the concept of mediation by taking away almost all its defining attributes, hence as several authors have pointed out should be given another term and should not be shielded by the definition of "mediation".

Mediation studies have shown that disputants are most satisfied with the mediation process when it is non-coercive and attentive to parties' interests.¹⁰³ This should be an expected outcome once you force parties to mediate in one form or another either directly or indirectly. As observed in the case of Halsey "It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so."¹⁰⁴ Once parties have been coerced it will be common for them to be hesitant and some people may act by being defiant and not opening up during the mediation. This will impact both the process and outcome as one party may have an advantage over another.

Another objection to compulsory mediation is that processes are not neutral. Some aspect of mediation may serve the interests of one party over the other. This is due to the power imbalances that occur as provided for in the OWJN report. In divorce mediation, for example, this situation exists when there is a history of domestic abuse.¹⁰⁵ The abusive party benefits from a process which assumes the parties have equal bargaining power, which provides limited protection for the former partner, and which does not consider who is in the wrong.¹⁰⁶ The trend towards mandatory mediation has sparked concern in many feminist legal academics and practitioners. In general, feminists are concerned that mediation will result in losses to women in the context of the family, as well as in broader society. These concerns are grounded in the practical experience of women. For example, in a recent questionnaire distributed by OWJN,

¹⁰² Compulsory Mediation, Article by Paul Randolph, January 2013, Mediate.com

¹⁰³ Guthrie C. & J. Levin, A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute, 13. Ohio St. J. on Disp. Resol. 885, 892-93 (1998).

¹⁰⁴ [Halsey v Milton Keynes General NHS Trust](#) [2004] EWCA Civ 576 (Dyson LJ, para 9).

¹⁰⁵ DISSERTATION "Compulsory mediation: A contradiction?" By Tsormpatzoglou Stavros

¹⁰⁶ Gagnon, Andree G. "Ending Mandatory Divorce Mediation for Battered Women". Harvard Women's Law Journal 15 (1992): pp. 274-77.

a shelter worker responded that: "[In] [her] experience many women who have participated in mediation have been dissatisfied with the process, the mediator and the outcome."¹⁰⁷

Mandatory mediation has the potential to be abused by courts which may want to expedite cases for the purpose of promoting efficiency in the legal system. This is despite the fact that the courts should facilitate settlements which promote justice and the parties' interests.¹⁰⁸ This is due to the fact that it is meant to reduce the backlog of cases which in some states, for example Italy has been a success. However, the problem that may likely arise is the risk that the courts can take advantage and refer cases to mediation unnecessarily and in the long run impede access to justice and achieve justice itself.

In Kenya the concept of mandatory mediation is quite new, the pilot project mediation rules Section 11 talk about non-compliance. This section states that in the event of non-compliance the party that refuses to comply shall be made to pay costs that the courts may deem fit. In essence, this may not encourage parties to comply with mediation and even proceed with a positive attitude after being fined. This may even worsen the case where there is domestic violence involved as in the incidents that occur in California.

5.3 RECOMMENDATIONS

Mediation is a good dispute resolution mechanism however when made use of voluntarily. Once altered, it changes the face of it and its impact. Its success is quite commendable and has misguided legislators to think it a success once mandated too. Once parties decide to go to court it is quite strange to tell them that they need to go into mediation rather than proceed to the court process that they had faith in. Parties who believe that they can achieve justice through litigation once referred to mediation against their will may find it unfair and may change their attitude towards the process. Parties should therefore be strongly advised into mediation rather than being imposed to mediate. This will create a fairer system of justice and may even have a greater success as opposed to making it mandatory upon them. This also does not alter and erode mediation since it maintains its attributes as a voluntary and informal settlement scheme.

¹⁰⁷ http://owjn.org/owjn_2009/component/content/article/55-family-law/161-the-trend-towards-mandatory-mediation-a-critical-feminist-legal-perspective , last accessed on 15/12/2015 at 20.55

¹⁰⁸ Green, Cameron (2010) "ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process," ADR Bulletin: Vol. 12: No. 3, Article 2. Available at: <http://epublications.bond.edu.au/adr/vol12/iss3/2>

This is not to state that mediation does not have a success rate. It has seen a success in some countries though not in all matters (divorce due to violence). However, empirical studies as seen earlier have proved that voluntary mediation is more successful than mandatory mediation.

Mediation therefore should not be made mandatory but rather could be made an alternative within the courts. This system could be in the form whereby parties are advised of the choice of mediation before proceeding to litigation. This stage could involve encouragement and a brief talk of the merits of mediation. It should however be left upon the parties to decide whether they still prefer litigation or mediation. This decision making will enhance justice and fairness be it in mediation or litigation. In the case where there is a backlog of cases courts should consider alternative means to reduce the backlog rather than placing it on mediation which is a voluntary informal process that does not require to be made otherwise.

Also before placing a scheme, the judiciary should involve organisations such as FIDA, a council of elders, and other institutions so as to learn from other jurisdictions and ensure there is no conflict with some communities.

5.4 CONCLUSION

The challenges that come along with mandating mediation are irreparable and irreversible which could thereon hinder access to justice whereas the main purpose of introducing them is to enhance access to justice. Streamlining mediation to the court process is basically forming a hybrid of mediation and arbitration which is against the spirit of mediation which is voluntariness.

This paper does not discourage mandatory mediation completely but rather points out the dangers that are associated with making mediation mandatory. These considerations ought to be taken into account before making mediation a court process.

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