

MEDIATION PRACTICE IN NIGERIA: EXPERIENCES FROM ABUJA AND ONDO WITH LESSONS
FROM ONTARIO, CANADA

By

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ABSTRACT

This thesis examines mediation practices in Nigeria: its development, challenges and success, precisely within the judicial precinct of Abuja and Ondo, while drawing lessons from Ontario, Canada. The research explores extensively, the evolution of dispute resolution mechanisms in Nigeria, from traditional methods to the formal integration of mediation within the judicial system. Comparatively, the study analyses the legal frameworks, institutional structures, and operational challenges of court-connected mediation in Nigeria, particularly in Abuja and Ondo State.

The research provides a detailed overview of mediation's development in Nigeria, including the establishment of Multi-Door Courthouses and Alternative Dispute Resolution Centers. It examines the effectiveness of these institutions in resolving disputes and improving access to justice. The thesis also traverses the recent enactment of the Nigerian National Mediation Act (Arbitration and Mediation Act 2023) and its potential impact on mediation practices across the country.

In contrast, the study investigates Canada's mediation landscape, with a specific focus on Ontario's Mandatory Mediation Program (OMMP). It traces the evolution of mediation in Canada, highlighting the push for national legislation and the development of guidelines by the Alternative Dispute Resolution Institute of Canada (ADRIC). The research offers insights into the structure, implementation, and outcomes of the OMMP, offering useful lessons for Nigeria's evolving mediation system.

The thesis employs a comparative analysis to identify best practices and potential areas for improvement in Nigeria's mediation framework. It addresses key challenges facing mediation in Nigeria, such as inadequate funding arising from absence of Judicial autonomy, reluctance among legal practitioners to embrace ADR because of paucity of research in mediation and ADR, this poor knowledge results in low referral rates from judges and magistrates. Hence, the findings emphasize the pivotal role of judicial autonomy, adequate funding and comprehensive legal education in advancing effective court-connected mediation and ADR. By drawing on Canada's experiences, particularly the success of the OMMP, the study proposes recommendations for enhancing Nigeria's mediation practices.

This research contributes to the growing body of knowledge on alternative dispute resolution in Nigeria and offers practical insights for policymakers, legal practitioners, and stakeholders involved in the administration of justice. The findings and recommendations aim to improve the efficiency and effectiveness of mediation as a tool for dispute resolution within the Nigerian legal system.

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DEDICATION

This work is dedicated to efforts for access to justice in both Canada and Nigeria.

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INTRODUCTION

In Africa, traditional justice systems have weathered diverse forms of interference from the colonial masters and have met people's needs, especially those in rural areas.¹ The patterns and activities that form the fabric of customary law in various African societies are evolving, and are not the same.² Advocacy for the restatement of customary law and the ascertainment of living customary law has existed owing to changes in the traditional perception of justice.³ Then comes the task of amalgamating the conventional and present-day dispute-resolution techniques in order to advance access to justice for disputants,⁴ not only in the continent of Africa generally, but also in Nigeria specifically. Scholarly publications categorized the astonishing diversity of culture in Africa into three types of societies: the centralized, the decentralized polities of the sub-Saharan, and the Islamic system of the Sahel.⁵

The centralized communities in Africa were largely heterogeneous or multicultural, typically led by a paramount chief or a King-in-council. Examples include the Yoruba in Nigeria, Zulus of South Africa, and Bemba of Zambia.⁶ To prevent abuse of power in centralized societies,

¹ Adenike Aiyedun & Ada Ordor, "Integrating the Traditional with the Contemporary in Dispute Resolution in Africa" (2016) 20 Law Democracy & Development 154

² *Ibid*

³ TW Bennett, *Customary Law in South Africa* (Cape Town: Juta, 2004) at 44-49; TW Bennett, "Official vs Living Customary Law: Dilemmas of Description and Recognition" in A Claassens & B Cousins, eds, *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (Cape Town: Juta, 2008) 138; Chuma Himonga & Craig Bosch, "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?" (2000) 117:2 SALJ 306; Marius Pieterse, "It is a Black thing: upholding culture and customary law in a society founded on non-racialism" (2001) 17:3 SAJHR 364 at 377.

⁴ Adenike Aiyedun, *supra* note 1

⁵ AN Allott, *New Essays in African Law* (London: Butterworths, 1970); TW Bennett & NS Peart, *A Sourcebook of African Customary Law for Southern Africa* (Cape Town: Juta, 1991).

⁶ PC Lloyd, "The Integration of the New Economic Classes into Local Government in Western Nigeria" (1953) 52:208 African Affairs 327 at 329-30.

although ultimate power rested in an individual or a group of individuals, the leaders appointed subordinates, the latter of which had the power to maintain fairness within the system. In Nigeria, particularly in Yorubaland, for instance, if the king acted *ultra vires*, his chiefs could ask him to go into exile or "open the calabash," a different way of asking someone to commit suicide.⁷ The chiefs, too, were not immune to checks.

Also, if the chiefs acted against the interest of the people, the sovereign, with the support of the other subordinates, could remove them;- the enhanced checks and balances in the Nigerian system of governance guaranteed that public opinion fed into the governance of the community. The European colonialists thought the existing dispute-resolution methods in Africa, and specifically in Nigeria, to be barbaric and incompatible with theirs and hence established a formal court system considered superior to existing dispute-resolution mechanisms. This led to a dual dispute-resolution structure that features Indigenous resolution processes alongside Western-style courts.⁸

To date, this has made access to the justice system severely cumbersome and costly to disputants. This was compounded by the intricacies of professional legal representation and language that often place proceedings above the understanding of ordinary litigants.⁹ While the focus of Western courts was adjudication, traditional or informal justice systems are Alternative Dispute Resolution systems established by communities or non-governmental institutions.¹⁰

⁷ TO Elias, *The nature of African customary law* (Manchester: Manchester University Press, 1956)

⁸ Adenike Aiyedun, *supra* note 1 at 159.

⁹ *Ibid*

¹⁰ Adenike Aiyedun, *supra* note 1 at 159.

In Canada, informal or Indigenous legal traditions existed that have been adopted by the Law Commission of Canada to describe a body of "Aboriginal dispute resolution systems" and "governance processes."¹¹ These legal traditions embodied respect, restitution, reconciliation, responsibility, and connection with natural and spiritual environments, creators, and communities.¹² These core values aim to set conditions essential to living in harmony, respecting differences, promoting the well-being of individuals, families, and the community, and resolving disputes in ways that promote better relationships.¹³

Indigenous legal traditions in Canada around conflict resolution were carried out by the Accessing Justice and Reconciliation Project (AJR).¹⁴ It has been explicitly stated that there exists a broad range of diversity in the legal systems and perspectives on justice among Indigenous peoples.¹⁵ The AJR goal was to:

"Better recognize how Indigenous societies used their legal traditions to successfully deal with harms and conflicts between and within groups and to identify and articulate legal principles that could be accessed and applied today to work toward healthy and strong futures for communities."¹⁶

When applying a similar method to that used by lawyers in identifying legal principles in Canadian Court decisions, the AJR project, in partnership with First Nation communities in

¹¹ Andrée Lajoie, "Introduction: Which Way Out of Colonialism?" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 13 <https://www.ubcpres.ca/asset/9417/1/9780774813709.pdf>

¹² Nisha Sikka, George Wong & Catherine Bell, "Indigenous Centered Conflict Resolution Processes in Canada" (2014), online (pdf): First Nations Housing & Infrastructure Council [https://fnhpa.ca/Library/Matrimonial Real Properties/Web-version-Final-Indigenous-Centred-Conflict-Resolution-app.pdf](https://fnhpa.ca/Library/Matrimonial%20Real%20Properties/Web-version-Final-Indigenous-Centred-Conflict-Resolution-app.pdf).

¹³ *Ibid* at 2.

¹⁴ Hadley Friedland, "IBA Accessing Justice and Reconciliation Project: Final Report" (4 February 2014), online: Indigenous Bar Association http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2013/04/iba_ajr_final_report.pdf.

¹⁵ Marie-Andrée Denis-Boileau, "The Gladue Analysis: Shedding Light on Appropriate Sentencing Procedures and Sanctions" (2021) 54:3 UBC L Rev 621 at 557 <https://commons.allard.ubc.ca/ubclawreview/vol54/iss3/2>

¹⁶ Hadley Friedland, *supra* note 14 at 2

collaboration with knowledgeable people from the locals, made two revelations about dispute resolution:

- I. Indigenous legal traditions do not adhere to a uniform approach. Instead, each tradition provides a diverse array of principled legal remedies and resolutions for addressing harm and conflict.¹⁷
- II. Indigenous legal traditions demonstrate enduring consistency, continuity, flexibility, and the ability to adapt to evolving circumstances.¹⁸

This was corroborated by the pronouncement in the case of *Re Southern Rhodesia* that:

“There are Indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own ...; they are no less enforceable than rights arising under English law.”¹⁹

From the above, both informal and formal justice systems bear a striking semblance of precision and enforceability. These notions elevate and highlight the inclusion of communitarian and familial intervention to nurture conflicted parties toward finding a resolution.²⁰ It is widely recognized that a system of civil justice is essential for maintaining a civilized society.²¹ The law

¹⁷ *Ibid* at 3

¹⁸ *Ibid*

¹⁹ *Re Southern Rhodesia* [1919] AC 211 at 233-34 (PC) <http://www.uniset.ca/other/cs2/1919AC211.html>

²⁰ Laura N. Mahan & Joshua M. Mahuma, "Bridging the Divide: Cross-Cultural Mediation" (2017) *International Research Journal and Review* 14 <https://files.eric.ed.gov/fulltext/EJ1170662.pdf>

²¹ Hans Fabricius SC, "Access to Justice: The Woolf Report" (1996) 9:2 *Consultus* 108 <https://www.gcbsa.co.za/law-journals/1996/november/1996-november-vol009-no2-pp108-115.pdf>

provides the basic structure for commerce and industry to operate, safeguards individuals' rights, regulates their dealings with each other, and enforces government duties.²²

Settlement of disputes is a global phenomenon, ubiquitous in all human relations, and plays key roles in sustaining world peace.²³ Evidence exists of the settlement of international and private disputes in Sumerian Inscription as far back as 4000 BC.²⁴ In his remarks in *Bremer v. South India Shipping Corp*²⁵ Lord Denning opined that:

"Every civilized system of government required that the State makes accessible to all its people a means for the just and peaceful settlement of disputes between them." A pivotal role of law is providing an efficient means of resolving disputes in our evolving world."²⁶

Access to a neutral court decision-maker to remedy wrongs and enforce legal rights is a key element in most democracies.²⁷ For many decades around the globe, the court system has remained a central point for dispute resolution that is declared as formal.²⁸ Both Nigeria and Canada received English law from Britain, which unfortunately colonized both countries. Each inherited the British court system, which is largely adversarial,²⁹ acrimonious and with procedural expectations that presume a duel to the death.³⁰ The challenges of the formal justice system are

²² Kehinde Aina, "The Lagos Multi-Door Courthouse - One Year After" (Paper delivered at the Workshop on The Lagos Multi-door Courthouse: The Procedure and Promise, Lagos, 30 September 2003) [unpublished]

²³ Lukman Ayinla, "An ADR: A Tith towards Practical Application" (2001) Kogi State ULJ 248.

²⁴ Chowdhury & Sahara, *Roy Chowdhury on Arbitration* (Eastern et al, 1979) at 5.

²⁵ *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd*, [1981] AC 909 at 917 (HL).

²⁶ Akereolu, Alero. "Institutionalizing Alternative Dispute Resolution" (2014) 11:1 US-China L Rev 105.

²⁷ *Ibid*

²⁸ Jay Folberg et al, *Resolving Disputes: Theory, Practice and Law*, 2nd ed (New York: Aspen Publishers, 2010)

²⁹ Chowdhury, supra note 24

³⁰ Alero Erhieyorwe Akereolu, "Duel to Death or Speak to Life: Alternative Dispute Resolution Today and Tomorrow" (7th Inaugural Lecture delivered at Ajayi Crowther University, 11 January 2018) at 14. According to her, "What is the connection between the duel and the adversarial system of administration of justice? There are legal battles in court, and lawyers are the modern-day champions for their clients, strenuously advocating and drawing blood if necessary. Counsel may cross-examine a witness with the only goal of humiliating or embarrassing the witness. After all, as the popular adage goes, "All is fair in love and war." In court battles, relevant but damaging evidence may be buried or not disclosed; there could also be deliberate omission or falsification of facts, all to 'win the battle (trial)'. Is this what the reasonable man on the streets of Dugbe or Owode asked for when he came to the temple of justice?"

not hidden, and reform of the civil-justice system has necessitated reform from England and Wales to Africa and North America. Lord Woolf acknowledged that many of the challenges and complaints about the civil court system in common law countries were more about the process than the outcomes.³¹ The Honourable Justice Mojeed Adekunle Owoade agrees with this view. The Justice highlights problems, which include delay, inadequate infrastructure, court congestion, insufficient courtrooms, corruption of both judicial workers and court staff, case backlogs, and the cost of litigation.³²

The former Chief Justice of Nigeria, Justice Mahmud Muhammed, succinctly expressed his view on the system of Justice in Nigeria as follows:

“A major criticism of our justice delivery system in Nigeria is the persistent delay in the administration of justice. Indeed, we must note the old judicial aphorism that states that Justice Delayed is Justice Denied, which I daresay is more so where life and liberty are at stake...”³³

This further attests to the ongoing debate that the restrictive single option offered by the so-called formal justice system through litigation cannot be said to sufficiently meet users' needs.³⁴ Even though both courts and tribunals have a role in deciding disputes, it cannot be an overstatement that not everyone with disputes approaches them, insomuch as access to court does not translate to access to justice.³⁵ A former Chief Justice of the United States underscored this view when he said:

³¹ Laura N. Mahan, *supra* note 20.

³² M.A. Owoade, "Global Trends in Court Connected Alternative Dispute Resolution: Quo Vadis the Nigerian Judiciary" in C. Nweze, C. Offiah & A.O. Mogboh Jr, eds, *Beyond Bar Advocacy: Multidisciplinary Essays in Honour of Anthony Okoye Mogboh*, SAN (Umuahia: Impact Global Publisher Ltd, 2011) 700.

³³ Kehinde Aina, "Court Annexed Mediation: Successes, Challenges and Possibilities, Lessons from Africa Session (Nigeria)" at 2 Online: <https://www.conflictdynamics.co.za/DBFile/Files/B8CA4844-4DE1-4018-96F5-DDFC5365FEB3/download>

³⁴ *Ibid*

³⁵ Warren Burger, as quoted in "Ask Peegee" (last visited 19 October 2024), online: Arbitration India <https://www.arbitrationindia.com/peegee.html>.

"The notion that most people want black-robed judges, well-dressed lawyers and fine-paneled courtrooms as the setting to resolve disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible...."³⁶

As a sequel to the above, it is apparent a well-structured alternative to both civil litigation and adjudicatory procedures is imperative.³⁷ Mediation, arbitration and conciliation are the frontline alternative dispute resolution mechanisms.

³⁶ Tom Goldstein, "Burger Warns About a Society Overrun by Lawyers", The New York Times (28 May 1977). Justice Warren Burger was the 15th Chief Justice of United State of America. "There are people, Justice Burger also said, "who seem to regard litigation as one of the essences of life, and who scorn any solutions short of the traditional; but the harsh truth is that if we do not devise substitutes for the courtroom processes, and do not do it rather quickly, we may well be on our way to a society overrun by hordes of lawyers hungry as locusts competing with each other..." <https://www.nytimes.com/1977/05/28/archives/burger-warns-about-a-society-overrun-by-lawyers-burger-in-warning.html> Also cited in Elizabeth S Stong, "Some Reflections from the Bench on Alternative Dispute Resolution in Business Bankruptcy Cases" (2009) 17:2 Am Bankr Inst L Rev 387.

³⁷ Avtar Singh, *Law of Arbitration and Conciliation (Including ADR Systems)*, 7th ed (Lucknow: Eastern Book Company, 2006) at 394.

PART 1: RESEARCH METHODOLOGY AND DEFINITIONS OF PROCESSES

1.Scope and Limitations

This thesis considers the following objectives: -

- I. To evaluate mediation's effectiveness in Abuja and Ondo courts within Nigeria's legal framework.
- II. To evaluate the challenges of implementing mediation within the Nigerian courts system and propose strategies for overcoming these challenges;
- III. To analyze the mediation practices in Ontario and to identify transferable lessons, best practices, and the feasibility of implementing Canadian mediation practices in the Nigerian legal system; and
- IV. To provide recommendations for policy reforms and procedural changes for mediation in Nigeria.

The thesis encounters several setbacks. This includes the limitation of its scope to one province in Canada and two states in Nigeria. Ontario, which is the focus of this thesis in Canada, may not accurately represent the symbol of mediation—specifically, the mandatory mediation program—across other provinces. There may be other provinces that implement it more effectively or less effectively than does Ontario. Additionally, Ontario's mandatory mediation program is restricted to just three cities: Ottawa, Toronto, and Windsor.

A similar challenge applies to Nigeria, where the thesis is confined to Abuja and Ondo, which may not accurately reflect the situation in the remaining thirty-four states. Furthermore,

the lack of data and literature, particularly from Nigeria, poses another limitation. Surprisingly, I was unable to find certain information online regarding the Ontario Mandatory Mediation Program (OMMP). These limitations could have been mitigated had interviews or questionnaires been utilized in the research instead of relying solely on the comparative literature and doctrinal approach.

2. Justification For the Thesis

Despite the limitations, the thesis aims to address the following questions:

- I. How does mediation enhance dispute resolution within the court systems of Abuja and Ondo?
- II. What are the key characteristics and successful elements of mediation practices in Ontario, and how can these be adapted to the Nigerian context?
- III. What legal, cultural, and institutional factors in Nigeria may influence the implementation of mediation practices, and how can these challenges be effectively tackled?

3. Research Methodology

This study utilizes both comparative literature and doctrinal methods for its findings and analysis. The rationale for employing these approaches in this thesis is based on several important considerations. First, the comparative literature approach allows for the investigation of mediation practices within diverse cultural and legal contexts, specifically in Nigeria and Ontario, Canada. Its goal is to identify best practices that can enhance conflict resolution strategies in Nigeria.

Secondly, the doctrinal approach centers on the theoretical foundations and legal frameworks of mediation. It involves an analysis of the statutory and regulatory environment in Nigeria, juxtaposed with established mediation laws in Ontario, to assess strengths, weaknesses, and potential areas for reform. Additionally, a qualitative focus is emphasized: while empirical research yields quantitative data, this approach prioritizes a comprehensive interpretive understanding of mediation experiences. It highlights the significance of qualitative insights in formulating informed recommendations for improving mediation practices in Nigeria.

The reasons for selecting Abuja and Ondo in Nigeria, along with Ontario in Canada, are compelling. As Nigeria's capital city, Abuja functions as an essential political and administrative centre. Its varied population and governmental systems provide a distinctive backdrop for exploring mediation practices and their application in urban environments. In contrast, Ondo embodies a different socio-cultural context within Nigeria, enabling a comparative analysis of how mediation operates across various regional landscapes. Incorporating perspectives from Ontario, Canada, introduces an international dimension to the research. Ontario is recognized for its robust mediation frameworks and practices, offering insights that can inform and enhance the mediation landscape in Nigeria.

By comparing these three locations, the thesis seeks to underscore both the challenges and successes of mediation practices and derive lessons that can be applied to improve conflict resolution strategies in Nigeria.

The thesis is structured into five parts.

Part I: Introduction and Definition of Concepts: This section provides an overview of African traditional justice systems, with a particular focus on Nigeria. It explores the following key themes: the evolution of customary law within African societies, European colonialism's impact on established dispute-resolution methods, and the emergence of a dual dispute-resolution framework that incorporates Indigenous processes alongside Western-style courts. Additionally, it addresses the challenges the formal justice system faces, including delays and high costs, and emphasizes the necessity for alternative dispute resolution (ADR) mechanisms. The section concludes by outlining the principal ADR processes: arbitration, negotiation, mediation, and conciliation.

Part II Mediation Practice in Nigeria: This examines several key aspects: the pre-colonial conflict resolution practices in Nigeria; the role of Nigerian courts as inherited from the colonial system; the resurgence of mediation within the Nigerian dispute-resolution landscape; the legal frameworks that support mediation in Nigeria; experiences with mediation in the Abuja and Ondo judicial divisions; and the professional bodies that promote mediation in the country. The section explains that the predominant type of mediation utilized in Abuja and Ondo is court-connected. It assesses the effectiveness of mediation in these areas. It addresses the numerous challenges facing the justice system, suggesting that a robust qualitative and quantitative court-connected mediation mechanism could help resolve many of these issues.

Part III Mediation Practice in Canada: This offers a detailed overview of mediation practices across the country, with a particular emphasis on experiences from Ontario. It traces

the evolution of mediation in Canada since the 1970s, highlighting concerns over accessibility to justice and the negative impacts of adversarial dispute resolution. The section notes the efforts of various provinces, including Ontario, British Columbia, and Alberta, to establish a resolution system distinct from traditional litigation, along with the Canadian Bar Association (CBA) advocacy for justice reform.

Additionally, it discusses the ongoing debates surrounding national mediation legislation. Without a consensus on such legislation, the National Mediation Rules developed by the Alternative Dispute Resolution Institute of Canada (ADRIC) are presented as a framework. The part concludes by showcasing the success of the Ontario Mandatory Mediation Program (OMMP), referencing a study by Hann *et al.* (2001) that demonstrated significant benefits in case resolution time, litigant costs, and overall satisfaction with the mediation process.

Part IV: Literature Review: The thesis focuses on various mediation styles and their applications. It offers a comprehensive analysis of four primary mediation approaches: facilitative, evaluative, transformative, and narrative. The review engages with various scholarly perspectives on mediation styles, using Leonard Riskin's writings as a foundational reference point for mediation orientations. It also examines the application of these styles across different contexts, including family disputes, workplace conflicts, environmental issues, and international disputes.

The section highlights the strengths and limitations of each approach and explores ongoing debates within the mediation community concerning their effectiveness and ethical implications. The review concludes with Randolph Lowry's analytical perspective, asserting that regardless of the mediator's chosen style, they all involve an evaluative component.

Part V examined the challenges confronting mediation practices in Nigeria and drew upon valuable lessons from Canada to address these issues. It identifies three key challenges: the lack of judicial autonomy, insufficient legal research, and inadequate procedural frameworks governing court-connected mediation in Nigeria. To tackle these challenges, the section proposes that Nigeria can benefit from Canada's more developed court-connected mediation system, which enjoys strong systemic support and recognizes the challenges faced by the Nigerian system as fundamentally systemic in nature. By implementing these lessons, Nigeria could enhance its mediation practices and improve the overall effectiveness of its justice system.

4. Definitions And Types of Processes

i) The Concept of Alternative Dispute Resolution (ADR):

ADR encompasses processes deployed to assist parties in disputes, either within or outside the formal legal system, without recourse to adjudication or a judge's decision.³⁸ Some stakeholders from Nigeria have termed these processes "African Dispute Resolution".³⁹ Undoubtedly, some developed nations such as China, India, Italy, and the United States have also claimed to be pioneers in ADR.⁴⁰ Some lawyers who are averse to ADR describe it as responsible for an alarming drop in revenues for lawyers.⁴¹

³⁸ Carrie Menkel-Meadow, "Mediation, Arbitration and Alternative Dispute Resolution (ADR)" (2015) University of California, Irvine School of Law Legal Studies Research Paper No 2015-59

³⁹ MO Ogunbe, "Alternative Dispute Resolution and Arbitration's Duty to Act in Good Faith" (2001) 3 *Olabisi Onabanjo LJ* 188.

⁴⁰ Muhammed Mustapha Akanbi, *Domestic Commercial Arbitration in Nigeria: Problems and Challenges* (Saarbrücken: LAP LAMBERT Academic Publishing, 2012) at 56.

⁴¹ Emilia Onyema, "Is Arbitration Within the Remit of ADR?" (19 April 2021), online (blog): Egbunike Umegbolu <https://blogs.brighton.ac.uk/chinwe/2021/04/>. In her opinion, ADR and the word 'alternative' can mean whatever you want it to mean. For the legal profession, ADR often means an alarming drop in revenue, and for the judiciary, an alarming drop in relevance. ADR /Mediation has undoubtedly shaken up the Centuries-old litigious

Despite this, there is a movement towards appropriate dispute resolution and process pluralism.⁴² This epitomizes that, given the nature of disputes, parties and differences in customs and people's traditions, including location, may require different processes; hence, there is no one-size-fits-all for all humans in dispute.⁴³

The modern concept of ADR has been accepted in Nigeria, Canada and worldwide.⁴⁴ The taxonomy of different dispute processes (ADR) differentiates between binding and non-binding processes.⁴⁵ They are also separated by the degree of control the third-party neutral participant has over both the process and the substance -decision, advice, or facilitation, the formality of proceeding-whether held in a private or public setting, with or without formal rules of evidence, informal separate meetings or 'caucuses' with the parties, and with or without the participation of more than the disputants.⁴⁶ The selection of a specific ADR process is heavily influenced by the nature of disputes and the parties involved.

In Part 4 of this thesis, it detailed that the specific characteristics of a dispute have a significant impact on the selection of mediation styles that a neutral mediator or participant may utilize to facilitate the parties in reaching a resolution. Alternative dispute resolution can be

dispute resolution model. It is now a mere shadow of its former self-regarding participation. We now have judges in the Federal Circuit Court and state Supreme Courts (S.A.) sitting as mediators in their courts. However, they refer unresolved matters back to other bench members to decide. Are the courts now turning ADR, too?

⁴² Carrie Menkel-Meadow, "Process Pluralism in Transitional/Restorative Justice: Lessons from Dispute Resolution for Cultural Variations in Goals Beyond Rule of Law and Democracy Development in Argentina and Chile" (2015) 3 Intl J Conflict Engagement & Resol 1. Carrie's concept of process pluralism, originating from broader areas such as conflict resolution and alternative dispute resolution in legal contexts, is a crucial element of transitional justice. It involves the simultaneous or sequential occurrence of multiple processes over time.

⁴³ *Ibid*

⁴⁴ Lord Woolf. *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*. (London: Lord Chancellor's Department, 1995), online: <https://www.justice.gov.uk/>.

⁴⁵ M.A Owoade, *supra* note 32 on page 4

⁴⁶ Lawrence Susskind, Sarah McKearnan & Jennifer Thomas-Larner, *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* (Thousand Oaks, CA: Sage Publications, 1999)

essential for supplementing and maintaining the efficacy of the judicial system.⁴⁷ The issue of using civil-procedure reform to improve dispute resolution is a global concern. At the center of this approach lies ADR options, which have been seen as promising ways to realize that goal.⁴⁸

ADR is a spectrum that enhances the growth of consensual solutions by the disputing parties, and are considered viable alternatives. The spectrum includes mediation, negotiation, conciliation, and arbitration. Other hybrid or combined ADR procedures exist but this Part will be limited to those identified in this paragraph. ADR can be described as a continuum. It can involve anything from low-level facilitation to high-level intervention, from arranging an informal meeting to discuss next steps to accepting the binding decision of an arbitrator where parties have reached an impasse.⁴⁹ Courts have been generous to ADR inventiveness by parties to disputes. As one court observed:

We recognize that [ADR] is an evolving concept and that new mechanisms, often borrowing on more traditional ones, are being created. Although we would not likely be inclined to enforce an agreement to resolve a dispute through trial by combat or ordeal, we do not wish to put a straitjacket on the creative development of new forms of [ADR] that individual parties or industries find useful and preferable to litigation.⁵⁰

⁴⁷Department of Justice Canada, "Alternative Approaches" (19 October 2024), online: Government of Canada <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/04.html>; Both the courts and alternative dispute resolution (ADR) processes collaborate with each other. Courts frequently utilize ADR methods, such as mediation, as part of the litigation process, with some provinces in Canada mandating mediation. Despite this, the court system continues to serve as the primary venue for adjudicating serious or violent criminal cases and is available as an option when disputing parties refuse mediation or arbitration.

⁴⁸ Klaus J. Hopt & Felix Steffek, eds, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2012); See also Jean-François Roberge, "Sense of Access to Justice as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)" (2016) 17 *Cardozo J Conflict Resol* 323

⁴⁹ "ADR-assignment" (last visited 19 October 2024), online: Course Hero <https://www.coursehero.com/file/20538661/ADR-assignment>

⁵⁰ *Annapolis Professional Firefighters Local 1926 v City of Annapolis*, (1994) 642 A2d 889 at 895 n 6 (Md Ct Spec App). <https://www.courtlistener.com/opinion/2009643/annapolis-professional-firefighters-v-city-of-annapolis/>

I will briefly discuss the main frontline of the ADR spectrum, focusing on mediation, which is the meat of this contribution.

ii). Arbitration

Arbitration is a dispute resolution process where an impartial third party, known as an arbitrator, privately hears and evaluates the arguments of the parties involved. The arbitrator then issues a final and legally binding decision, referred to as an award.⁵¹ In *MISR(Nigeria)Ltd. v. Oyedele*,⁵² arbitration was defined as the determination of a dispute between not less than two parties after judicially hearing both sides by a person(s) other than a court of competent jurisdiction.⁵³ Such a dispute may be an existing dispute or a future one; and one important point is that disputants choose their own judge (arbitrator(s) to decide for them.⁵⁴

Halsbury's Laws of England have defined arbitration as: "a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting judicially in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it."

⁵¹ Nomita Aggarwal, "Alternative Dispute Resolution: Concept and Concerns" (2006) 7:1 Nyaya Deep 68.

⁵² (1966), 2 ALR (Comm) 157.

⁵³ *Ibid* at 119

⁵⁴ *Lagos State Arbitration Law*, 2009, LSN 2009, c A7, s 63.

Evidently, arbitration is cost-effective⁵⁵ and faster when compared with litigation.⁵⁶ It is, an adjudicative, binding and consensual process.⁵⁷ One of the attributes of arbitration is party autonomy.⁵⁸ This enables parties in the dispute to change the procedure collaboratively.⁵⁹ Parties' autonomy allows for flexibility in choosing who would be their arbitrator⁶⁰, and in agreeing on the appropriate and efficient guidelines for resolving their dispute.⁶¹ Arbitration provides an ability to save face for the parties, and they enjoy confidentiality.⁶² The arbitration agreement is the cornerstone of the arbitration process.⁶³

⁵⁵ David M Trubek *et al*, "The Costs of Ordinary Litigation" (1983) 31:1 UCLA L Rev 72. Arbitration, being a lower-cost medium of resolving disputes, is arguable. Trubek argues that the cost of litigation is less than what many ADR proponents claim. Trubek and his colleagues, in their seminal 1983 study "The Costs of Ordinary Litigation," challenge the assumption that litigation is inherently expensive. Their research provides several key insights: Cost Drivers: The study found that case complexity and associated litigation events, rather than the amount at stake, were the primary drivers of litigation costs. Resource Investment: The researchers explored factors determining the amount of time and money invested in a case, as well as the "productivity" of these investments. Variation in Costs: The study revealed significant variations in litigation costs across different types of cases and parties, suggesting that blanket statements about litigation expenses may be oversimplified. While arbitration offers potential cost savings through greater control over timing and procedures, these benefits must be weighed against potential drawbacks, such as arbitrator fees and the possibility of procedural complications. In conclusion, while arbitration can offer cost advantages in many cases, Trubek's research reminds us that litigation costs may not always be as high as commonly assumed. The choice between arbitration and litigation should be made on a case-by-case basis, considering the specific circumstances and potential cost drivers of each dispute.

⁵⁶ Stephen B Goldberg & Margaret L Shaw, "The Past, Present and Future of Mediation as Seen through the Eyes of Some of its Founders" (2010) 26:2 Negotiation J 237.

⁵⁷ William G Horton, "ADR in Canada: Options for the Appropriate Resolution of Business Disputes" (2009) 21:2 Advocates' Soc J 11-23; see also, Igor Ellyn, 'Litigating and Arbitrating Business Disputes' (Markham: LexisNexis, 2015)

⁵⁸ Mayer Brown International LLP, "An Introduction to Arbitration" (2012), online (pdf): Mayer Brown https://www.mayerbrown.com/-/media/files/news/2012/12/an-introduction-to-arbitration/files/lexisnexis_2012_intro-to-arbitration/fileattachment/lexisnexis_2012_intro-to-arbitration.pdf

⁵⁹ Andrew Pirie, *Alternative Dispute Resolution: Skills, Science and the Law* (Toronto: Irwin Law, 2000) at 218

⁶⁰ Wuraola Aishat Dasyilva, *An Examination of the Use of Alternative Dispute Resolution Processes in Canadian Mergers & Acquisitions Practice* (2017) at 11: A Thesis submitted to the Faculty of Graduate Studies of The University of Manitoba in partial fulfillment of the requirements of the degree of Master of Laws.

⁶¹ John Arrastia & Christi Underwood, "Arbitration v. Litigation: You Control the Process v. The Process Controls You" (2009) 64:4 Disp Resol J 31.

⁶² *Ibid.*

⁶³ Julie Macfarlane *et al*, *Dispute Resolution: Readings and Case Studies*, 4th ed (Toronto: Emond, 2016) at 485.

I will conclude this with the summation in Elizabeth Stong's article.

Arbitration is similar in many respects to a trial. Discovery may be available to the parties before the hearing. The arbitrator may hold a pre-hearing conference. Evidence and arguments are presented to the arbitrator, and witnesses may be called to testify and cross-examined. Depending on the forum procedures and the arbitrator's practice, the rules of evidence may only be somewhat applied. Ex-parte contacts with the arbitrator are not allowed, and while the arbitrator may encourage the parties to consider settlement, the arbitrator cannot become involved in settlement discussions. After the hearing, the arbitrator issues a decision binding on the parties and enforceable in a court.⁶⁴

iii). Negotiation

Any direct or indirect communication between parties with different interests that encourages discussion of the form of any joint action which they might use to manage and ultimately resolve their differences is termed "negotiation".⁶⁵ The need for negotiation is pervasive due to the interdependence of human relations.⁶⁶ It is the pre-eminent form of dispute resolution.⁶⁷ Moreover, it is a significant event that everyone engages in.⁶⁸ Given negotiation's presence in daily life, it is not surprising that it can also be applied within the context of other dispute- resolution processes, such as mediation and litigation-settlement conferences.⁶⁹ Negotiation is at the center of mediation and arbitration, as parties have to negotiate to appoint either their mediator(s) or arbitrator(s). In fact, all that transpires in mediation proceedings is the application of negotiation.

⁶⁴ Elizabeth S Stong, *supra* note 36 at 396.

⁶⁵ Law Society of Upper Canada, "Short Glossary of Dispute Resolution Terms" (Toronto: Law Society of Upper Canada, 1992) at 6.

⁶⁶ Alero Akeredolu, *supra* note 30 at 19.

⁶⁷ SG Goldberg, EA Frank & NH Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 2nd ed (Boston: Little, Brown and Company, 1992) at 3.

⁶⁸ Herb Cohen, *You Can Negotiate Anything* (Toronto: Bantam Books, 1980) at 16

⁶⁹ Department of Justice Canada, "Dispute Resolution Reference Guide - Negotiation" (last modified 21 October 2024), online: Government of Canada <https://www.justice.gc.ca/eng/rp-pr/csj-sic/dprs-sprd/res/drrg-mrrc/03.html>.

Negotiation can be competitive or cooperative. It is competitive when parties view the interests of the opposing party or parties as irrelevant, except insofar as they advance one's own goal of maximizing returns.⁷⁰ It focuses on the specific position of parties rather than their underlying interest.⁷¹ It tends to encourage brinkmanship and advance mistrust between parties.⁷² Cooperative or interest-based negotiation, on the other hand, is based on the premise that both parties can win.⁷³ Shared interests and values are emphasized while both parties work out a mutually agreeable solution.⁷⁴

iv). Mediation

Mediation is an ancient form of dispute resolution used for millennia in various cultures.⁷⁵ It is familiar to Indigenous people in Africa and Canada.⁷⁶ Mediation existed prior to the codified regulation of mediation.⁷⁷ This may be why courts cannot survive without it in modern times. The Chief Justice of the Supreme Court of New South Wales has observed that "Mediation is an integral part of the Courts' adjudicature processes and the 'shadow of the Courts' promotes resolution."⁷⁸ Due to its widespread usage, a universally accepted definition of the process and its objectives encompassing all its forms is currently needed.

⁷⁰ Department of Justice Canada, *Ibid.*

⁷¹ Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, rev ed (Middlesex: Penguin Books, 2011) at 3-11.

⁷² *Ibid* at 5-7

⁷³ *Ibid* at 43.

⁷⁴ Goda J Ragburam, "Alternative Dispute Resolution" (2007) NYAYA DEEP 21.

⁷⁵ Jay Folberg and A. Taylor "Mediation: A Comprehensive Guide to Resolving Conflict without Litigation" (San Francisco: Jossey-Bass, 1984) at 7

⁷⁶ Unyime Morgan "Mediating Indigenous Disputes: Lessons from Africa and Canada" *Journal of Alternative Dispute Resolution* (The Law Brigade Publishing Group), 2023.

⁷⁷ Adeyinka Ajayi and Lateef Buhari, "Methods of Conflict Resolution in African Traditional Society" *African Research Review Ethiopia*, 2014:138-157 at [143,150]

⁷⁸ Balakrishnan K.G J. "Mediation and Conflict Resolution," NYAYA DEEP, 2008, PP. 11-12

Finding a modern definition of mediation in this haystack of experiences would be daunting. Macfarlane states: -

The process of mediation aims to facilitate the development of consensual solutions by the disputing parties. The process is overseen by a non-partisan third party, the mediator, whose authority rests on the consent of the parties whose negotiation is being facilitated. The mediator has no independent decision-making power, or legitimacy, beyond what the parties voluntarily afford them.⁷⁹

Mediation may be described as the process by which the participants, with the assistance of a neutral person or persons, systematically isolate disputes to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.⁸⁰

Fuller and Moore describe mediation as a process with the: -

"capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions towards one another"⁸¹

This means mediation has the propensity to make parties more collaborative, with co-operative energy toward each other. Rather than seeing themselves as adversaries, they become partners, with a renewed perception of their conflict as a joint challenge requiring their synergy to resolve:

⁷⁹ Julie Macfarlane "The Mediation Alternative" in J. Macfarlane, ed. *Rethinking Dispute: The Mediation Alternative* (Toronto: Edmond Montgomery, 1997) at 2. See also, Jay Folberg, Ann L Milne & Peter Salem, *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) at 8.

⁸⁰ Bernard Mayer, "Facilitative Mediation" in Jay Folberg, Ann L Milne & Peter Salem, eds, *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) 29 at 31. Also, see, Michael Emerson, "Mediation: The Do's and Don'ts" (last visited 20 December 2024), online: Emerson Family Law <emfl.com.au/our-publications/mediation-the-dos-and-donts/> . See also New South Wales Department of Education and Communities, "Peer Mediation for Primary Schools: Helping Students to Resolve Conflict in Peaceful Ways" (2024) at 5, online: NSW Department of Education <https://education.nsw.edu.au/content/dam/main-education/student-wellbeing/attendance-behaviour-and-engagement/peer-mediation/primary-whole-package.pdf.pdf>.

⁸¹ Jennifer L Schulz, *Mediation & Popular Culture*, 1st ed (London: Routledge, 2020) at 1. Also, Lon Fuller, "Mediation: Its Forms and Functions" (1971) 44:2 S Cal L Rev 305 at 328

They become part of the solution. Mediation does not rely on a legal judgment issued by a judge or jury.⁸²

Mediation has been broadly accepted in North America, including Canada, mainly because the process offers diverse goal choices.⁸³ Pirie succinctly puts it this way:-

Mediation offers to assist under-siege legal institutions, deficit-stricken governments, and profit-conscious businesses to reduce the cost of disputing. On the other hand, mediation also purports to be transformative, empowering the individual, the community, and even the global village by changing the dispute and the views and attitudes of the disputants. Mediation proponents claim mediation can preserve continuing relationships, provide privacy, identify underlying interests, discover integrative or win-win solutions, result in long-lasting agreements, prevent violence, and generally avoid the downside associated with more adversarial approaches to dispute resolution.⁸⁴

From a global perspective, mediation, as a frontline in ADR advocacy, advances the rule of law in diverse ways. Its advocates opine that it increases access to justice by making it easier for people who are poor, illiterate or geographically scattered to seek redress.⁸⁵ It is also said that mediation saves time and cost required to resolve disputes.⁸⁶ It can also serve as an alternative to a somewhat corrupt and biased court system.⁸⁷ It may promote foreign investment opportunities.⁸⁸ It can meet the needs of the vulnerable, such as women and visible minorities who may find it challenging to seek redress through court.⁸⁹ It may help facilitate community

⁸² FindLaw, "Mediation Cases: What Cases are Eligible for Mediation?" (1 November 2023), online:

FindLaw <https://www.findlaw.com/adr/mediation/mediation-cases-what-cases-are-eligible-for-mediation.html>

⁸³ Hugh F Landerkin & Andrew J Pirie, "Judges as Mediators: What is the Problem with Judicial Dispute Resolution in Canada?" (2003) 82:2 Can Bar Rev 249, online: CanLII <https://canlii.ca/t/2ck0>

⁸⁴ Andrew J Pirie, *Alternative Dispute Resolution: Skills, Science, and the Law* (Toronto: Irwin Law, 2000) at 153.

⁸⁵ Robert Kossick, "The Rule of Law and Development in Mexico" (2004) 21:3 *Ariz J Intl & Comp L* 715 at 786

⁸⁶ Maria Dakolias, "A Strategy for Judicial Reform: The Experience in Latin America," (1995), *Virginia Journal of International Law* 167, at 201

⁸⁷ Thomas R., J. Moyer & Emily Stewart Haynes "Mediation as a Catalyst for Judicial Reform in Latin America" (2003) *OHIO ST. J. ON DISP. RESOL.* 619, 621

⁸⁸ Anthony Wanis-St. John "Implementing ADR in Transitioning States: Lessons Learned from Practice" (2000) *HARV. NEGOT. L. REV.* 339, 345

⁸⁹ Amy J. Cohen "Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal" (2006) *HARV. NEGOT. L. REV.* 295, 299. Also, Christopher Gibson & Michael Woolcock "Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy" (World Bank Policy

cohesion, thereby promoting harmony.⁹⁰ It has the capacity to create unexpected reform, such as in politics.⁹¹ Moreover, it also assists community members in working together for their individual rights protection.⁹²

Consideration of mediation for dispute resolution is appropriate when parties seek control over the outcome,⁹³ especially if the main obstacle to resolution is the reluctance of counsel rather than the parties themselves.⁹⁴ It is also suitable when all parties have an interest in maintaining their relationship after the dispute ends;⁹⁵ and when there is an issue in dispute that needs to be addressed.⁹⁶ Additionally, mediation is favorable when all parties are willing to meet and attempt to settle the dispute,⁹⁷ trust exists between the parties,⁹⁸ a flexible and informal

Research Working Paper 3713, Sept. 2005), available at <http://ssrn.com/abstract=806225> (arguing that deploying mediation in Indonesian communities can empower local populations and ultimately promote equality)

⁹⁰ Moyer TJ, Haynes ES. "Mediation as a catalyst for judicial reform in Latin America" (2003) 18:3 Ohio St J Disp Resol 619-: arguing that "Mediation can act as a unifying process by bringing disparate groups together to work collectively to establish peace in war-torn societies." Okechukwu Oko. "The Problems and Challenges of Lawyering in Developing Societies" (2004) 35:3 Rutgers LJ 569-: urging that ADR can play an essential role in re-establishing social harmony, and focusing specifically on the example of Nigeria.

⁹¹ U.S. Agency for International Development, *Alternative Dispute Resolution Practitioners' Guide* (Washington, DC: Office of Democracy and Governance, 1998), online: https://pdf.usaid.gov/pdf_docs/Pnacp335.pdf:- (asserting that ADR programs can increase civic engagement and improve the skills and abilities of local political leaders. Mediation promotes participation in government by engendering trust in governmental institutions)

⁹² *Ibid* at 14 -: stating that Bangladeshi women who participate in ADR "believe that they receive better protection and more compensation . . . than from the formal court system"; Cohen, *supra* note 90, at 337–40 –:(exploring the use of "rights-based" Mediation in Nepal). See also C.J. Larkin & Pamela A. DeVoe, "Community Mediation in the Shadow of Revolution: The Nepal Experience" (2006) *Resolution* at 20-:(describing the use of rights-based community mediation in Nepal)

⁹³ Legal Line, "What is mediation and when is it appropriate?" (n.d.), online: Legal Line <https://www.legalline.ca/legal-answers/what-is-mediation-and-when-is-it-appropriate-2/> [https://web.archive.org/web/20231023123456/https://www.legalline.ca/legal-answers/what-is-mediation-and-when-is-it-appropriate-2/].

⁹⁴ S.B.J. Sinha, "Mediation: Constituents, Process and Merit" (2006) 7:4 NYAYA DEEP 35.

⁹⁵ Government of British Columbia, "When to Mediate" (accessed October 23, 2024), online: Government of British Columbia <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/mediation/about-meditation/when-to-mediate>.; See also Sinha *ibid*.

⁹⁶ *Ibid*; See *Exfin Shipping (India) LTD v. Tolani Shipping Co. Ltd*, [2006] EWHC 1090

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

process is desired,⁹⁹ and no party can afford to ignore the problem.¹⁰⁰ Furthermore, mediation is ideal when the power balance between the parties is relatively equal¹⁰¹ other dispute resolution options are too expensive or slow¹⁰² a creative solution is necessary,¹⁰³ and the parties prefer to settle the dispute privately.¹⁰⁴

What class of cases or disputes are amenable to be mediated? Mediation has been applied to disputes that arise from any of the following:¹⁰⁵ Insurance claims; land-use planning and development; trade and commerce; separation and divorce; civilian interaction with police; and immigration and refugee issues, among other. On the other hand, mediation may not be suitable in some circumstances.¹⁰⁶ For example, where there is fear of violence or abuse between the parties, or the case is genuinely frivolous or opportunistic, mediation would be a poor candidate for resolution. If a party is acting in bad faith, the parties to the dispute need to have the power to change things or to resolve the problem.

Mediation within the court system may be categorized into court-connected mediation (CCM) and judicial mediation (J.M.). Court-connected mediation may also be referred to as court-connected ADR (CCADR) in some jurisdictions, just like judicial dispute resolution (JDR) is also

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ Peter Bishop, Cheryl Picard, Rena Ramkay & Neil Sargent, *The Art and Practice of Mediation*, 2nd ed (Toronto: Emond Montgomery Publications, 2015) at 2.

¹⁰⁶ Fresh Start Mediation, "When is Divorce Mediation Not Recommended?" (2024), online: *Fresh Start Mediation* <https://freshstartmediation.ca/when-is-divorce-mediation-not-recommended/>. See also, Herschel Fogelman, "Identifying an unsuitable case for mediation" (1 November 2020), online: Fogelman Law PC <https://fogelmanlaw.ca/2020/11/01/identifying-an-unsuitable-case-for-mediation/>. See online Canadian Bar Association, <https://www.cba.org/Sections/Family-Law/Articles/2021/The-changing-landscape-of-family-dispute-resolution>

used interchangeably with judicial mediation in some jurisdictions. CCM/CCADR takes place within the institutional precinct of the court to avail litigation options outside of the conventional courtroom.¹⁰⁷ CCM/CCADR is carried out under the auspice of a multi-door courthouse in the Nigerian State(provincial) High Courts, ADR Centre under the Federal High court and the National Industrial Court, or Mediation Centre under the court of appeal and the Supreme Court in Nigeria. More details (along with legal frameworks) about these institutions for CCM/CCADR are enumerated in Part 2 below.

In Canada, court connected mediation is called mandatory mediation or court annexed. In Ontario, to be precise, it is carried out under the supervision of Local Mediation Committees.¹⁰⁸ Judicial mediation is a facilitative mediation process by a judge concerning a civil dispute.¹⁰⁹ J.M. is a process involving a judge undertaken to encourage settlement in a court dispute, which in some cases may involve arrays of settlement activities that are advisory, evaluative¹¹⁰ and/or facilitative.¹¹¹ The guiding rule is that such a judge would not be allowed to preside over the trial should the mediation process fail to settle the dispute. All that transpires at the mediation is protected by rules of confidentiality and is not revealed to the trial judge. The Part 3 of this thesis

¹⁰⁷ Peter Bishop & Ors, *supra* note 105 p. 55

¹⁰⁸ Government of Ontario, "Apply to be on the mandatory mediation roster". <https://www.ontario.ca/page/apply-be-mandatory-mediation-roster>

¹⁰⁹ Jean-Francois Roberge, "Emerging Trends in Access to Justice and Dispute Resolution in Canada" (2014) 4 J Arb & Mediation 69. Michaela Keet & Brent Cotter, "Settlement Conferences and Judicial Role: The Scaffolding for Expanded Thinking about Judicial Ethics" (2013) 91 Can B Rev 363. Louise Otis & Eric H. Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 Pepp Disp Resol LJ 351.

¹¹⁰ James A Wall, Dale E Rude & Lawrence F Schiller, "Judicial Participation in Settlement" (1984) J Disp Resol vol 1984 iss 7. Also, Deborah Hensler, "A Research Agenda: What We Need to Know About Court-Connected ADR" (1999) 15 Disp Res Mag.

¹¹¹ Jean Francois & Dorcas Quek Anderson, "Judicial Mediation: From Debates to Renewal" (2018) 19:2 Cardozo J Conflict Resol 618. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135620

focuses on Canadian mediation practice with a focus on the Ontario Mandatory Mediation (OMMP) and its enabling statutory instrument.

v). Conciliation

This is similar to mediation, but it often involves a more proactive role by the conciliator in proposing solutions. This form of ADR involves a neutral who is given authority to evaluate the dispute and suggest possible solutions to the parties.¹¹² The parties of course are at liberty to either accept or amend or even outrightly reject such solution proposed by the conciliator. In most countries, mediation and conciliation are used interchangeably.¹¹³ Recently, Nigeria repealed its federal legislation on conciliation¹¹⁴ and they replaced it with mediation.¹¹⁵ The reason for this paradigm shift, as it was in other countries, could be that mediation can be evaluative in styles and approaches depending on what the parties want. More analysis of what an evaluative is mediation and other variants/styles of mediation can be found in Part 4 of this thesis.

5. Conclusion

ADR offers diverse methods for dispute resolution that complement traditional legal systems. Countries like Nigeria and Canada have these methods in their legal frameworks, enhancing access to justice and promoting efficient conflict resolution. Further discussion will

¹¹² Akeredolu, *supra* note 30 at 20

¹¹³ Reinhard Ellger, "Mediation in Canada: One Goal-Different Approaches to Mediation in a State with Federal and Provincial Jurisdictions" in Klaus J Hopt & Felix Steffek, eds, *Mediation: Principles and Regulation in Comparative Perspective* (Oxford: Oxford University Press, 2012) 909 at 914.

¹¹⁴ *Arbitration and Conciliation Act* (Nigeria), Cap A18, Laws of the Federation of Nigeria 2004.

¹¹⁵ *Arbitration and Mediation Act, 2023* (Nigeria)

reveal the extent to which each of these countries have successfully integrated mediation with the suggestion towards Nigeria borrowing some leaves from the Canadian kind of mediation. The next two parts will explore the development of mediation in Nigeria and Canada, focusing on their histories and respective legal frameworks.

The thesis title specifically concentrates on the examination of court-connected mediation in both Nigeria and Ontario. This work aims to analyze the operational frameworks, challenges, and best practices of mediation within judicial contexts in these jurisdictions.

PART 2: MEDIATION PRACTICE IN NIGERIA

1. Introduction

This Part focuses on several issues. These include the history of pre-colonial conflict resolution practices in Nigeria. Then attention turns- the role of Nigerian courts as inherited from the earlier colonial system. We will also look at how mediation has made a comeback to the Nigerian dispute-resolution landscape in the eyes of the enabling law, and discuss experiences of mediation in Abuja and Ondo judicial divisions. This section concludes with the professional bodies that promote mediation in Nigeria.

2. The Pre-Colonial Conflict/Dispute Resolution Practices in Nigeria

Pre-colonial conflict/dispute resolution mainly rested with traditional rulers, village heads, family heads, religious leaders, and the community people in Nigeria. They are granted authority and legitimacy by the consent of community members to direct the affairs of ethnocultural or linguistic groups to achieve order.¹¹⁶ Nigeria has three significant ethnicities: Igbo from the Southeast, Yoruba from the Southwest and Hausa-Fulani from the North. Igbo pre-colonial society was a quasi-democratic republic.¹¹⁷ In Eastern Nigeria (the Igbo people), the Family Head, The Umuada, The Village Tribunal (Amala), Age Grades, titled men, also known as Chiefs, and Oracles are the six indigenous legal institutions that had the authority to serve as mediators, facilitators,

¹¹⁶ Eniola Mistura Bello, and Lynda Onuoha. "Traditional Institutions and Nation Building for Sustainable Development in Contemporary Nigeria: Roles and Challenges." (2021) at 3. Online https://www.academia.edu/96456745/Traditional_Institutions_and_Nation_Building_for_Sustainable_Development_in_Contemporary_Nigeria_Roles_and_Challenges

¹¹⁷ Oluwadunsin Oluwafisayo Soji-Oye, "Historical Background of Nigerian Politics in the Pre-colonial Period" (2024) Afe Babalola University-GST 203, online: https://portal.abuad.edu.ng/Assignments/1606944831GST_203_assignment.docx

negotiators and peacemakers over their domain.¹¹⁸ The Family Head mediates certain marital disputes, cases of delinquency, and boundary disputes between households¹¹⁹ and over resolving other cases between family members.¹²⁰

Suppose a member defies the family head, and a leadership crisis arises, the Umuada (the married daughters of the family) are invited to resolve the dispute or force compliance with the decision.¹²¹ Matters affecting outsiders or capable of causing intra-village disputes are referred to Amala (the village tribunal), which is composed of 10 to 15 lineages.¹²² Finally, if the facts of a case are unclear or the offender's identity is uncertain, an Oracle is resorted to.¹²³

Divination serves as a tool for uncovering hidden sources, addressing health issues, and resolving interpersonal and communal disputes.¹²⁴ This practice is employed to shed light on enigmatic origins, facilitate healing processes, and navigate tensions between individuals and within groups. When a defaulter is found among the conflicting parties, as revealed by the diviner who sees beyond the ordinary and explains the supernatural aspect of events, the defaulter is sanctioned.¹²⁵ Sanctions are confined to the social realm (shaming and stigmatizing) and the

¹¹⁸ Ernest E. Uwazie, "Modes of Indigenous Disputing and Legal Interactions Among the Ibos of Eastern Nigeria" (1994) 30:1 J Legal Pluralism & Unofficial L 87.

¹¹⁹ Olusola Olaniran, and Aisha Arigu, "Traditional Rulers And Conflict Resolution: An Evaluation Of Pre And Post Colonial Nigeria" (2013), Research in Humanity and Social Science, at 122 online: <https://core.ac.uk/download/234673744.pdf>.

¹²⁰ Ernest Uwazie, *supra* note 118

¹²¹ *Ibid*

¹²² *Ibid*

¹²³ *Ibid*

¹²⁴ Olusola Olaniran and Aisha Arigu, *supra* note 119.

¹²⁵ *Ibid*

supernatural (cursing and sorcery).¹²⁶ Parties have the power to reject any settlement that they are not happy with.

In conclusion, in Igbo pre-colonial Nigeria, conflict resolution was based on voluntary consensus and agreement. Everybody, including gods and the spirits of the ancestors, had to agree to a solution. This made the traditional conflict-transformation consensus-based. The concentration of authority in a single person or institution and the emergence of a rigid hierarchy were avoided.¹²⁷

In northern Nigeria, (people such as Kaduna, Sokoto, Kano, Zaria, and others), the Hausa/Fulani pre-colonial system can be traced and credited to the Holy Jihad fought by Uthman Danfodio in 1804. The Holy Jihad, commonly referred to as the Fulani Jihad, was initiated by Usman dan Fodio in 1804 as a religious campaign aimed at revitalizing and purifying Islamic practices across the region.¹²⁸ The impetus for the conflict arose following Usman dan Fodio's exile from Gobir by King Yunfa, his former student.¹²⁹ Spanning from 1804 to 1808, the jihad led to the formation of the Sokoto Caliphate, a theocratic entity that profoundly reshaped the political and religious dynamics of Northern Nigeria.¹³⁰ Through a series of military engagements, Usman dan Fodio's forces systematically annexed a number of Hausa kingdoms, culminating in

¹²⁶ *Ibid*

¹²⁷ *Ibid*. Asmerom Legesse, *Gada: Three Approaches to the Study of African Society* (New York: Free Press, 1973).

¹²⁸ Harvard Divinity School, "Usman Dan Fodio" (last visited 25 October 2024), online: Harvard Divinity School <https://rpl.hds.harvard.edu/faq/usman-dan-fodio>

¹²⁹ "Fulani Jihad War of 1804" (25 October 2024), online: Naijabiography <https://naijabiography.com/history-culture/fulani-jihad-war-of-1804/>.

¹³⁰ "The Fulani Jihad and its Implication for National Integration and Development in Nigeria" (2011) 5:5 African Research Review 1, online: https://www.academia.edu/30717068/The_Fulani_Jihad_and_its_Implication_for_National_Integration_and_Development_in_Nigeria_Pp_1_12

the capture of Gobir in 1808. This expansion not only consolidated Islamic authority but also established a lasting influence on the socio-political structures in the region.¹³¹

The system of government adopted was monarchically and popularly regarded as a highly centralized and hierarchical method of administration.¹³² The prominent judicial institutions in the pre-colonial Hausa/Fulani included the Emir (the paramount ruler), the Emir's ministers and aides, the District Head (Hakimi), the village heads and the Alkali court.¹³³ The Waziri, equivalent to a prime minister, champions the cause of smooth administration by leading the society. He executes the Emir's instructions as his representative. The Galadima oversees the affairs of the Emirates, which serve as the capital territory of the Emir. Madawaki commands the cavalry, effectively leading the army.¹³⁴

Security of lives and property is the responsibility of the Dogari, the chief police officer. The emirate's judicial administration is governed by appointed Islamic judges, the Chief Alkali or Grand Khadi, applying Islamic Tenet-Sharia in Northern Nigeria.¹³⁵ About two dozen of the Northern Nigeria areas use sharia law in their modern-day administration of justice.¹³⁶ This means at least twenty years of Sharia practice since Nigeria returned to democracy.¹³⁷

¹³¹ Wikipedia, "Jihad of Usman dan Fodio", Wikipedia https://en.wikipedia.org/wiki/Jihad_of_Usman_dan_Fodio.

¹³² Seun Oyediji, "Hausa-Fulani Pre-Colonial Political System in Nigeria," Prof Seun Oyediji (March 30, 2014), <https://profseunoyediji.wordpress.com/2014/03/30/hausafulani-pre-colonial-political-system-in-nigeria/>

¹³³ *Ibid*

¹³⁴ *Ibid*

¹³⁵ Christiana O. Olowolafe and Olawale Oloriode, "A Contextual Analysis of Three Major Tribes' Traditional Conflict Resolution Mechanisms in Pre-literate Nigerian Society" (2020) Applied Research J Humanities & Soc Sci

¹³⁶ U.S. Commission on International Religious Freedom, "Shari'ah Criminal Law in Northern Nigeria" (report) (Washington, DC: USCIRF, [2019]), online: <https://www.uscirf.gov/publications/shariah-criminal-law-northern-nigeria>.

¹³⁷ Katrin Gänsler, "Nigeria Looks Back on 20 Years of Sharia Law in the North." DW.com, 27 October 2019, <https://www.dw.com/en/nigeria-looks-back-on-20-years-of-sharia-law-in-the-north/a-51010292>.

Within farming communities, a hierarchy of leaders is often called upon to settle disputes. This includes village elders, ward heads, village heads, and district heads. In cases of severe damage, a more senior leader is consulted. The Emirs play a role in forming professional and tribal associations, and each association has the freedom to elect its chairperson. The elected chairs then choose one representative to be a member of the Emirate Council.¹³⁸

Three levels of conflict resolution can be established:¹³⁹

- I. A low-level committee composed of village heads, herder, and farmer leaders primarily resolves disputes through mediation and compensation payments.
- II. A middle-level committee comprised of the District Head, Sarkin Fulani, and the branch chair of the Farmers' Association. Very few issues are resolved at this level.
- III. A high-level committee comprising the Emir, the Galadima (who represents the Chairs of Associations), and other members of the Emirate Council. The decision at this level is final, and both conflicting parties must adhere to it.

In Yorubaland, located in Southwestern Nigeria, the traditional governance structure is centered around the Oba (King), often referred to as Kaabiesi, which translates to "one who cannot be questioned." Despite this authoritative title, the Oba operates within a framework that incorporates democratic principles, supported by a network of chiefs who assist in the administration of the kingdom. The Oba is regarded by the populace as an "awokose" (good

¹³⁸ Olawale R. Olaopa & Saheed Ogundare, "Traditional Leadership, Indigenous Knowledge, and Local Governance: Implications for Good Governance and Sustainable Development Agenda" in *Indigenous People - Traditional Practices and Modern Development* (London, UK: IntechOpen, 2023), online: *IntechOpen* <http://dx.doi.org/10.5772/intechopen.1003144>). Olusola Olaniran, *supra* note 119

¹³⁹ *Ibid*

example of moral and courage), serving as a role model and garnering substantial trust and respect.¹⁴⁰ This elevated status enables him to navigate multiple roles effectively acting as a mediator, arbitrator, judge, or conciliator in various societal matters.

Historically, the handling of disputes in pre-colonial Yorubaland was a common occurrence, yet the prevailing ethos demanded ethical and prompt resolution of conflicts.¹⁴¹ The cultural understanding emphasizes the necessity for expeditious resolution, recognizing that swift mediation is essential for maintaining social harmony and stability within the community.¹⁴² According to Akeredolu,¹⁴³ the early intervention of the elders in reconciling the disputing factions usually saves conflict situations from escalating into violent situations. Whenever disputes arise between individuals and different parties, primacy is given to restoring the relationships, soothing hurt feelings, and reaching a compromise on improving future relationships.¹⁴⁴

According to Dike,¹⁴⁵ The elders are often touted as mogaji, that is the eldest or most influential person in the family/lineage. The elderly heads of the district, referred to as baale, are also involved in resolving disputes. The baale takes charge of the management and control of all the land in the locality and before any decision concerning the land can be made, the relevant baale is consulted.

¹⁴⁰ Olalekan E. Ajayi & Abdulraheem Issa, "Traditional Methods of Conflict Management and Resolutions: The Case of the Old Oyo Empire" (2022) 7:4 European J Management & Marketing Studies 1

¹⁴¹ Adeyinka T. Ajayi & Lateef O. Buhari, "Methods of Conflict Resolution in African Traditional Society" (2014) 8:2 African Research Review 138

¹⁴² *Ibid*

¹⁴³ Akeredolu, *supra* note 30 at p. 8

¹⁴⁴ Ademola K. Fayemi, "Agba (elder) as Arbitrator: A Yoruba socio-political model for conflict resolution - A review of Lawrence O. Bamikole" (2009) 1:3 J L & Conflict Resolution 60. <http://www.academicjournals.org/JLCR>

¹⁴⁵ Dike SC, Boma G Toby & Dorcas FE, "Transforming and Mediation and Conciliation Practices for Effective Dispute Resolution in Nigeria" (2020) J Property L & Contemporary Issues 231. Also see Olalekan E. Ajayi & Abdulraheem Issa, *supra* note 140

The elderly have a wealth of approaches to settling. They use proverbs, persuasions, subtle blackmail, and precedents. In extreme situations, they could use the threat of excommunication or emotional blackmail.¹⁴⁶ The disputant weighs his option of seeking peace or being sent out of the community. Yoruba culture encourages reconciliation, which makes them perceive going to court as a sign that the disputants are dysfunctional.¹⁴⁷

When you look at the various ethnic groups in Nigeria, you will see that before the advent of colonial rule, they had had their Indigenous methods of settling disputes.¹⁴⁸ According to

Akpata: -

In the environs of Benin City, the Village Head (Odionwere) or the family head (Okaegbe) was principally the arbitrator or mediator to resolve conflicts or disputes among the people. The parties were also at liberty to request any member of the community in whom they reposed confidence to mediate or arbitrate, undertaking to abide by his decision.¹⁴⁹

To conclude under this subpart, Hon. Justice Bode Rhodes stated that:

Mediation, an alternative dispute resolution (A.D.R.) mechanism, is the traditional way of resolving disputes peacefully in rural agrarian Nigeria. The mediator's authority hinged on his standing and the respect accorded to him in the community. In Nigerian traditional societies, mediation was used to preserve cultural norms and values. Mediation prevented disputes from festering, maintained peace, and preserved traditional values.¹⁵⁰

¹⁴⁶ Jerome T Barrett & Joseph Barrett, "A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement" (2004), online (pdf): Mediation History <www.mediationhistory.org/wp-content/uploads/2020/10/A-History-of-Alternative-Dispute-Resolution-The-Story-of-a-Political-Social-and-Cultural-Movement-by-Jerome-T-Barrett-Joseph-Barrett-z-lib.org_.pdf>.

¹⁴⁷ Olufunke B. Olaoba, "Ancestral Focus and the process of conflict resolution in Traditional African societies" in A O Albert, ed, *Perspectives on Peace and Conflict in Africa: Essays in Honour of General (Dr) Abdulsalam A Abubakar* (Ibadan: John Archers, 2005)

¹⁴⁸ Paul O. Idornigie, "Alternative Dispute Resolution Mechanisms and the Judiciary" in Muhammad T Ladan & Adebambo Adewopo, eds, *N.I.A.L.S. Legal History of Nigeria* (Lagos: N.I.A.L.S. Press, 2020) 8

¹⁴⁹ Ephraim Akpata, *The Nigerian Arbitration Law in Focus* (Lagos: West African Book Publishers, 1997). See also, Paul Idornigie, "Evolution of Commercial Arbitration" (2003) *Current Jos LJ* 246

¹⁵⁰ Olabode Rhodes-Vivour A, "Mediation (A 'Face Saving Device') - The Nigerian Perspective" (September 2008) *IBA Legal Practice Division Mediation Committee Newsletter* 554 at 586

In the case of *Okpuruwu vs. Okpokam*, the Honourable Justice Oguntade J.C.A. (as he then was) observed thus: -

In the pre-colonial times and before the advent of the regular courts, our people (Nigerians) certainly had a simple and inexpensive way of adjudicating disputes between them. They referred them to elders or a body set up for that purpose. Over the years, the practice has become strongly embedded in the system, and they survive today as custom.¹⁵¹

3. The Roles of Nigerian Courts as Inherited from The Colonial System

Under the provisions of the Berlin Conference of 1885,¹⁵² Nigeria was established as a British colony, although Lagos had been annexed by the British Crown as early as 1861.¹⁵³ This annexation facilitated the introduction of English law into the region through Ordinance No. 3 of 1863.¹⁵⁴ Following this, *Ordinance No. 4 of 1876*, which served as a statute of general application, further integrated standard legal principles and doctrines of equity into the corpus of Nigerian law.¹⁵⁵ The colonial era effectively ceased when Nigeria transitioned to a republic in 1963, marking a significant milestone in its legal and political evolution.¹⁵⁶ Hence, the colonial rule introduced 'litigation as represented by English-style courts'¹⁵⁷

Nigerian developed a system of civil justice, essential to maintaining a civilized nation post-colonially and at independence. This system was patterned to be similar to the British system,

¹⁵¹ (1998), 4 NWLR (Pt 90) 554 at 586 (SC)

¹⁵² Katie Graham, "Nigeria: Colonization" (2009), online: Weebly <https://hj2009per6nigeria.weebly.com/colonization.htm>

¹⁵³ "Colonial Nigeria" (last modified 26 October 2024), online: Wikipedia https://en.wikipedia.org/wiki/Colonial_Nigeria

¹⁵⁴ Giles D Short, "Blood and Treasure: The Reduction of Lagos, 1851" (1977) 13 ANU Historical J 11. Paul Idornigie *supra* note 148

¹⁵⁵ Paul Idornigie, *supra* note 148

¹⁵⁶ Olawari DJ & Abdulrasheed AM, *Nigeria's Democracy in the Fourth Republic* (Cambridge Scholar Publishing, 2024) at 5.

¹⁵⁷ Paul Idornigie, *supra* note 148

arising from Nigeria's heritage as a British colony. The goal was for law to provide the basic structure for commerce and industry, the protection of individual rights, and the enforcement of governmental duties. A primary function of law is to develop and maintain an efficient means of resolving disputes.¹⁵⁸ The civil justice system evolved through colonial law in Nigeria, which is an adjudicatory or adversarial method of dispute resolution. An adversarial method is a formal process that requires parties to a dispute and their witnesses to appear before courts or tribunals set up by an enabling law to resolve their dispute.¹⁵⁹

The Nigerian Constitution provides a comprehensive list of courts in Nigeria.¹⁶⁰ These courts are categorized as superior courts of record, including the Supreme Court of Nigeria, the Court of Appeal, the Federal High Court, the High Court of the States, the Sharia Court of Appeal, and the Customary Court of Appeal.¹⁶¹ Additionally, other courts may be established by law. The definition includes Magistrates Courts, Area Courts, and Customary Courts, which play an essential role in the dispensation of justice in Nigeria.¹⁶²

The adversarial system, often characterized as a 'battle of adversaries' or 'legal combat,' possesses numerous advantages that should not be overlooked. This framework has introduced a degree of objectivity and predictability into the legal sector, remaining a foundational element

¹⁵⁸ Lord Woolf, *supra* at note 44

¹⁵⁹ A Sanni, ed, *Introduction to Nigerian Legal Methods*, 2nd ed (Ile-Ife: Obafemi Awolowo University Press, 2006).

¹⁶⁰ Constitution of the Federal Republic of Nigeria (CFRN) 1999, 4th Amendment.

¹⁶¹ CFRN, 1999, s. 6(5)

¹⁶² Halima Doma-Kutigi, "Evaluating The Multi-Door Courthouse System in Nigeria: Issues, Challenges and Prospects" (Paper delivered at the Law and Society in Africa Conference 2019, American University in Cairo, 1-3 April 2019).

in our societal structure. It plays a critical role in maintaining social order by effectively adjudicating disputes between parties.

It's important to note that the adversarial system facilitates the interpretation of legal documents and the handling of criminal cases, especially in serious offences and emergencies where the law imposes strict guidelines. The emphasis on legal strategy and adherence to precedent are also rooted in this framework. Particularly in scenarios involving frivolous claims, litigation is often the most appropriate course of action, ensuring that disputes are resolved in a structured and equitable manner.¹⁶³

The downsides of litigation through court and as an adversarial process are mammoth despite its contribution to national development and stability. The courts are inefficient and inaccessible to many ditto to the following:

- a) The Financial Cost of Litigation/Court Proceedings: Conventional litigation is a costly process that poses a significant barrier for poor and middle-class individuals.¹⁶⁴ The cost of legal representation is so high that more and more people are forced to represent themselves¹⁶⁵ in courtrooms, leading to what is often a disillusioning experience.¹⁶⁶ Despite the advantages of early settlement, litigators often worry about meeting the financial expectations of their law firms,¹⁶⁷ while also guarding against the allegations of

¹⁶³ Maureen Stanley-Idum & James Agaba, *Civil Litigation in Nigeria* (Lagos: Nelag and Company, 2015) at 33-34

¹⁶⁴ Nandini Ramanujam & Alexander Agnello, "Access to Justice and Underemployment in the Legal Profession" (2017) 54:4 Osgoode Hall LJ 1091 at 1091

¹⁶⁵ *Ibid*

¹⁶⁶ Julie Macfarlane, *The New Lawyer: How Clients Are Transforming the Practice of Law*, 2nd ed (Vancouver: UBC Press, 2017) at 213-214.

¹⁶⁷ *Ibid* at 7

improvident settlement by their clients as a result of actual or perceived inadequate diligence. This creates a dilemma for lawyers who want to prioritize the best interests of their clients but can be constrained by financial pressures and concerns about their professional reputation. As a result, many individuals struggle to access competent legal representation, leading to a widening justice gap in our society.¹⁶⁸

b) The Conundrum of Delay: Nigerian Courts are characterized by the common problem of wanton delay. What length of time does it take to conclude a case and give a decision? According to Aina,¹⁶⁹ the average lifespan of a dispute ranges from 4-10 years at a trial court. The same dispute can spend another 3-6 years at the Court of Appeal plus 2- 4 years at the Supreme Court. The case of *Ariori v. Elemo*¹⁷⁰ exemplifies the detrimental impact of prolonged legal proceedings on justice delivery. Litigation extended over an astonishing fifteen years solely at the trial court level. When the matter finally reached the Supreme Court, the protracted delays in the lower court prompted a ruling that justice had effectively been thwarted.

Consequently, the Supreme Court mandated a retrial; however, by that juncture, the case had aged two decades, with the parties still awaiting resolution. This situation underscores the critical need for a judicial system that prioritizes expeditious and efficient case management to mitigate unnecessary delays and ensure timely justice. In Nigeria, there are numerous instances where the inefficiencies of the legal process have resulted in

¹⁶⁸ David Rainsberry, "Incentivizing Change: The Emergent Models" (2020) CanLII Docs 91.

¹⁶⁹ Kehinde Aina, *supra* note 33 at 3-4

¹⁷⁰ *Ariori & Ors v Elemo & Ors*, [1983] NGSC 4 (Supreme Court of Nigeria).

prolonged adjudications, inflicting considerable hardship on litigants and undermining the rule of law.

More examples are, in the case of *Ekperokun v. University of Lagos*,¹⁷¹ It took the High Court seven years to dispose of a case of wrongful termination of employment. Similarly, in the case of *Onagoruwa v. Akinyemi*,¹⁷² it took 21 years for the Supreme Court to deliver a verdict. Another example is *Nwadiogbu v. Nnadozie*,¹⁷³ which took an astonishing 23 years to be resolved. These cases serve as a reminder of the challenges faced by the Nigerian justice system and highlight the need for reforms to ensure the timely and efficient delivery of justice. In his speech at the opening of the New Legal Year (2015/16), Hon. Justice Mahmud Mohammed, G.C.O.N., Chief Justice of Nigeria (as he then was) said:

In the 2014/2015 Legal Year, the Supreme Court heard 1578 matters, consisting of 1009 motions and 569 substantive appeals, delivering 262 Judgements in that period. Indeed, we received over 500 new appeals filed in the last Legal year alone at the rate of about ten new appeals per week, most of which are interlocutory.¹⁷⁴

¹⁷¹ *M O Eperokun & Ors v University of Lagos*, [1986] 4 NWLR (Pt 34) 162 at 193

¹⁷² *Onagoruwa v. Akinyemi*, [2001] 13 NWLR (Pt 729) at 38

¹⁷³ *Nwadiogbu v. Nnadozie*, [2002] 12 NWLR (Pt 727) at 315

¹⁷⁴ The Chief Justice addressed the issue of persistent delays in the administration of justice, acknowledging it as a major criticism of Nigeria's justice delivery system. He provided statistics for the 2014/2015 Legal Year, during which the Supreme Court heard 1,578 matters and delivered 262 judgments.

- c) Amongst these challenges in Nigeria are antiquated methods of processing files and proceedings,¹⁷⁵ lack of privacy,¹⁷⁶ involuntariness, enforcement problems, inflexible procedures, lack of control from parties, and breed enmity.¹⁷⁷

4. How Mediation Made a Comeback to the Nigerian Dispute Resolution Landscape in the Eyes of the Enabling Law and Experiences of Mediation in the Abuja and Ondo Judicial Divisions.

The introduction of formal ADR in Nigeria can be traced back to the *Arbitration Ordinance of 1914*,¹⁷⁸ which was the first statute with respect to ADR in the country. It later evolved into chapter 13 of the *Revised Laws of Nigeria 1958*,¹⁷⁹ which was a product of the colonial era, along with various other legislation made before Nigeria's independence in 1960¹⁸⁰ and its newfound republican status in 1963. This law¹⁸¹ applied to all the existing regions, including the western, eastern, and northern regions. It was also implemented in Lagos, which was the seat of power at the time.

¹⁷⁵ Halima Doma, "Enhancing Justice Administration in Nigeria through Information and Communications Technology" (2016) 33:2 J Marshall J Info Tech & Privacy L 89.

¹⁷⁶ *Salawa v Adza* (1997), 11 NWLR (Pt 527) 14. Here court interpreted the word "public" to mean "in front of everyone,". See also CFRN 1999, *supra* at note 161 s. 36(1). In *Kotoye V. Central Bank of Nigeria* and 7 Ors the court while interpreting fair hearing held that; "Fair hearing anticipated by the constitution implies that every reasonable and "fair-minded observer who watches" the proceedings should be able to come to the conclusion that the court or other tribunal has been fair to all parties concerned."

¹⁷⁷ *Jadesimi v. Okotie-Eboh* (1996) S.C.N.J. 1 is indeed a significant case that illustrates how litigation can polarize and disintegrate families. This case involved a dispute over the estate of Chief Festus Samuel Okotie-Eboh, a prominent Nigerian politician and businessman.

¹⁷⁸ *The Arbitration Ordinance 1914*, based on the *English Arbitration Act of 1889*

¹⁷⁹ Eunice R Oddiri, "Alternative Dispute Resolution" (Paper delivered at the Annual Delegates Conference of the Nigerian Bar Association, Abuja, 22-27 August 2004) at 8 [unpublished]

¹⁸⁰ Encyclopædia Britannica, "Nigeria as a Colony" (27 October 2024), online: Encyclopædia Britannica <www.britannica.com/place/Nigeria/Nigeria-as-a-colony>.

¹⁸¹ Eunice Oddiri, *supra* at note 179

However, this law was mainly focused on domestic arbitration,¹⁸² This legislation needed to provide for other amicable dispute-resolution mechanisms. It operated as an alternative to litigation for three decades. Later, in 1988, to remedy the lacuna in the previous *Act* and to have autochthonous legislation with Nigeria exercising its autonomous power, the *Arbitration and Conciliation Act*, promulgated as *Decree 11*, was born. It became an Act in 2004 after Nigeria returned to democratic rule in 1999. The third schedule of the *Act* had twenty rules on conciliation described as articles.¹⁸³

Practitioners in Nigeria used both mediation and conciliation interchangeably. The amended Act 2004 was based on the United Nations Commission on International Trade Law, "The UNCITRAL Model Law" on international Commercial Conciliation¹⁸⁴ Which defined conciliation:

"conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.¹⁸⁵

This lasted for 35 years with no national legislation on Mediation save for some rules of courts,¹⁸⁶ rules of various professional mediation institutions¹⁸⁷ and some specific legislation¹⁸⁸ Which provided the procedures for dispute resolutions within the mandates of such government

¹⁸² Damilola Ashaolu, Adewale E Oduwole & Olabisi Olabisi, "Commercial Arbitration and Conciliation in Nigeria: Law, Practice and Procedure" in *Essay in Honour of Justice Olufunlola O Adekeye (Rtd)* (Abuja: Velma Publishers, 2012) at 22.

¹⁸³ *Arbitration and Conciliation Act*, Cap A18 LFN 2004, Schedule 3.

¹⁸⁴ *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law*, GA Res 57/18, UNGAOR, 57th Sess, Supp No 17, UN Doc A/57/17 (2002)

¹⁸⁵ Paul O. Idornigie, *supra* note 148

¹⁸⁶ Lagos State of Nigeria, *High Court of Lagos (Civil Procedure) Rules*, 2019, O 27, r 2. See also, *Rivers State of Nigeria, High Court of Rivers State (Civil Procedure) Rules*, 2010, O 25 & O 27.

¹⁸⁷ Chartered Institute of Arbitrators, *Mediation Rules* (London: CI Arb, 2020); Lagos Court of International Arbitration, *LCIA Mediation Rules*, 2012. See also, Institute of Chartered Mediators and Conciliators, *ICMC Mediation Rules*, 2020

¹⁸⁸ *Matrimonial Causes Act*, Cap M7, LFN 2004, ss 17, 30. *Consumer Protection Council Act*, Cap C5, LFN 2004, s 2.

agencies. The challenge with the law was that a conciliator must be appointed,¹⁸⁹ unlike a mediator who is open to solicitation without the need for formal appointment always.¹⁹⁰ Legislative respite started oozing when the Constitution of the Federal Republic of Nigeria made provision for mediation as part of the alternative dispute resolution mechanisms and empowered the Chief Judge of State to make rules to regulate the practice and procedure of the High Court of the State. Under its foreign policy, the Constitution provides thus: "Respect for international law and treaty obligations, as well as the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication".¹⁹¹

By this provision, Nigeria shows readiness to make amicable dispute settlements as part of its foreign policy. However, this encourages national commitment towards reforms that will improve the situation. On practice and procedure, the Constitution provides: "Subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State."¹⁹²

i). The Emergence of the Multi-Door Courthouse, Mediation Centers, and Alternative Dispute Resolution Centers

Owing to a global search for alternatives and practically-oriented procedures that are user-friendly and amenable to public needs, Professor Rosco Pound, as far back as 1906, recognized

¹⁸⁹ *Arbitration and Conciliation Act* (Nigeria), *supra* note 114, s. 40. See also Conciliation in Nigeria, " *Nigerian Law Guru* (June 2024), <https://nigerianlawguru.com/wp-content/uploads/2024/06/CONCILIATION-IN-NIGERIA-1.pdf>.

¹⁹⁰ *Arbitration and Mediation Act, 2023* (Nigeria) s. 72. The new Act provides more flexibility in the mediation process compared to the conciliation process under the old ACA, but it does not eliminate the need for appointment where a formal appointment is required.

¹⁹¹ CFRN 1999, *supra* note 161 s. 19(d)

¹⁹² *Ibid* s. 274

the adversarial and contentious nature in the legal system. Pound specifically noted the difficulties produced by the “sporting theory of justice” and called for change.¹⁹³ Later, in 1976, Professor Frank Sander of Harvard University, while delivering a paper in commemoration of Pound, spoke about a "comprehensive Justice Center" that could accommodate all shades of disputes and resolve them without always appearing before a judge.¹⁹⁴ However, the convener of the Pound Conference, the American Bar Association (ABA), published Sander's paper using a multi-door courthouse (MDCH) nomenclature rather than the Comprehensive Justice Center earlier used.¹⁹⁵

Fortunately, it was stocked by all stakeholders and became popular, and Sander himself commented that he was indebted to ABA for using a catchy name—Multi-Door Courthouse.¹⁹⁶ The multi-door courthouse is a court-connected or court-annexed alternative dispute resolution (CCADR) mechanism hub that gives the parties different doors or routes to resolve their disputes.¹⁹⁷ It may also mean a courthouse or dispute resolution center encouraging courts and

¹⁹³ Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (Paper delivered at the American Bar Association Conference, 29 August 1906), (1906) 40 Am L Rev 729.

¹⁹⁴ Frank Sander & Mariana Hernandez Crespo, "A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse" (2008) 5:3 U St Thomas LJ 7.

¹⁹⁵ *Ibid*

¹⁹⁶ *Ibid*

¹⁹⁷ Greg C. Nwakoby, Ikenga K. Oraegbunam, and Sylvia Ifeyinwa Nwabachili, "The Regulatory and Implementation Regime for Multi-Door Courthouse System for Resolution of Disputes in Nigeria" (2023) 1:1 LASJURE 116. See also, Hon Justice Roli Daibo Harriman, "The Multi-Door Court House Concept and Justice Delivery in Nigeria" (Keynote address delivered at the Inauguration of the Edo State Multidoor Courthouse, 20 January 2017), online: Edo State Judiciary <https://edojudiciary.gov.ng/wp-content/uploads/2017/01/SPEECH-BY-HON.-JUSTICE-ROLI-DAIBO-HARRIMAN-LLM-ON-THE-OCCASSION-OF-THE-INAUGURATION-OF-EDO-STATE-MULTIDOOR-COURT-BY-THE-OUTGOING-CHIEF-JUDGE-HON.-JUSTICE.-C.-O.-IDAHOSA..pdf>. Also, Alero Akeredolu, "A Comparative Appraisal of the Practice and Procedure of Court-Connected Alternative Dispute Resolution in Nigeria, United States of America and United Kingdom" (PhD Thesis, University of Ibadan, 2013) [unpublished] at 33

communities to offer citizens alternatives to courtroom trials for resolving disputes.¹⁹⁸
MDCH/CCADR is a court of law where ADR facilities are provided.¹⁹⁹

Consequently, when individuals seek judicial intervention for dispute resolution, they are not limited to the traditional litigation framework. Instead, they are presented with alternative dispute resolution options in suitable cases, allowing their claims to be directed towards these processes for resolution.

According to Professor Frank Sander:-

Now, I should explain the idea, whatever you want to call it. The idea is to look at different forms of dispute resolution—Mediation, arbitration, negotiation, and med-arb (a blend of mediation and arbitration). I tried to look at each of the different processes and see whether we could work out some taxonomy of which disputes ought to go where and which doors are appropriate for which. That is something I have been working on since 1976 because the multi-door courthouse is a simple idea but not simple to execute because deciding which cases ought to go to what door is not a simple task. That is something we have been working on.²⁰⁰

The search for an improved justice system continues in Nigeria on all fronts. Several committee members of the Bar, Bench, NGOs, and other stakeholders involved in the justice system have suggested revamping the court system. The main goal of these recommendations is to decrease the amount of time and money involved in legal proceedings and to enhance accessibility to justice. One of the key proposals made by all the groups in these reform initiatives is the formal introduction of Alternative Dispute Resolution into the administration of justice. This

¹⁹⁸ Akeredolu *supra* note 30 at 23.

¹⁹⁹ *Ibid*

²⁰⁰ Frank Sander & Mariana Hernandez, *supra* note 194.

was climaxed by Lord Woolf's *Access to Justice Report 1996*, which outlined principles for an effective justice system:²⁰¹

1. It should be just in the results it delivers; -
2. It should be fair and seen to be so by ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights, providing every litigant with an adequate opportunity to state his own case and answer his opponent's, and treating like cases alike; -
3. Procedures and costs should be proportionate to the nature of the issues involved; -
4. It should deal with cases with reasonable speed; -
5. It should be understandable to those who use it; -
6. It should be responsive to the needs of those who use it; -
7. It should provide as much certainty as the nature of particular cases allows;- and,
8. It should be effective: adequately resourced and organized to give effect to the previous principles.

Mediation was formally established in Nigeria in 2002 with the launching of the Lagos Multi-Door Courthouse (LMDC), the first court-connected Alternative Dispute Resolution center in Africa.²⁰² This initiative emerged as a Public-Private Partnership between the Lagos State High Court of Justice and the Negotiation and Conflict Management Group (NCMG),²⁰³ aimed at

²⁰¹ Lord Woolf , supra note 44 at 119; see also Civil Justice Council, "Access to Justice for Litigants in Person: A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice" (November 2011) at 16, online: Courts and Tribunals Judiciary <https://www.judiciary.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf>.

²⁰² Morenike Obi-Farinde, "The Growth of Mediation in Nigeria" (2021), online: *Mediate.com* <https://mediate.com/the-growth-of-mediation-in-nigeria/>

²⁰³ *Ibid*

integrating ADR into the standard dispute-resolution framework for litigants seeking access to justice in Lagos.²⁰⁴

Under the leadership of Kehinde Aina, the NCMG was instrumental in advancing justice reform in Nigeria, drawing upon the principles and practices of court-connected ADR as implemented in the United States and systematically adapting them to the local context.²⁰⁵ The LMDC stands out as an innovative facility, providing a spectrum of dispute resolution methods, including mediation, arbitration, and judicial appraisal, thereby enhancing the efficiency and efficacy of the justice delivery system.²⁰⁶

Mediation practice in Nigeria predominantly operates within a court-annexed framework.²⁰⁷ While certain jurisdictions offer provisions for walk-in cases and designated settlement weeks, the overarching practices apply to standardized legal regulations within specific judicial divisions.²⁰⁸ "Walk-in" cases refer to situations where parties directly approach the Multi-Door Courthouse (MDCH) for mediation services.²⁰⁹ These cases are typically not formally filed in court; instead, they involve individuals seeking expedited, cost-effective, and discreet dispute-resolution alternatives.²¹⁰ Court-annexed mediation pertains to disputes that have already been initiated in court, with judicial direction encouraging parties

²⁰⁴ Until 1991, Lagos State served as the capital of Nigeria before Abuja assumed that designation. Despite this transition, Lagos has maintained its status as the commercial hub of the country. The decision to select Lagos for this initiative was strategic, given its established economic significance and infrastructural advantages.

²⁰⁵ Kehinde Aina, *supra* note 22 at 3

²⁰⁶ E.C. Muller & C.L. Nel, "A Critical Analysis of the Inefficacy of Court-Annexed Mediation (CAM) in South Africa: Lessons from Nigeria" (2021) 46:2 J Jurid Sci 42. See also, Kehinde Aina, *supra* note 33.

²⁰⁷ Alero Akeredolu, *supra* note 197

²⁰⁸ *Ibid*

²⁰⁹ Kehinde Aina, *supra* note 33

²¹⁰ Akeredolu Alero, *supra* note 26

to pursue mediation. Under this model, the court mandates participation in mediation by referral of such case to MDCH. Any agreement reached through this process is recorded as a judgment by the court.²¹¹

The institutional framework supporting court-annexed mediation in Nigeria comprises Multi-Door Courthouses associated with the State High Courts, Alternative Dispute Resolution (ADR) Centres connected to both the Federal High Court and the National Industrial Court, as well as Mediation Centres located within the two apex appellate courts: the Court of Appeal and the Supreme Court. For the purposes of this research, the analysis of mediation practices is confined to Abuja and Ondo State. It is safe to add that ADR, which enhances the speedy resolution of cases and promotes justice, is part of Nigeria's National Policy. Below are provisions that show that Nigeria is all out to improve its justice system through ADR:²¹²

- I. All courts should adopt Alternative Dispute Resolution (ADR);⁻²¹³
- II. The Judiciary should adopt measures designed to promote flexibility in case handling while reducing cost, delay, and other unnecessary burdens on litigants in case adjudication;⁻²¹⁴
- III. All judiciaries within the Federal Republic of Nigeria should ensure that all Courts in their jurisdictions further the overriding objective of justice by actively managing cases;⁻²¹⁵ and

²¹¹ European Union Justice and Legal Empowerment Programme, "Court-annexed Mediation and Dialogue" (October 2020), Policy Brief No 7, online: United Nations Development Programme <https://www.undp.org/sites/g/files/zskgke326/files/migration/vn/EUJULE-Court-Annexed-EN.pdf>. Alero Akeredolu, *supra* note 197

²¹² National Judicial Council, "The National Judicial Policy" (2 October 2013), online: National Judicial Council <https://njc.gov.ng/national-judicial-policy>. National Judicial Institute Act, Cap N55, LFN 2004.

²¹³ *Ibid* Access to Justice 6(g)

²¹⁴ *Ibid* Case Management 7(a)

²¹⁵ *Ibid* Alternative Dispute Resolution 11(a)

- IV. A Judicial Officer shall always encourage parties before the Court to explore Alternative Dispute Resolution (ADR) Procedures where appropriate.²¹⁶

5. Mediation Practice in Abuja

Abuja is the center of political authority in Nigeria. In Abuja, aside from the constitutional provision for mediation, various court rules spell out how mediation procedures work. This section will examine the Abuja High Court Rules and its practice Direction on ADR as it relates to the workings of its MDCH, and The Court of Appeal Rule vis-a-vis its mediation program.

i). Abuja Multi-Door Courthouse (AMDC)

This was established in 2003 as an Alternative Dispute Resolution Centre in Abuja to complement the effort being made by the executive in encouraging the influx of foreign investments in the country.²¹⁷ The Chief Judge of the Federal Capital Territory exercises his constitutional authority by issuing practice directions for mediation and ADR procedures. According to the Provision, "Subject to the provisions of any Act of the National Assembly, the Chief Judge of the High Court of the Federal Capital Territory, Abuja, may make rules for regulating the practice and procedure of the High Court of the Federal Capital Territory, Abuja."²¹⁸

The *FCT High Court Civil Procedure Rules* provide also:²¹⁹

Upon acceptance for filing by the registry, all originating processes shall be screened for suitability for ADR. Where it is considered appropriate, the chief judge may refer the case to:
The Abuja Multi-Door Courthouse.

²¹⁶ *Ibid.*

²¹⁷ "Nigeria: Uwais: Centre to Facilitate Foreign Investment" (14 October 2003), online: AllAfrica <https://allafrica.com/stories/200310140412.html>.

²¹⁸ CFRN 1999 s. 259

²¹⁹ High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018, O 2, r 7.

Or other appropriate ADR institutions or practitioners by the practice directions that shall from time to time be issued by the chief judge of Abuja

To demonstrate commitment to amicable dispute resolution on the part of the practicing lawyers, the *FCT Civil Procedure Rule* adds:²²⁰

A certificate of pre-action counselling signed by counsel and the litigants shall be filed along with the originating processes where proceedings are initiated by counsel, showing that the parties have been appropriately advised as to the relative strength or weakness of their respective cases and the counsel shall be personally liable to pay costs of the proceedings where it turns out to be frivolous, as in Form 6 (Certificate of Default).

Later, in 2018, the AMDC changed to the Uwais Dispute Resolution Centre (UDRC). The objectives of the center are:²²¹

- i. To provide enhanced, timely and cost-effective access to justice could reduce parties' frustration with the justice delivery system;-
- ii. To supplement the avenues for justice by making additional doors available through which disputes can be resolved;-
- iii. To develop the "Managerial Judges" concept and design how best settlement could be achieved among parties;-
- iv. To utilize the immense resources of retired judges through services in mediation and other ADR mechanisms; -
- v. To fast-track criminal trials and bring closure to victims of crime through the development of plea-bargain procedure available under the *Administration of Criminal Justice Act*²²²

²²⁰ *Ibid* Rule 8

²²¹ Uwais Dispute Resolution Center (UDRC), "Practice Direction and Rules" (2018) at 4.

²²² *Administrative of Criminal Justice Act* (ACJA), 2015, LFN 2015, s 270.

- vi. To provide state-of-the-art facilities and a venue for training stakeholders in the justice delivery system and to provide manpower for the use of ADR.

The Court of the Federal Capital Territory is inspired to encourage parties to use ADR, refer cases to the UDRC, and ensure that the parties have exhausted the ADR options before filing or continuing litigation. Practicing lawyers are obliged to encourage their clients to use ADR, while parties themselves are advised to attend ADR sessions in good faith without undue requests for adjournments.²²³ The matter may be brought to the Center by any of the presiding judges, parties to the dispute,²²⁴ and director of the Center.

Action begins once parties complete a Request Form (Form 1) and in circumstances where counsel to clients are notified that the matter has been referred for mediation. Parties are to accompany Form 1 with a detailed explanation of what led to the dispute.²²⁵ Once this is received within seven days, the other party will be informed through a Notice of Referral along with a Submission Form 2 for them to state their own side of the dispute and a memorandum to parties. The other party is given a Notice of Referral seven days after being served to submit their Form 2.²²⁶

²²³ UDRC, *supra* note 221, art 1.3.

²²⁴ Uwais Dispute Resolution Center, "UDRC Mediation Procedure 2018", r 2 at 43.

²²⁵ According to Rule 3 of the Uwais Mediation Procedure, a request for mediation must include a brief description of the dispute, along with the names, addresses, and telephone numbers of all parties involved and their representatives. Additionally, Order 19(3)(1a) stipulates that the claimant is required to file their statement of case within 14 days of the court issuing the order, while the defendant is expected to submit their response within the same timeframe.

²²⁶ UDRC, *supra* note 221, art 2.

Once parties send in their Form 1 and Form 2, the ADR Registrar will ensure copies from the other party are exchanged. The parties may be invited to Pre-session and Intake Screening with other dispute resolution staff.²²⁷ According to the Practice Direction,

During the intake screening, also referred to as the Pre-session meeting, the Dispute Resolution Specialist (DRS) will outline the procedural framework, address any pertinent issues, ascertain the underlying interests of the parties, and evaluate potential settlement avenues. Additionally, the DRS will provide recommendations on the most suitable Alternative Dispute Resolution (ADR) channels. Furthermore, the DRS will supply the participants with the biographical information of suggested mediators or neutrals, allowing them to make informed choices.²²⁸

Parties must sign a confidentiality memorandum in Form 4 and confirmation of attendance in Form 3.²²⁹ Sessions in mediation are protected from disclosure nor admissible in evidence for any purpose.²³⁰ A case may be dismissed if either party does not submit Form 4. In such instances, a Certificate of Default (Form 6) may be issued, particularly when the parties are unable to reach a consensus on the selection of a mediator or fail to consider the recommendations offered by the mediation center.²³¹ While parties need to attend mediation sessions in person, they may have their counsel accompany them, but not in a representative capacity.²³²

ii). The Court of Appeal Mediation Programme

According to the Court of Appeal report,²³³

The Court of Appeal (Alternative Dispute Resolution Centre) is a court-annexed Alternative Dispute Resolution Center located within the premises of the Court of Appeal of Nigeria. Its primary mission is to provide efficient, timely, and user-friendly alternatives to appeals related to disputes. The

²²⁷ UDRC, *supra* note 221, art 4.1.

²²⁸ UDRC, *supra* note 221, art 4.2.

²²⁹ UDRC, *supra* note 221, art 4.3.

²³⁰ UDRC, *supra* note 221, art 6(a)(b).

²³¹ UDRC, *supra* note 221, art 4.4.

²³² UDRC, *supra* note 221, art 5.1.

²³³ Court of Appeal ADRC Report (2024) at 1.

concept of the CAADRC was first proposed by the Negotiation and Conflict Management Group International (NCMG) in 2007, with a proposal submitted to the then Honorable President of the Court of Appeal, Hon. Justice Umaru Abdullahi, CON. By 2011, the Court of Appeal Mediation Program (CAMP) was established through the provisions of Order 16 of the Court of Appeal Rules, 2011. The CAMP was continued in the Court of Appeal Rules in 2015. In 2018, under the leadership of then-President of the Court of Appeal, Hon. Justice Zainab Bulkachuwa, CFR, the Court of Appeal Mediation Rules were published in the Federal Republic of Nigeria Official Gazette on March 2, 2018. Subsequently, the Court of Appeal Mediation Centre was launched, with its headquarters in Abuja and divisions in Port Harcourt and Lagos.

The Court of Appeal is the penultimate court in the hierarchy of Courts in Nigeria.²³⁴ "It is possible to have mediation for matters that have been appealed." The Court of Appeal Rules 2021 provides for a Court of Appeal Alternative Dispute Resolution Programme (CAADRP) that enables parties to seek Alternative Dispute Resolution at any time before the appeal is set down for hearing.²³⁵ The Court made specific rules of procedures for the operation of its CAADRP.²³⁶

According to the rules:

The Court shall promote mediation and such other alternative dispute resolution mechanisms towards enhancing the administration of Justice and speedy resolution of disputes, assist the parties in reaching an expeditious resolution of their disputes in all good faith reasonably and efficiently and encourage disputing parties and their counsel to strive towards reducing the cost of litigation and associated delays thereby facilitating a fair and just resolution of disputes with limited animosity among parties.²³⁷

The Court may, upon the request of any of the parties, refer the appeal to the Court of Appeal Alternative Dispute Resolution Center (CAADRC),²³⁸ provided the appeal is of a civil nature which relates to breach of contract, liquidated money demand, matrimonial causes, child custody, parental actions, inheritance, chieftaincy or personal actions in tort.²³⁹ Such a request for mediation is made in Form 15 in the first schedule to the Rules within 21 days of the entering of

²³⁴ *Alli Dogo v The State*, 2013 LLJR-SC (Nigeria Supreme Court)

²³⁵ *Court of Appeal Rules (CARs)*, 2021, O 16 r (1)(2)

²³⁶ *Court of Appeal Alternative Dispute Resolution Rules (CAADRR)*, 2021

²³⁷ CAADRR r 1(1-3)

²³⁸ CAADRR r 8(1)

²³⁹ CAADRR r 7(a)

the appeal.²⁴⁰ Any party served with a request for ADR may file a response within seven days.²⁴¹

The Registrar will send the complete request and the accompanying documents to the Court.

When an appeal is referred to CAADRC, it is adjourned to a definite date not exceeding 3 months

for the outcome of the ADR between the parties.²⁴² The Court will direct the Registrar to provide

copies of the Record of Appeal and Exhibits to the CAADRC.²⁴³ In addition to this, and

without prejudice to the pleadings already made available on the Court record in respect of the dispute, each party to the mediation shall, within such time as may be fixed by the Centre, supply, aside the 10-page summary referred to in Rule 8(4) and (5), a mediation bundle which shall contain such information and documents as will be helpful in the mediation.²⁴⁴

The President of the Court possesses the authority to appoint a mediator or co-mediator when deemed appropriate, contingent upon the parties' agreement.²⁴⁵ In instances where

consensus is lacking, the President has the discretion to select a mediator from the Court's

designated pool of mediators.²⁴⁶ The CAADRR's provision empowers the mediator to provide

direction and assistance during impasses in discussions.²⁴⁷ In cases involving corporate entities,

the rule stipulates that a managing director, executive director, or another senior officer with

direct knowledge of the case must be present at the mediation sessions, either accompanied by

legal counsel or independently.²⁴⁸ A critical requirement is that any representative of the

²⁴⁰ CAADRR, r 8(3)

²⁴¹ CAADRR r 8(5)

²⁴² *Ibid* r 8(2b)

²⁴³ *Ibid* r 8 (2c)

²⁴⁴ *Ibid* r 15(1)

²⁴⁵ *Ibid* r 9(1a)

²⁴⁶ *Ibid* r 9(1b)

²⁴⁷ *Ibid* r 10(5)

²⁴⁸ *Ibid* r 14(2)(ii)

corporation must possess written authority to negotiate and make binding commitments on behalf of the company.²⁴⁹

Should the parties reach an agreement on one or more contested issues, the mediator is tasked with documenting the terms in a memorandum of settlement.²⁵⁰ This memorandum may encompass agreements related to the approval of proceedings, including the allocation of costs associated with the mediation process.²⁵¹ Conversely, if the parties do not achieve a comprehensive settlement within the designated mediation timeframe—typically capped at 80 days²⁵²—the mediator is obliged to inform the Court.²⁵³ Where mediation fails, the appeal will be set down for hearing.

The justification for developing additional alternatives to exclusive reliance on litigation, particularly within the Court of Appeal, was emphasized by Hon. Justice Zainab Bulkachuwa, CFR, former president of the Court. His Lordship articulated this perspective, highlighting the significance of diversifying dispute resolution mechanisms:²⁵⁴

The importance and speedy nature of mediation in the administration of Justice is glaringly apparent at the lower courts in Nigeria. It has played a vital role in decongesting our High Courts. The case that involved the former Vice President of Nigeria, Dr. Alex Ekwueme, is a *locus classicus* on this subject. The former Vice President was a party to a contract involving land sale as chairman of an investment corporation. A dispute arose between the corporation and Estate Agents, which was subsequently litigated. The matter was before the Court for 17 years until the trial Court referred the matter to the Lagos Multi-Door Courthouse (LMDC). At the LMDC, the matter was recommended for mediation, and the matter was successfully resolved in one day between 10:00 am – 8:30 pm. She added, a matter involving two Businessmen was referred to the Kano Multi-Door Courthouse (KMDC). The defendant owed the plaintiff a sum of ₦12.9 Million. The KMDC succeeded in resolving the issue in one sitting, and both parties were able to rebuild their

²⁴⁹ *Ibid*

²⁵⁰ *Ibid* r 21(1)

²⁵¹ *Ibid* r 21(3)

²⁵² *Ibid* r 22

²⁵³ *Ibid* r 23

²⁵⁴ Denen S Orkar, "Critical Examination of the Differences in the Alternative Dispute Resolution Practices of the Federal High Court and the National Industrial Court of Nigeria" (2023) 11:2 Nnamdi Azikiwe U J Intl L & Juris at 3

commercial relationship, to mention but a few. Hence, we saw the need to replicate mediation at the appellate level. Against this backdrop, the idea of appellate mediation in the Court of Appeal was born. With today's event, litigation will cease to be the only method of determining appeals in the Court of Appeal. Parties before the Court can now choose between litigation and mediation. This signifies an opportunity for parties and their counsel to enjoy the full flavour of Order 16 of the Court of Appeal Rules 2016.²⁵⁵ By the provisions of Order 16 Court of Appeal Rules, 2016, civil appeals in respect of breach of contract, liquidated money demand, matrimonial causes, child custody, parental actions, inheritance, chieftaincy and personal actions in tort are eligible for reference to the Court of Appeal Mediation Centre at any time before an appeal is set for hearing. The Court of Appeal Mediation Centre would provide a platform that will encourage disputing parties to reach an expeditious resolution of their disputes in good faith and a fair and efficient manner. The Centre will improve access to Justice, increase user confidence in the court system, lighten the Court's docket, and invariably afford the conventional Court ample time for such matters or issues that are best solved through litigation.²⁵⁶

The statement from the President of the Court of Appeal underscores the importance of mediation within Nigeria's judicial system. This marks the first occasion in which the appellate justice system, one of the highest tiers in the court structure, offers alternatives to conventional litigation for pursuing appeals at the Court of Appeal.²⁵⁷

How Effective Is The CAADRC?

The table below shows the cases brought at the Court of Appeal Alternative Dispute Resolution Centre to be resolved through mediation in its three divisions:²⁵⁸

DIVISION/CENTRE	NUMBER OF CASES
A. ABUJA CASES	165
Settled and concluded	87
Returned to registry for appeal hearing	43

²⁵⁵ Aluko, A. (2021). Towards a more effective legal framework for investor-state arbitration in Nigeria. <https://core.ac.uk/download/479335264.pdf>. The Court of Appeal Rule 2016 has been replaced by 2018 Rules with few improvements.

²⁵⁶ Kenneth Atavti & Obisue Emmanuel, "ADR: A Timely Access to Justice Delivery" (16 December 2019), online: Nigerian Pilot <http://nigerianpilot.com/adr-a-timely-access-to-justice-delivery/>.

²⁵⁷ Denen *supra* note 249

²⁵⁸ CAADRC *supra* note 228 at 7

ongoing	35
B. LAGOS CASES	35
Settled and concluded	10
Returned to Registry	9
Ongoing	16
C. PORT HARCOURT CASES	33

Case Overview: An analysis of the data presented in the CAADRC table of cases indicates that Abuja has a total of 165 cases, with 87 settled (52.7%), 43 returned for appeal (26.1%), and 35 ongoing (21.2%). In Lagos, the total number of cases is 35, with 10 settled (28.6%), 9 returned for appeal (25.7%), and 16 ongoing (45.7%). Port Harcourt shows a total of 33 cases, but no further breakdown is provided.

Effectiveness of Mediation: Abuja has a relatively high settlement rate of 52.7%, compared to Lagos, which has a rate of 28.6%. This suggests that mediation in Abuja may be more effective, or that the cases brought there are more suitable for resolution through mediation. Additionally, the rate of cases returned for appeal in Abuja, which stands at 26.1%, is significant. This indicates that a considerable number of cases did not reach a resolution and were considered complex enough to revert to the traditional court system. Lagos has a higher percentage of ongoing cases at 45.7%. This may indicate challenges in reaching settlements or a greater number of complex disputes compared to Abuja.

Comparative Analysis: The total number of cases managed by the CAADRC is markedly higher in Abuja than in Lagos and Port Harcourt. This may indicate a greater demand for the CAADRC's services in Abuja or suggest that the organization is more established in that region. The absence of detailed information regarding the Port Harcourt division constrains the analysis; however, with only 33 cases recorded, it may imply either lower levels of engagement with the CAADRC or a smaller number of disputes being filed in that area.

Implications: The data suggests that, while the CAADRC has demonstrated some effectiveness, there remains significant room for improvement, particularly in Lagos, where the settlement rate is notably lower. The ongoing cases in Lagos, along with the number of cases returned for appeal, underscore potential barriers to successful mediation. These issues could be addressed through targeted training, enhanced mediation strategies, or by increasing the parties' willingness to engage in the process. Overall, the CAADRC is partially fulfilling its role as an alternative dispute resolution mechanism; however, consistent monitoring and evaluation are essential to enhance its effectiveness across all locations.

Conclusion: The analysis indicates that the CAADRC's effectiveness of mediation varies significantly across its regional divisions, with Abuja demonstrating superior performance in achieving successful settlements. A deeper examination of the specific case types and the mediation methodologies employed could yield valuable insights to enhance the overall efficacy of the mediation process across all divisions. Unfortunately, these were not provided in the report.

However, the CAADRC in the Abuja division has a greater number of filed cases and higher settlement rates compared to the Lagos Centre for several reasons. First, the Abuja Centre serves as the headquarters and is more developed than other divisions. Being the political capital and seat of power, Abuja facilitates compromises that involve both political and economic solutions, thus fostering flexibility and understanding among disputing parties. Additionally, it is possible that more complex cases are filed in Lagos, the commercial hub of Nigeria, rather than in Abuja. Lastly, since Nigeria has only one Supreme Court, which is located in Abuja, the Supreme Court Mediation Centre has not been operational. This situation allows for cases to be referred to the Appeal Court Mediation Centre from the Supreme Court.

6. Mediation Practice in Ondo State

Ondo State is among the judicial areas in Nigeria where mediation has recently been introduced formally. Before this period, most disputes were adjudicated in the State High Court, Magistrate, and Customary Courts. Three major frameworks govern the practice of mediation: the *Ondo State High Court (Civil Procedure) Rules*,²⁵⁹ *Ondo State Multi-Door Courthouse Law*,²⁶⁰ and the Practice Direction on Mediation Procedure.²⁶¹

The *High Court Civil Procedure Rule* provides that cases filed in the court registry must first be evaluated to determine whether they suit ADR.²⁶² Once it is considered that such a case is amenable to ADR, the necessary steps are taken to send the matter to the Ondo State Multi-Door

²⁵⁹ *Ondo State High Court (Civil Procedure) Rules, 2019, Order 28*

²⁶⁰ *Ondo State Multi-Door Courthouse Law (OSMDL), 2022 (Nigeria)*

²⁶¹ Ondo Multi-Door Courthouse, "Practice Direction on Mediation Procedure" (O-PDMP) (2021).

²⁶² *Ibid* O 28 (1)

Courthouse(OSMDC).²⁶³ Once parties reach a settlement agreement, they must file a settlement report within fourteen days before the Court can rule to enforce such an agreement as the Court's judgment.²⁶⁴

The leading institution for Mediation in Ondo State is the Ondo State Multi-Door Courthouse whose Law was passed²⁶⁵ and assented²⁶⁶ to in 2022. The state governor, while signing the Bill into law:

... stated that it was initiated to promote more accessible access to justice in line with global trends in Alternative Dispute Resolution (ADR), saying it will encourage the state's people to explore the alternative dispute resolution that the multi-door courthouse provides. The multi-door courthouse would further boost the administration of justice in the state and allow litigants to settle matters without going through the conventional court process, which, in most cases, creates enmity and takes longer to resolve. The Law would assist the legal process, which has become cumbersome in the country, by charging judges and other stakeholders in charge of the administration of justice to encourage litigants to use out-of-court settlement and explore alternative dispute resolution for the peace and progress of society. Make the environment convivial. Do not let them see themselves as adversaries.²⁶⁷

The law provides for a corps of mediators known as a panel of neutrals who have considerable experience in their practice and must have passed the assessment of the ODMDC screening committee.²⁶⁸ To increase the number of cases settled annually, the Law provides for a settlement

²⁶³ *Ibid* O 28(3)

²⁶⁴ *Ibid* O 28(4)

²⁶⁵ Ondo State House of Assembly in 2022, which was of the view that it would ease the tension and the burden of judges and lawyers as well as the state in resolving some cases outside the conventional courtroom.

<https://leadership.ng/akeredolu-signs-multi-door-court-house-bill-into-law/>

²⁶⁶ Arakunrin Oluwarotimi Akeredolu, Senior Advocate of Nigeria and immediate past governor of Ondo State, now deceased, December 2023

²⁶⁷ https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewibjf-r9dGEAxUel4kEHe6kCEQQFnoECBcQAQ&url=https%3A%2F%2Fwww.thisdaylive.com%2Findex.php%2F2022%2F11%2F02%2Fakeredolu-signs-multi-door-court-house-bill-into-law&usg=AOvVaw2Nh_-4PM-R7d3oGQSupS9E&opi=89978449

²⁶⁸ OSMDL *supra* note 260, Interpretation, p. 4

week, usually set aside annually under the directive of the Chief Judge, during which ODMDC will engage in mediation and other ADR processes to decongest the court dockets.²⁶⁹

The law also encourages corporations or institution take advantage of the ODMDC to apply for mediation by way of walk-in.²⁷⁰ Furthermore, it encourages disputing parties whose matters are already listed before the Court for hearing to appear before it to explore settlement options.²⁷¹ To elicit quality assurance from the conduct of mediation sessions and settlement agreements of disputes, the Law provides for two ADR Judges and a magistrate of the Ondo State judiciary appointed by the Chief Judge. These officials are to take responsibility for promoting mediation within the Judiciary.²⁷²

Mediation proceedings take place in the OSMDC or any other state venue as the Chief Judge approves from time to time.²⁷³ Mediation and cases coming to OSMDC are designated in the Case Management Department, which serves as the Registry. The Registry is responsible for processing cases that come to OSMDC as referrals, walk-ins, or direct intervention and managing the dockets.²⁷⁴ Counsel's responsibility regarding mediation is to the Court. The ODMDC and the legal profession work together to promote a more efficient justice delivery system.²⁷⁵

Counsel has duties to advise clients to submit to ADR and explore the most appropriate mechanism for resolving the matters that are brought to lawyers.²⁷⁶ Counsel is urged to give due

²⁶⁹ *Ibid*

²⁷⁰ *Ibid* s 5(1)

²⁷¹ *Ibid* s 5(2)

²⁷² *Ibid* s 12(1)

²⁷³ *Ibid* s 12(4)

²⁷⁴ *Ibid* s 15(3)(d)

²⁷⁵ *Ibid* s 19(1)

²⁷⁶ *Ibid* s 19(2)

consideration and support to suggestions, orders and directives from the courts for an amicable settlement or the referral of ongoing matters to the ODMDC.²⁷⁷ They must ensure their clients respect notices, invitations and directives for mediation sessions.²⁷⁸ The parties themselves have responsibilities to the mediation process and are to work with the officers in charge of managing their disputes.²⁷⁹

i) Provisions of Ondo Multi-Door Courthouse Practice Direction on Mediation Procedure

The state's Chief Judge issued a Practice Direction on Mediation Procedure, which comprises twenty-four Articles.

According to him,²⁸⁰ "In line with Order 28 of the Ondo State High Court Civil Procedure Rules 2019 and other powers enabling me, I make this Practice Direction on Mediation Procedure to administer mediation matters at the Ondo State Multi-Door Courthouse."

Article 1 Application of the Rules.

It shall apply to matters referred to the OSMDC for mediation from the High Courts of Justice of Ondo State and other jurisdictions outside the State, Federal Courts, Private persons, corporations, Public Institutions, and Dispute Resolution Organisations. It recognizes that parties may have mediation agreements regarding existing or future disputes and, by so doing, be deemed to have made this practice direction part of their agreement.²⁸¹

Article 2 provides for the commencement of mediation through walk-ins, court referrals, or direct intervention.

In the walk-in window, any party or parties to a dispute may initiate mediation by filing a written request for mediation with OSMDC. Upon receipt of such a request, the OSMDC will contact the

²⁷⁷ *Ibid* s 19(3)(i)

²⁷⁸ *Ibid* s 19(3)(ii)

²⁷⁹ *Ibid* s 20(a)

²⁸⁰ Hon. Justice Williams Akintoroye, former Chief Judge Ondo State Judiciary (2021-2023)

²⁸¹ O-PDMR *supra* note 261 at 4.

other party involved in the dispute and obtain a submission to mediation from them. In referral cases, the enrollment of an Order of the matter from the Court will be presented to OSMDC, which invites the parties to submit to the ADR Process. In some situations where issues in dispute bother the state polity and can distort the peace of the State, OSMDC will extend an invitation for mediation to all parties.²⁸²

Article 3 contains how a request for mediation is made: “The party will make a brief statement of the nature of the dispute and provide details of parties and representatives, if any. The initiating party shall simultaneously file three copies of the request with the OSMDC and a copy for every other party to the dispute.”²⁸³

Article 4: Submission to Mediation

- a) Upon receipt of the Notice of Referral, the other party notifies the OSMDC in writing within seven days of its submission to the mediation process per the practice direction on the mediation procedure.
- b) If the recalcitrant party refuses to submit within the stipulated time to the ADR Process, the ADR Judge shall order the party to appear before him, and he shall make requisite orders and give directives as he considers desirable in fulfilling the overriding objectives of the OSMDC.
- c) Where a party refuses to appear before the ADR Judge as stipulated in (b) above, this shall be treated as contempt of Court, and the ADR Judge shall give orders that include fines, costs in monetary terms, etc., as may be considered appropriate under the circumstances.²⁸⁴

Article 5 provides for tripartite agreement among the parties, the mediator and the OSMDC²⁸⁵ while Article 6 describes how a mediator is appointed.

Qualified mediators are appointed by OSMDC subject to the parties' approval from its Panel of Neutrals (PON) or provide parties with a short list of mediators from its PON. The mediator(s) so appointed shall be deemed to have undertaken to make available sufficient time for the

²⁸² *Ibid* at 4-5

²⁸³ *Ibid* at 5

²⁸⁴ *Ibid*

²⁸⁵ *Ibid* at 6

expeditious conduct of the mediation, and they are expected to disclose any circumstance likely to create a presumption of bias, including pecuniary or proprietary interest.²⁸⁶ When appointing a mediator, the person must be professionally qualified, in good standing with the OSMDC, and have years of cognate experience in their particular field of ADR practice. The mediator shall abide by the terms of the OSMDC Practice Direction, the Mediation Agreement, and the OSMDC Code of Conduct for Mediators.²⁸⁷

Article 8 provides for the roles of the mediator(s).

They are expected to assist the parties impartially in reaching an amicable dispute settlement without imposing a decision on them. They are to consider the case's circumstances, the parties' underlying interests, and the need for speedy settlement of the dispute. Part of their duties is to end the mediation whenever, in their judgment, it will be futile to continue the mediation proceeding. Another key role is assisting the parties in drawing up a settlement agreement with their consent.²⁸⁸

Lawyers are not prohibited from participating in mediation sessions. They are seen as part of the solution to assist parties in reaching an amicable resolution. They are expected to encourage their clients to respect notices, invitations, and directives from the OSMDC and the confidentiality of the mediation session(s).²⁸⁹

Article 10 provides that the parties play an essential role in resolving their dispute, especially collaborating towards speedy resolution. It is the responsibility of the Judges of the High Court of Ondo State to control and manage proceedings and issue orders which would encourage the adoption of ADR methods in dispute resolutions; to mandatorily refer parties directly to the OSMDC for them to explore settlement of their dispute; and to ensure the adoption

²⁸⁶ *Ibid*

²⁸⁷ *Ibid* at 7

²⁸⁸ *Ibid* at 7-8

²⁸⁹ *Ibid* art 9 at 8

and enforcement of terms of settlement reached at the OSMDC in the same manner as a Judgement or order of Court.²⁹⁰ It is contempt of Court when a party who fails to properly represent himself/herself reneges on paying the appropriate penalty of N10,000 (15 CAD). If the parties are not representing themselves, details about the person standing in the position must be available to OSMDC.²⁹¹

The mediator has the authority to conduct joint and separate meetings with the parties, and there shall not be a record or transcript of the mediation session except if the parties consent to it.²⁹² Parties can amend their claims and counterclaims or submit additional documents to support their claims.²⁹³ If the parties cannot reach a settlement in the negotiation at the mediation and all the parties, or their representatives, request and the mediator agrees, the mediator will produce a non-binding recommendation on settlement terms for the parties.²⁹⁴ This will not attempt to preempt what a court might order but merely set out what the mediator suggests are appropriate settlement terms in all circumstances.²⁹⁵

Efforts are made to round off the mediation within thirty days from the mediator's appointment, including the signing of the settlement agreement by the mediator and the parties and endorsement by the ADR/ Referral Judge.²⁹⁶ As reiterated earlier, all parties to the mediation or dispute must ensure the confidentiality of all information. Records, reports, or other documents arising from the mediation will be without prejudice, privileged, and not admissible

²⁹⁰ *Ibid*

²⁹¹ *Ibid* art 13 at 9-10

²⁹² *Ibid* art 14(a)(b) at 11

²⁹³ *Ibid* art 14(d)

²⁹⁴ *Ibid* art 14(f)

²⁹⁵ *Ibid*

²⁹⁶ *Ibid* art 14(g)

or discoverable in any current or subsequent litigation, arbitration, or other proceedings, save for if they were admissible before the matter was referred to mediation.²⁹⁷

Article 16 offers parties the opportunity to initiate settlement of the dispute and make it available for the mediator to sign. The terms of the agreement bind the parties to signing the settlement agreement. This becomes an enforceable contract and is forwarded for endorsement to the Referral Judge (Court-referred matters) or the ADR Judge (walk-in and direct Intervention matters).²⁹⁸ Although mediation is cheaper than other alternative dispute resolution mechanisms, such as arbitration and conciliation, parties must pay a non-refundable administrative fee upon submission of a statement of issues or statement in response or as may be directed by the OSMDC. Part of the expenses include the session fee, which must be paid before the commencement of mediation; incidental expenses shall be borne equally by the parties by its fee schedule and terms and conditions of service.²⁹⁹

The OSMDC fixes the amount payable to mediators for their services and the modalities and timing of their payment, considering the amount in dispute, the complexity of the dispute's subject matter, and any other relevant situation.³⁰⁰ Matters brought for mediation are not affected by the statute of limitation. Hence, laches and acquiescence do not affect them.³⁰¹ Mediators and the OSMDC are insulated from liability arising from omission concerning services offered.³⁰²

²⁹⁷ *Ibid* art 15 at 11

²⁹⁸ *Ibid* art 16 & 17 at 12-13

²⁹⁹ *Ibid* art 19 at 13

³⁰⁰ *Ibid* art 20 at 14

³⁰¹ *Ibid* art 22 at 14

³⁰² *Ibid* art 23 at 14

ii) Examining The Efficacy of Mediation As A Dispute Resolution Mechanism in Ondo Judiciary.

According to a five-year report on the operations of the Ondo State Multi-Door Courthouse (ODMDC), the ADR Judge, Hon. Justice Bankole Akinwunmi, emphasized the importance of establishing the ODMDC, which facilitates the referral of cases and accommodates walk-in cases. Mediation has become the preferred option for many parties utilizing the ODMDC, clearly enhancing the administration of justice in the state.³⁰³

According to Justice Bankole,

Mediation has emerged as the most widely adopted form of alternative dispute resolution (ADR) at ODMDC since the Courthouse was established in 2018. Individuals who approach the Courthouse voluntarily typically prefer mediation, and cases referred from conventional courts are also directed towards mediation. The effectiveness of mediation in resolving disputes at ODMDC is reflected in the number of cases successfully settled to date, although there is still room for improvement. From February 2019 to December 2023, a total of 118 mediation cases were filed at ODMDC. Of these, 57 cases were resolved, while 49 remain either unresolved or were abandoned, with 12 cases currently pending. It is also noteworthy that only 2 arbitration cases have been filed to date, both being private arbitration cases.³⁰⁴

The table below shows the break-down of cases handled for the five-year period at the ODMDC through mediation.

YEAR	WALK-IN	REFERRAL	SETTLED	UNSETTLED
2019	12	11	13	10
2020	10	12	14	8
2021	13	5	8	10
2022	19	17	16	19
2023	12	7	6	4

³⁰³ OSMDC Report (2024) at 1

³⁰⁴ *Ibid*

TOTAL	66	52	57	51
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Key Observations

i). Case Trends:

The number of cases peaked in 2022, with the highest counts across all categories. The lowest number of cases occurred in 2023, indicating a significant decline compared to previous years.

ii). Settled vs. Unsettled:

Over the five years, more cases were settled (57) than left unsettled (51), reflecting a reasonable success rate in mediation efforts.

iii). Walk-In vs. Referral:

WALK-IN cases consistently outnumbered REFERRALS, suggesting that individuals directly approaching ODMDC were more common than referrals from courts within Ondo.

The ODMDC's mediation efforts have shown moderate effectiveness, with a slight edge in the number of settled cases compared to unsettled ones. However, the decreasing total of cases in recent years, particularly in 2023, may necessitate a deeper investigation into the underlying causes. The report highlighted three significant challenges confronting the ODMDC: a lack of funding, the reluctance of some legal practitioners in the state to accept alternative dispute resolution (ADR), and a low rate of referrals from judges and magistrates. These challenges are thoroughly examined in Part 5 of this thesis, which includes recommendations for policy reform.

The case demography at the ODMDC can be shown in the table below to show that the Courthouse had handled series of civil cases since its establishment.³⁰⁵

Land Cases	Family Cases	Commercial Cases	Rent Cases	Others (defamation and debt recovery)
56	8	18	6	30

Key Observations: The case demography at the ODMDC reveals an interesting distribution of cases where mediation is used as a tool for settling disputes. Let's analyse the breakdown of these cases:

Case Distribution

Total Cases: The ODMDC handled a total of 118 cases across various categories.

Case Types and Percentages:

1. Land Cases: 56 cases (47.46%)
2. Other Cases: 30 cases (25.42%)
3. Commercial Cases: 18 cases (15.25%)
4. Family Cases: 8 cases (6.78%)

³⁰⁵ *Ibid* at 2

5. Rent Cases: 6 cases (5.08%)

Preponderance of Land Cases:

Land disputes account for nearly half of all cases managed by the ODMDC.³⁰⁶ This substantial proportion indicates that conflicts related to land are a critical area for mediation efforts. The prevalence of these cases may suggest several underlying factors, including: (i) Complex property ownership issues; (ii) Boundary disputes; and (iii) Inheritance conflicts concerning land

Others:

The second largest category within the mediation landscape is classified as "Other cases," in the report, encompassing disputes related to defamation and debt recovery. This category represents approximately 25% of the total cases, underscoring the adaptability of mediation in resolving a wide range of conflicts across different domains.

Commercial Disputes:

Commercial litigation constitutes the third largest category of cases filed at ODMDC, indicating a notable trend among businesses toward utilizing mediation as a preferred mechanism for dispute resolution over conventional litigation. This shift reflects a growing recognition of the efficacy and efficiency that mediation offers in addressing conflicts within the commercial sector.

³⁰⁶ This is supported by the total number of cases filed at ODMDC, which stands at 118, while those concerning land-related disputes amount to 56. This figure represents more than half of all cases filed during the period..

Family and Rent Disputes:

Although the volume of cases in these categories is relatively low, their inclusion signifies the application of mediation techniques across a diverse range of personal and civil conflicts. This suggests that mediation is increasingly recognized as a viable mechanism for resolving such disputes.

In conclusion, the case demography at the ODMDC reflects a strong preference for mediation in land-related disputes, while also showcasing its effectiveness across a broad spectrum of legal issues in Ondo State. This data underscores the growing importance of alternative dispute resolution methods in various sectors of society and the legal system in Ondo.

7. The Nigerian National Mediation Act; Its Impacts on Mediation Practice in Nigeria

On May 26th, 2023, a significant event occurred in Nigeria's history as the In 2023, President Muhammadu Buhari signed the *Arbitration and Mediation Act*³⁰⁷ into law, which replaces the *Arbitration and Conciliation Act* (Chapter A18)³⁰⁸ that had been in effect for over thirty years in Nigeria.³⁰⁹ The new *Arbitration and Mediation Act* provides a comprehensive legal framework designed for the fair and efficient resolution of commercial disputes, addressing the shortcomings of the previous legislation.³¹⁰

³⁰⁷ AMA supra note 115

³⁰⁸ ACA supra note 114

³⁰⁹ Laura Alakija "Nigeria's New Arbitration Act: What You Need to Know" Kluwer Arbitration Blogs, 2023

³¹⁰ Tochukwu Amaefue & Micheal Chukwu, "Dispute Resolution Landscape: Changes in Nigeria" (2023) African Law Practice NG (alp) 1, online: <alp.company/resources/arbitration/alp-ng-co-review-dispute-resolution-landscape-changes-nigeria

The Alternative Dispute Resolution landscape in Nigeria has been significantly reshaped by the enactment of the *Arbitration and Mediation Act* (AMA), which formally codifies mediation as a statutory process. The new Act aligns largely with existing court rules and practice directions concerning mediation procedures. Notably, it expands the role of mediators as it was provided for in CAADRR, allowing them to make suggestions or proposals to the parties involved—an ability that was previously associated exclusively with conciliators prior to the implementation of the *Arbitration and Mediation Act*³¹¹

Historically, mediators were constrained in their functions, often limited to facilitating communication without offering substantive advice, even when parties encountered impasses.³¹² This delineation between mediation and conciliation has sparked debate among practitioners; this is because in Nigeria justice system, conciliation is more suited and often used for resolving industrial and labour disputes.³¹³ While both mediation and conciliation may be used for labour and industrial related matters, here are some basis that push forward conciliation above mediation in that space.

³¹¹ AMA supra note 115, s.73(6)

³¹² Julie Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002) 40:1 Osgoode Hall LJ 49; The Family Mediation Trust, "The Complexity of Suitability in Family Mediation: Understanding Mediator Constraints" (2025), online: *The Family Mediation Trust* <www.thefamilymediationtrust.org/family-mediation-blogs/the-complexity-of-suitability-in-family-mediation-understanding-mediator-constraints>; FindLaw, "What Are the Disadvantages of Mediation?" (20 September 2023), online: *FindLaw* <www.findlaw.com/adr/mediation/what-are-the-disadvantages-of-mediation.html>. See also, Lee Jay Berman, "Impasse is a Fallacy" (February 2006), online: *Mediation Tools* <http://www.mediationtools.com/articles/impasse.html>, and Lela P Love, "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997) 24:4 Fla St UL Rev 937.

³¹³ Onyinyechi Gift Wosu, "The Procedures for Settlement of Trade Disputes in Nigeria" (2022) 6:2 African J L & Human Rights 45 at 48.

- i. Legal Framework: The Trade Disputes Act of Nigeria emphasizes conciliation as an essential step in the dispute resolution process.³¹⁴ While mediation is also recognized, conciliation holds greater significance in the legal framework for resolving industrial conflicts. This is also underscored by the provision of the *National Industrial Court of Nigeria (Civil Procedure Rules, 2017)* inter alia that:

The President of the Court or a Judge of the Court may refer for amicable settlement through conciliation or mediation any matter filed in any of the Registries of the Court to the Alternative Dispute Resolution Centre (hereinafter referred to as the Centre) established within the Court premises pursuant to Section 254C (3) of the 1999 Constitution (as amended by the Third Alteration Act, 2010) and Article 4(5)(a)–(e) of the Instrument of the Alternative Dispute Resolution Centre.³¹⁵

- ii. Government Involvement: The Minister of Labour and Productivity possesses the authority to appoint a conciliator in instances where mediation proves unsuccessful. This governmental intervention enhances the credibility and effectiveness of the conciliation process.³¹⁶
- iii. Timing In Dispute Resolution Process: Conciliation generally takes place after mediation has been attempted and has not succeeded. Mediation typically serves as the initial step, allowing the parties a period of 7 days to work out the dispute with the help of a mediator. If mediation doesn't lead to a resolution, the matter is then moved on for conciliation.³¹⁷

³¹⁴ *Trade Disputes Act*, Cap T8, Laws of the Federation of Nigeria 2004, s 8. See also, Uche Jack Orji, "Law and Practice of Conciliation in Nigeria" (2012) 56:1 J African L 87. <https://doi.org/https://doi.org/10.1017/S0021855311000246>

³¹⁵ National Industrial Court of Nigeria (Civil Procedure) Rules, 2017, O 24, r 1. See also, National Industrial Court Act, 2006 (Nigeria), s 7(3)

³¹⁶ Onyinyechi Gift Wosu, *supra* note 313

³¹⁷ Hon Justice Olufunke Yemi Anuwe, "Employment Dispute Mediation" (*Paper delivered at the Workshop on Alternative Dispute Management and Negotiation Skills Training Course, Nigerian Institute of Advanced Legal Studies*, 23 October 2019) at 9. *Ibid*

Although both mediation and conciliation are significant in Nigeria's industrial dispute resolution system, the legal framework and its practical application tend to favor conciliation as the preferred method for addressing more complex or entrenched industrial conflicts. The newly enacted Act confers authority on mediators to propose solutions seems to effectively addresses any potential void left by the omission of conciliation.³¹⁸ The Arbitration and Mediation Act 2023 in Nigeria maintains a clear differentiation between mediation and conciliation.

However, it establishes mediation as the predominant method of alternative dispute resolution, effectively replaces conciliation within this legal framework with the following innovations:

- i. The Act establishes comprehensive provisions on mediation (Sections 67-87) to supersede the earlier directional provisions on conciliation found in the Arbitration and Conciliation Act of 1988.³¹⁹
- ii. Part II of the Act establishes a comprehensive framework for mediation, marking its first formal recognition as a dispute resolution mechanism under Nigerian federal law.
- iii. The Act outlines the range of issues that can be mediated under its provisions. These encompass international commercial mediation, domestic commercial mediation, domestic civil mediation, as well as domestic and international settlement agreements arising from mediation and finalized in writing by the parties to resolve a commercial

³¹⁸ *AMA*, *supra* note 115

³¹⁹ Laura Alakija, "Nigeria's New Arbitration Act: What You Need to Know" (25 June 2023), online: Kluwer Arbitration Blog <arbitrationblog.kluwerarbitration.com/2023/06/25/nigerias-new-arbitration-act-what-you-need-to-know/>

dispute.³²⁰ The Act has adopted the UNCITRAL Model Law on International Commercial Mediation.³²¹ However, the Act generally will not apply to disputes related to settling rights and obligations that are void under Nigerian law,³²² unless the parties agree otherwise, the Act will not apply when a judge or an arbitrator attempts to facilitate a settlement during proceedings;³²³ when the case has been recorded and is enforceable as an arbitral award;³²⁴ when a court or judicial proceedings have approved the case, have been concluded;³²⁵ and when the case is enforceable as a judgment of a Nigerian court.³²⁶

- iv. The Act outlines comprehensive rules concerning the conduct of mediation proceedings,³²⁷ confidentiality,³²⁸ and the enforcement of settlement agreements arising from mediation.³²⁹
- v. In the context of international settlement agreements, the Act incorporates and requires adherence to the provisions of the *Singapore Convention*, specifically the *Convention on International Settlement Agreements Resulting from Mediation*.³³⁰ To

³²⁰ AMA, *supra* note 115, s 67(2). See also, Abiodun V. Ogunnubi, "Evaluating the Effects of the Arbitration and Mediation Act 2023 on Mediation Practice in Nigeria Through the Lens of the Lagos Multi-Door Courthouse (LMDC)" (28 February 2025), online: S.P.A. Ajibade & Co. <spaajibade.com/evaluating-the-effects-of-the-arbitration-and-mediation-act-2023-on-mediation-practice-in-nigeria-through-the-lens-of-the-lagos-multi-door-courthouse-lmdc/>.

³²¹ United Nations Commission on International Trade Law (UNCITRAL), "Home" (accessed 28 February 2025), online: UNCITRAL <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en>.

³²² AMA s 67(a)

³²³ *Ibid* s 67(b)

³²⁴ *Ibid* s 67(c)

³²⁵ *Ibid* s 67(d)

³²⁶ *Ibid* s 67(e)

³²⁷ AMA s 73

³²⁸ *Ibid* s 76

³²⁹ *Ibid* s 82

³³⁰ *United Nations Convention on International Settlement Agreements Resulting from Mediation*, 20 December 2018, art 1 (entered into force 12 September 2020). This Convention applies to written agreements reached through mediation to settle commercial disputes, referred to as "settlement agreements." For these agreements to

be eligible, the settlement agreement must have been created in a country that is a party to the convention and must relate to a commercial relationship.³³¹

- vi. The Act suspends statute of limitation on civil matters. That is, once parties to a dispute file to resolve it through mediation, their time stops running. According to the Act;

(1) When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended. (2) Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time or the day the mediation ended without a settlement agreement.³³²

According to the provision, the Act stipulates that time is effectively paused concerning the limitation of action during mediation. Consequently, the duration from the commencement of mediation until its conclusion is not factored into the calculation of the time limit for the action. Therefore, if the mediation ends without the parties reaching an agreement, the limitation periods will begin anew from the date the proceedings concluded, rather than from the date the cause of action arose.³³³

In summary, the Act sets up a more thorough and well-defined framework for mediation practices in Nigeria. This development brings Nigerian law into better alignment with global standards in alternative dispute resolution.7 Professional Institutions That Promote Mediation in Nigeria.

be considered international at the time of their conclusion, they must meet one of the following criteria: 1. At least two of the parties involved have their places of business in different countries; or 2. The country where the parties operate is different from either: a. The country where a significant portion of the obligations under the settlement agreement is fulfilled; or b. The country that has the closest connection to the subject matter of the settlement agreement.

³³¹ *Ibid* . See also, *AMA* s 87

³³² *Ibid* s 71

³³³ Alaba Ibrionke Kekere & Godfree Matthew, "A Critique of the Concept of Limitation Period Under the Arbitration and Mediation Act, 2023" (2024) 7:1 Redeemers U LJ 12

8. Professional Institutions That Promote Mediation in Nigeria.

i) Negotiation and Conflict Management Group (NCMG)³³⁴

Founded in 1996, the NCMG functions as an autonomous, not-for-profit, and non-governmental member-based organization committed to improving access to justice and promoting peace-building efforts throughout Africa.³³⁵ The organization aims to make significant improvements in the justice system by redesigning its structures and operations, leading to a fairer and more effective way of delivering justice. NCMG is dedicated to using proven methods that will have a major impact on justice and peace across the region.³³⁶

Over the past two decades, NCMG has been at the forefront of capacity development and innovation in Africa through constructive engagements, judicial reform, cultural orientation and sustained proliferation of ADR practices.³³⁷ They leverage on competence with the collective intelligence of partners and relevant institutions across the world through collaboration and partnership to develop bespoke solutions to entrenched challenges within governments, MDAs and corporations among others and participate in the development of local and international strategies for change. NCMG is involved in the promotion of access to justice and peace building in Nigeria and replication of the multi-door courthouse concept across the continent.³³⁸

³³⁴ Online: <https://ncmginternational.org/who-we-are/>

³³⁵ Kehinde Aina, *supra* note 33 at 3-5

³³⁶ "Who We Are." NCMG International, ncmginternational.org/who-we-are/. Accessed 28 Feb. 2025

³³⁷ Justice Muhammadu L Uwais, GCON, "Global Chairman, NCMG International" in *Twenty-One 1996-2017 Negotiation and Conflict Management Group* (Lagos: Aina Blankson, 2024) at 21

³³⁸ *Ibid*

ii) Institute of Chartered Mediators and Conciliators (ICMC)³³⁹

ICMC was established in the early 2000s with the primary goal of regulating and establishing standards for mediation and conciliation practices. The organization's main objectives include training professional mediators and conciliators; certifying qualified practitioners; and inducting certified professionals into the field.³⁴⁰ By focusing on these key areas, ICMC aims to cultivate a robust community ADR practitioners. This approach helps ensure that mediation and conciliation services are provided by skilled and certified professionals, ultimately contributing to the growth and credibility of ADR methods in resolving conflicts.³⁴¹

ii) Mediation Training Institute (MTI-Nigeria)³⁴²

The Mediation Training Institute (MTI-Nigeria) was established in 2005 and is registered in Nigeria. The institute specializes in offering certification training in Conflict Management, Mediation Skills, and Leadership. Additionally, it provides mediation and consultancy services for individuals, corporate entities, and government bodies. MTI-Nigeria is dedicated to training aspiring professionals, developing best practices and standards within the mediation field, and promoting the adoption of mediation as the primary method for resolving inter and intra-institutional disputes.

³³⁹ Institute of Chartered Mediators and Conciliators, "Our Profile" (last visited 28 February 2025), online: ICMC <www.icmcng.org/our-profile/>

³⁴⁰ Elachi, Agada. "The Role of Insider Mediator in Managing Electoral Disputes" (28 February 2025), online: Mediation Bulletin <mediationbulletin.com/the-role-of-insider-mediator-in-managing-electoral-disputes-by-dr-agada-elachi-president-icmc/>.

³⁴¹ *Ibid*

³⁴² Online: <https://mtinigeria.com/about-us-2/>

With its headquarters in Abuja, Nigeria, MTI-Nigeria organizes and conducts both local and international training programs. The organization envisions the creation of a New African Order, characterized by peace and harmonious coexistence — a future where divisive national borders, excessive military expenditures, and the inhumanity of man towards fellow man are relics of the past. This vision includes a continent where peace, justice, and good governance are embraced as fundamental solutions for achieving lasting peace, justice, stability, growth, and sustainable development.

9. Conclusion

Nigeria possesses various mechanisms for getting things done; however, the actual implementation has proven to be a significant challenge. This systemic disarray pervades multiple sectors, including the judiciary. Despite the existence of numerous institutions for mediation, building the capacity of practitioners remains a pressing issue. The systemic problems affecting the judiciary likewise impact the practice of mediation, particularly in court-connected scenarios. Part 4 explores the different styles that can be employed during mediation sessions, while Part 5 addresses the challenges associated with court-connected mediation in Nigeria, along with valuable lessons that can be drawn from Canada's Ontario Mandatory Mediation Program (OMMP).

PART 3: MEDIATION PRACTICE IN CANADA THROUGH EXPERIENCES FROM ONTARIO

1. Introduction

Part 2 discussed mediation in Nigeria, particularly in Abuja and Ondo, highlighting the transition from traditional methods to formal procedures within the justice system. Part 3 will examine mediation in Canada, specifically in Ontario, including the development of mediation, the push for national legislation, an assessment of guidelines from the Alternative Dispute Resolution Institute of Canada, and an overview of the Ontario Mandatory Mediation Program (OMMP).

2. Development Of Mediation in Canada Formal Justice System

Historically, Canada had used mediation to manage labour unrest since the 19th century.³⁴³ In the 1970s and 1980s, Canada began exploring mediation to address concerns about access to justice and the negative impacts of adversarial dispute resolution. At that time, mediation was unfamiliar to many in the legal field and the public.³⁴⁴ Economic concerns regarding court operations and legal aid prompted this shift.³⁴⁵ Mediation was however becoming a notable alternative dispute resolution method in Canada during the 1980s. Its popularity continued to

³⁴³ The federal government enacted the *Conciliation Act, 1900*, SC 1900, c 24 in response to labor unrest and union industrial actions in the late 19th century. This Act established a foundation for Canadian labor legislation, implementing regulated systems of collective bargaining that include mediation. According to Catherine Morris, voluntary labor conciliation has been integral to labor legislation in Canada since 1900. While labor mediators played a significant role in the mediation movement in the United States, Canadian labor mediators primarily focused their efforts on labor disputes and were not notably involved with the proponents of mediation within the justice system during the 1970s and 1980s.

³⁴⁴ Catherine Morris, "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws" (2013) SSRN Electronic J 1 at 69.

³⁴⁵ Melina Buckley, "A Short History of Federal Funding for Legal" (date unknown) online: Canadian Bar Association <http://www.cba.org/cba/advocacy/legalaid/history.aspx>

grow among the public, legal professionals, and judges. Initially focused on family law, mediation later expanded its application to civil and commercial disputes.³⁴⁶

The challenges of cost, delay, and complexity in the Canadian justice system led to increased interest in mediation. Users perceived courts as unaffordable, overly complex, and slow.³⁴⁷ At that time, concerns were rising in Canada about justice being predominantly accessible to the wealthy, leading to a perception that it favors those with greater resources. As access to justice declines, public confidence in the justice system is also diminishing.

According to Chief Justice Beverly McLachlin of the Supreme Court of Canada:-

Access to justice is critical for the justice system to serve its purpose. Many Canadians, especially middle-class individuals, cannot afford legal representation. This leads some people to represent themselves in court as "self-represented litigants". Others simply give up on pursuing justice through the legal system. The main barrier is the high cost of legal representation, which is unaffordable for many Canadians who don't qualify for legal aid but also can't afford private lawyers. This creates an "access to justice gap" where many Canadians are excluded from effectively using the justice system. Self-represented litigants face significant challenges navigating the complex legal system on their own. This situation puts stress on the entire justice system, including judges, lawyers, and court resources.³⁴⁸

In addition to the challenges about expenses and lethargy in the justice system, the rising concerns among academics and jurists include the consequences of the adversarial approach to litigation. This approach has had the propensity to amplify conflict and polarize disputants.³⁴⁹ This

³⁴⁶ Jerry McHale, *The Development of Mediation in British Columbia Canada*, presented at Hong Kong Mediation Conference (Hong Kong, 2007), [unpublished], online: <https://www.mediatebc.com/sites/default/files/McHale---History-of-Mediation-in-BC-2012-min.pdf>

³⁴⁷ *Ibid*

³⁴⁸ Rt. Hon. Beverley McLachlin, Beverley, "The Challenges We Face" (Speech delivered at the Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx>. While some initiatives have been started to address this issue, Chief Justice McLachlin emphasized that much more needs to be done to make access to justice a reality for ordinary Canadians. The inability of many Canadians to access legal representation and navigate the justice system effectively is seen as a critical problem that undermines the fairness and effectiveness of the legal system overall.

³⁴⁹ Catherine Morris, *supra* note 303.

was true of dispute in family law and in some commercial disputes which envisage future or continuing relationships. As at the time, many litigants acknowledged they could not afford a lawyer and turned to self-representing appearing in various courts. This slowed the flow of court proceedings, and it created difficulties for judges, lawyers and court administration, thereby causing further delay. These concerns created political will and consumer driven demand to improve the civil justice system. This spurred both the government and the business sector to respond with ADR options, including mediation.³⁵⁰

The first family conciliation service based in Canadian courts was established in Alberta in 1972. Ontario followed suit in 1973, and British Columbia in 1974.³⁵¹ During that period, family mediators in Canada were mainly social workers and counselors with training in family therapy.³⁵² The *Divorce Act*,³⁵³ which introduced 'no-fault' divorce in Canada, contributed to the increased interest in family mediation. Mediators played a significant role in formulating Section 9 of the *Divorce Act*, which requires lawyers to confirm that they have discussed negotiation with their clients and informed them about mediation services.³⁵⁴

³⁵⁰ *Ibid*

³⁵¹ Audrey Devlin & Judith Ryan, "Family Mediation in Canada - Past, Present, and Future Developments" (1986) 11:1 Mediation Q 93. See also, Family Justice Reform Working Group, "A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force" (May 2005), online (pdf): Government of British Columbia <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/final_05_05.pdf>

³⁵² Catherine Morris *supra* note 344 at 72. See also, Jay Folberg *supra* note 79 at 9.

³⁵³ Now, *Divorce Act*, RSC 1985, c 3 (2nd Supp)

³⁵⁴ *Ibid*, s 9.

In 1984, the British Columbia Law Society pioneered the development of family-law mediation standards after a decade of operating its Conciliation Service.³⁵⁵ This initiative established guidelines for the practice of family-law mediation and the conduct of family law mediators.³⁵⁶ Subsequently, a high-quality educational program was launched, resulting from the collaboration between the Education Society of British Columbia, the Justice Institute, and the Judiciary of British Columbia, to further support mediators in their professional development.³⁵⁷

Around the same time, Saskatchewan Province in their efforts to properly manage the economic crisis that struck its agriculture, leading to inability of farmers to service their debts thereby losing their farm land through foreclosure, introduced mediation Clause in Part II of *The Saskatchewan Farm Security Act*.³⁵⁸ The Act made mediation a condition precedent before foreclosure may commence.³⁵⁹ It required all stakeholders including farmers (mortgagors) and lenders(mortgagees) to attend a mediation session before exploring foreclosure action.³⁶⁰ This was considered a creative solution which improved the opportunity for lenders to get their money while farmers kept their lands.³⁶¹

³⁵⁵ Kari D Boyle, "A Short History of Family Mediation in British Columbia" (October 2013), online (pdf): Mediate BC Society <www.mediatebc.com/sites/default/files/A-Short-History-of-Family-Mediation-in-British-Columbia-Oct-2013-v2.pdf>.

³⁵⁶ *Ibid*

³⁵⁷ *Ibid*

³⁵⁸ *The Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1.

³⁵⁹ Julie Macfarlane & Michaela Keet, "Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program" (2005) 42:3 *Alta L Rev* 677. See also, Richard W Danyliuk & Hnatyshyn Singer Thorstad, "Farmers' Right of First Refusal Under the Saskatchewan Farm Security Act: An Overview" (Paper delivered at the Agricultural Law Update for Urban & Rural Practitioners seminar, Saskatchewan Legal Education Society Inc, December 1997)

³⁶⁰ *The Saskatchewan Farm Security Act supra* note 317 s 12(7)(9)

³⁶¹ *Ibid* s. 15

Another important facet of the mediation in the management of the farmers' and lenders conflict was that if the farmers were unable to keep their land, they were allowed to negotiate with lenders in such a way that was more humane and respectful and to come out with their dignity unscathed.³⁶²

There was an increase in agitation from the Canadian Bar Association (CBA) in 1996 through its publication of the systems of Civil Justice Task demanding that the justice system required an overhaul. The CBA made huge recommendations towards positive changes to the justice system.³⁶³ These suggestions included simplification of procedural rules, increased judicial management of cases, improved use of technology, and changes to legal education.³⁶⁴ Its first recommendation was that all jurisdictions in Canada should make non-binding dispute resolution processes such as mediation more accessible at an early stage of the litigation process.³⁶⁵

It was also recommended that participation in the mediation must be compulsory for all parties before they can approach the court system.³⁶⁶ The Report made by the CBA Task Force strongly encouraged the rise in the use of mediation in the Canadian civil-justice system. This endorsement of mediation by CBA was sequel to the view that, mediation if properly used, is not

³⁶² According to Macfarlane and Keet *supra* at note 359, the implementation of voluntary mediation services within the Unified Family Court, which functioned in Saskatoon from the mid-1970s until the mid-1980s, serves as a historical reference point for court-based dispute resolution. Additionally, the introduction of a mandatory pre-trial conference system by the judiciary in the Court of Queen's Bench in 1986 significantly enhanced settlement processes, achieving remarkable settlement rates of up to 66%. This data underscores the effectiveness of structured judicial interventions in family law disputes.

³⁶³ Eleanore A Cronk, "The Prospects for Civil Justice Reform" in Canadian Institute for the Administration of Justice, *Justice in Commercial Disputes / La justice et les litiges commerciaux* (Montreal: Éditions Thémis, 1997) 293 at 315

³⁶⁴ *Ibid* at 307 & 308

³⁶⁵ *Ibid* at 298 & 299. Also see Catherine Morris *supra* note 344 at 3.17

³⁶⁶ Margaret A Shone, "Civil Justice Reform in Canada 1996 to 2006 and Beyond" (December 2006) at 103-169, online (pdf): Canadian Forum on Civil Justice <https://cfcj-fcjc.org/sites/default/files/docs/2006/shone-final-en.pdf>.

only effective but significantly efficient in resolving disputes quicker, at low cost and user friendly.³⁶⁷

Canada has a desire to make mediation an area of foreign policy with penchant to become a more active mediator³⁶⁸ but there is no still national law on mediation. What as of today could fill the gap is the National Mediation Rules & Code of Conduct for Mediators issues by the Alternative Dispute Resolution Institute Canada (ADRIC).³⁶⁹

There have been several efforts towards Canadian Uniform Mediation Act,³⁷⁰ but critics and the desire of many provinces to create their own rules within their justice system and many stakeholders' views not to have mediation regulated seem to have prevailed over the National Uniform Law.

3. An Attempt at Canadian Uniform Mediation Act

The first point of call would be to identify issues that a Canadian Mediation Act would address. If this Act were to be agreed upon by all provinces, it will tend to make certain some issues and address head on the following:³⁷¹

- i. A comprehensive definition and interpretation of mediation from a national perspective will be established, along with its scope and applicability.

³⁶⁷ *Ibid.*

³⁶⁸ Peter Jones, "Canada and Mediation: Issues and Considerations" (January 2017), at 2. online: Canadian Global Affairs Institute https://www.cgai.ca/canada_and_mediation_issues_and_considerations.

³⁶⁹ ADR Institute of Canada, "Rules & Codes" (last visited 1 March 2025), online: ADR Institute of Canada <https://adric.ca/rules-codes/>.

³⁷⁰ Jerry McHale, "Uniform Mediation Act: Discussion Paper, Civil Section" (2000) Uniform Law Conference of Canada, online: Canadian Forum on Civil Justice <fcj-fcjc.org/sites/default/files/docs/hosted/17494-uniform_mediation.pdf>

³⁷¹ *Ibid* at 7

- ii. The legislation will clarify what constitutes confidentiality and privilege, including the circumstances under which an individual may be compelled to disclose information.
- iii. It will also examine the conduct of mediation, determining the powers of the mediator, and any prerequisites for classifying a process as mediation.
- iv. Criteria for the qualification or disqualification of mediators will be explored, alongside issues related to conflicts of interest.
- v. The process for formalizing settlements post-mediation will be addressed, including whether a specialized procedure is warranted.
- vi. Additionally, the enforcement of mediation settlements will be discussed, as will the authority of the Court in overseeing mediation. This includes its potential powers to issue orders exempting parties from attendance, adjourn mediation sessions, provide directives regarding disclosure, or impose penalties for inappropriate conduct with costs.

The second point is, of what necessity is a Canadian Uniform Mediation Act. Quite a plethora of views were expressed to substantiate the need for the Act. These include:³⁷²

I. Policy development and assistance to some provinces and programs: Improving the acceptance of mediation as a method for resolving disputes nationwide will be beneficial. Three crucial priorities for national reform were identified by the Canadian Bar Association in its 1996 Systems of Civil Justice Task Force Report.:-

³⁷² *Ibid* at 9

- i. The civil courts require a faster resolution of disputes to ensure timely justice for all parties involved;
- ii. Additionally, there is a need for more affordable dispute resolution methods to make the legal process accessible to a wider range of individuals; and
- iii. Simplifying and making the processes in civil courts more understandable will also help ensure that all parties can effectively participate in and understand the legal proceedings.

The establishment of uniform mediation legislation is designed to increase access to justice for community programs by instituting clear and uniform protocols governing mediation procedures. This proactive strategy aims to mitigate the dependency on extensive legal research, analytical frameworks, and the incremental evolution of common law to address critical issues surrounding confidentiality, compellability, and privilege in the mediation context.³⁷³

II. Creating a standardized act could benefit provinces by providing direct support to programs in need of additional resources and capacity for policy research and legislation development. Many projects and programs within provinces currently operate with limited resources. Legislation, policy development, and accompanying commentary can provide valuable guidance in addressing the planning, implementation, and operational challenges of these programs.³⁷⁴

³⁷³ *Ibid* at 9

³⁷⁴ *Ibid* at 10

III. Inter-jurisdictional dispute resolution. There is a clear incongruity in mediation rules across court-connected programs in Canada. The initiation of uniform conceptions of “mediation” and uniform rules relating to matters such as confidentiality would encourage inter-jurisdictional dispute resolution. Having national standards with which individual disputants, mediators, and businesses can become familiar may result in economic efficiencies regardless of where the mediation occurs.³⁷⁵

iv. Conflicting Requirements from Province to Province: While this is meagre, there is statutory provisions contradiction from one province to another. According to Jonnette Hamilton, a model statutory provision is needed to address challenges with confidentiality. In his words:

The scope of the legal protection for confidentiality in mediation varies with the jurisdiction in which a dispute is litigated, and with the numerous subject-matter specific statutes which incorporate mediation and provide for confidentiality. Although the institutionalization of mediation in Canada is recent, the uncertainty of protection for confidentiality is already compounded by an array of overlapping common law decisions, statutes, court rules and professional standards.³⁷⁶

In other views, some critics believed having Canadian Uniform Mediation Act is tantamount to cosmetic surplusage, hence not necessary. Some of their thoughts are:³⁷⁷

- i. Multiple conflicting laws is not much of a concern in Canada. It is advocated that there are relatively fewer regulatory provisions that governs the practice of mediation in Canada, hence, conflicting legislation is not that obvious or apparent to warrant a national legislation to regulate mediation. Only few provinces have mediation that is effective and efficient.

³⁷⁵ *Ibid*

³⁷⁶ Jonnette Watson Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24:2 Queen's LJ 561.

³⁷⁷ Jerry McHale *supra* note 329 at 11

- ii. There are limited inter-jurisdictional dispute in Canada to warrant such legislation on mediation.
- iii. Canadian jurisdictions have much less experiences with mediation. In fact, the practice of mediation is at its infancy in many provinces. It was argued that good years of experimental practices are essential to investigate whether national legislation would be necessary.
- iv. There is non-statutory protection in place for mediation through common law. The existing statutory provisions and common law rules, with regards to confidentiality of mediation are reasonably comprehensive and consistent and can provide sufficient haven to negotiation during mediation. Also, in most provinces, parties enter into contractual agreements before going into mediation by signing an agreement to mediate. This governs the process and makes unnecessary any Uniform Act.

4. The National Mediation Rules by ADR Institute Canada (ADRIC)

The ADR Institute of Canada (ADRIC) is recognized as Canada's preeminent self-regulatory professional dispute resolution organization.³⁷⁸ ADRIC sets the standard for best practices for alternative dispute resolution in Canada, offering leadership, value, and support to both individual and corporate members, as well as clients. It is committed to providing education and certification, promoting ethical standards and professional competence, and advocating for all forms of ADR in both public and private disputes.³⁷⁹

³⁷⁸ ADR Institute of Canada, "About Us" (last visited 12 November 2024), online: ADR Institute of Canada <https://adric.ca/about-us>

³⁷⁹ *Ibid*

Access to dispute resolution processes such as mediation and other ADR components provides families, workplaces, businesses, and communities with efficient and effective ways to resolve their disputes without recourse to the Courts and litigation. The demand for ADR is growing in the justice system, in our personal and professional relationships, and in every sector of our economy.³⁸⁰ The absence of Uniform Mediation Law in Canada, as rightly pointed out, resulted in the relevance of rulebooks issued by professional mediation organisations.

For the purpose of this research, the ADR Institute of Canada Rulebook on mediation, being referred as the National Mediation Rule, is considered mostly appropriate briefly under the sub-headings below;

- a. Prerequisite for Mediation: Parties to a contractual relationship such as sales of goods, hire purchase or landlord-tenant have opportunities while drafting the contractual agreement to insert mediation clause to resolve differences or dispute which may arise from such relationships. This clause creates a condition precedent for parties to first exploit mediation in resolving their dispute before litigation. The National Mediation Rules provides a Model Dispute Resolution Clause for Mediation:

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, shall be mediated pursuant to the National Mediation Rules of the ADR Institute of Canada, Inc. The place of mediation shall be [specify City and Province of Canada]. The language of the mediation shall be English or French [specify language].³⁸¹

³⁸⁰ *Ibid*

³⁸¹ ADR Institute of Canada, National Mediation Rules, Model Dispute Resolution Clause-Mediation, accessible online <https://adric.ca/rules-codes/national-mediation-rules/>

- b. Appointment of Mediators and their Legal Relationships to the parties: Inasmuch mediation procedures are private arrangement between parties, they are at liberty to determine who their mediator(s) will be and how many.³⁸² This include making choices regarding whether they will attend the mediation session alone or in company of their counsel. Parties may also rely on or ask ADRIIC to nominate one or more mediators for them in instance where they could not reach agreement of who to appoint.³⁸³ The mediator in agreement with the parties, draws up a mediation contract containing the terms of the mediation procedure.³⁸⁴ The mediator also consult with the parties to decide the place and time for the mediation session.³⁸⁵
- c. Duties and Liabilities of Mediators: Mediators are expected to maintain a level playing ground for all parties through independence, impartiality, and neutrality at every stage of the mediation process.³⁸⁶ Likewise, the duty of the mediator is to the process not any of the parties, hence, they cannot act as advocate of any party to the mediation.³⁸⁷
- d. Mediation Procedure: Being that there are no general statutory regulations that cover mediation procedures at both federal and provincial levels, this, as provided by ADRIIC may be rudimentary and piecemeal. According to the ADRIIC rulebook, pre-mediation is essential, synonymous to preliminary meeting in arbitration. It sets an agenda and the goal for the mediation session:

Unless otherwise agreed by the parties, the Mediator shall, expeditiously after being appointed, arrange a session or conference call with the appropriate representative or lawyer of all parties to

³⁸² ADRIIC, r 5.1

³⁸³ ADRIIC, r 5.2

³⁸⁴ ADRIIC r 10

³⁸⁵ ADRIIC r 11

³⁸⁶ ADRIIC r 6

³⁸⁷ ADRIIC "Code of Conduct for Mediators" in National Mediation Rules (2011)

discuss the matters set out in these Rules and all arrangements relating to the Mediation, including, without limitation: (a) the return of written material provided to the Mediator; (b) disclosure of offers or counter-offers made in the course of the Mediation; and (c) whether or not any settlement agreement is required to be in writing and executed by the parties before it is binding on the parties.³⁸⁸

While it is not the mediator's responsibility to make the decision for the parties, where the situation arises that parties run out of options, the mediator may assist them in breaking the deadlock by making a proposal for a compromise agreement with the consent of the parties.³⁸⁹

With the parties' agreement, the mediator may seek advice from experts and legal counsel during the mediation process if they are willing to cover the cost. The parties must personally take part in the mediation process. The mediator and the parties must be informed of the names and addresses of the parties' legal counsel at least three days before the session. The same rule applies to experts and other counsel present at the parties' request during the proceedings.³⁹⁰

The mediator and the parties involved have are expected to agree on the specific types of documents that may be presented during the proceedings, as well as the scope of the parties' authority to do so. It should be noted that the mediator does not have the authority to compel the submission of documents by the parties.³⁹¹ The ADRIC Mediation Rule provides for when it can be said that mediation has concluded. According to the Rule:

The Mediator may suspend the Mediation: (a) upon written request by one or more of the parties; or (b) by issuing a written declaration that further efforts at Mediation would not be useful at this time and that the Mediation is suspended.16.2; The Mediation is terminated: (a) by the execution

³⁸⁸ *Ibid* r 9

³⁸⁹ *Ibid* r 12

³⁹⁰ *Ibid* r 13

³⁹¹ *Ibid* r 15.

of a settlement agreement by the parties; (b) by the issuance of a written declaration of one or more parties that the Mediation is terminated; or (c) by the issuance of a written declaration by the Mediator that further efforts at Mediation would not be useful at this time and that the Mediation is terminated.³⁹²

- e. Privacy of procedure and confidentiality: This is central to mediation. The parties must be conversant with the fact that participation in mediation is without prejudice. Information shared during mediation is strictly confidential with regards to those who should not have it. This applies to both the mediator and the parties themselves, including any expert or counsel to the proceedings. The mediator is expected to maintain confidentiality in the storage and disposal of Mediation notes, records, files, information, documents, and communication generated during the mediation meetings.³⁹³

Certainly, information obtained during mediation is not admissible in litigation proceedings³⁹⁴ neither is the mediator compellable to stand as a witness in court from dispute of which they presided. The parties agree not to introduce certain facts as evidence in subsequent litigation procedures, including statements or proposals for compromise agreements made during mediation negotiations, factual admissions made during proceedings, a party's willingness to accept a settlement proposal made by the mediator, and proposals and statements made by the mediator.³⁹⁵

³⁹² *Ibid* r 16

³⁹³ *Ibid* r 15(6)

³⁹⁴ *Ibid* r 15(8)

³⁹⁵ *Ibid* r 15(9)

5. Court-Annexed Mediation-Ontario Mandatory Mediation Program (OMMP)

i). An Overview of OMMP

Mediation is gaining traction as a preferred alternative dispute resolution mechanism within Canadian provincial jurisdictions. Given the autonomous legislative powers of each province, it's not surprising that the integration of mediation into litigation frameworks has manifested differently across jurisdictions, resulting in distinct methodologies. A notable example of this legislative independence is the mandatory mediation program established in the Ontario civil procedure rules, which obliges parties to engage in mediation prior to proceeding to trial, thereby streamlining the dispute resolution process and potentially reducing court congestion.³⁹⁶

Mandatory mediation has been a requirement in most civil litigation proceedings in Toronto, Ottawa, and Windsor through the Ontario Mandatory Mediation Program (“OMMP”) for about 20 years.³⁹⁷ However, mandatory mediation is not available in other parts of Ontario. A detailed analysis of mandatory mediation in Ontario demonstrated several key outcomes: it resulted in substantial decreases in the duration required to resolve disputes, reduced litigation costs for participants, a notable increase in the early settlement of cases within the litigation timeline, and a marked level of satisfaction among both legal practitioners and clients involved in the process.³⁹⁸

³⁹⁶Reinhard Ellger, *supra* note 113 at 932.

³⁹⁷ Ontario Bar Association (OBA), “Expanding Mandatory Mediation in Ontario” (Toronto: Ontario Bar Association, 2022) at 2.

³⁹⁸ *Ibid*

Mandatory mediation alleviates the burden on judicial systems by facilitating earlier settlements, which correspondingly reduces the number of motions, pre-trials, and trials that courts must handle. This process not only streamlines case resolution but also improves access to justice for litigants, allowing them to settle disputes more efficiently and with lower legal costs. Importantly, the government incurs no expenses related to mandatory mediation, as the relatively low costs associated with mediation are borne by the litigants themselves.³⁹⁹

What, then, is the nature of OMMP? The OMMP program aims to assist individuals involved in civil litigation and estate matters in resolving their cases early in the litigation process to save time and money. Cases referred to mediation sessions early in the litigation process allow parties to engage in discussions about the disputed issues. With the assistance of a skilled mediator, the parties can explore potential settlement options and potentially avoid the pre-trial and trial process. Certain civil matters under rule 24.1 of the *Rules of Civil Procedure* and contested estates, trust including substitute decision matters under Rule 75.1 of the *Rules of Civil Procedure* are accepted to the OMMP.

ii). History of Ontario Mediation Program (OMMP)

The insider and public perceptions of the justice system in Ontario, as reflected in a report, indicate that many court administrators, judges, and lawyers believe that the system is in a state of crisis. It is precariously logjammed and in dire need of reform to cut costs, reduce complexity, and delays. These issues hamper public access to the courts and ultimately pose a threat to the

³⁹⁹ *Ibid* at 3

due administration of justice.⁴⁰⁰ The crisis was widely believed to have stemmed from several long-standing internal issues: overly complex procedural rules, outdated court processes, and a lack of transparent and efficient management structure.⁴⁰¹

However, the challenges that plagued the civil justice system were also seen as the outcome of external factors beyond the court system's control, such as the emergence of an excessively adversarial culture, legislation that allowed more freedom to litigate, and a steadfast "rights-focused" approach to issues that encouraged legal action overreaching settlements.⁴⁰² The perceptions of the nature and causes of the issues within the civil justice system were crucial in shaping many of the recommendations outlined in the report for conducting a comprehensive review of the justice system.

Mandatory mediation was initially started in Ontario on experimental basis.⁴⁰³ The positive outcome of the pilot project underscored by Provincial and Federal recommendations to commence mandatory mediation led to the permanent adoption of the Ontario Mandatory Mediation Program (OMMP) in three cities, Toronto, Ottawa, and later Windsor.⁴⁰⁴ The ADR Centre of the Ontario Court (General Division) was established in 1994 to offer improved, more

⁴⁰⁰ Michael J Trebilcock & Sandra Wain, "Public Perceptions of the Civil Justice System: Perceptions of the Problems, the Views of the Stakeholders" in Ontario Law Reform Commission, ed, *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, vol 1 (Toronto: Ontario Law Reform Commission, 1996) 1 at 3.

⁴⁰¹ *Ibid*

⁴⁰² *Ibid*

⁴⁰³ OBA *supra* note 397 at 6

⁴⁰⁴ *Ibid*

efficient, and cost-effective opportunities for defendants and plaintiffs to access justice and assess the potential enhancement of civil case proceedings through mediation.⁴⁰⁵

In 1995, an independent expert evaluated the ADR Centre⁴⁰⁶ and determined that the cases referred to the ADR Centre had reduced the median period for resolving cases and, therefore, had decreased client expenses compared to a control group.⁴⁰⁷ Statistics show that 40% of mediation-referred cases are initially settled. Lawyers noted that costs decreased, even for unsettled cases, as parties were compelled to assess their merits early on.⁴⁰⁸ Another trial initiative in 1997 also yielded favorable results.⁴⁰⁹

The ADR Centre tested out mandatory mediation, while the Province of Ontario⁴¹⁰ and the Canadian Bar Association ("CBA")⁴¹¹ carried out two significant civil-justice assessments. Both evaluations found that mandatory mediation would be advantageous, as it enhances access to justice and boosts the efficiency of the justice system. Ontario amended its Rules of Civil Procedure to establish mandatory mediation through Rule 24.1 for civil, non-family, case-managed actions in Ottawa and Toronto.

The rule requires that mediation be conducted promptly after the start of the legal process. The goal is to achieve a mutually agreeable dispute resolution between the involved

⁴⁰⁵ Warren K Winkler, "Evaluation of Civil Case Management in the Toronto Region: A Report on the Implementation of Toronto Practice Direction and Rule 78" (February 2008) at 3, 71-73, online: Court of Appeal for Ontario <https://www.ontariocourts.ca/coa/en/ps/reports/rule78.pdf>. *Ibid*

⁴⁰⁶ Julie Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Toronto: Queen's Printer for Ontario, 1995) at 1, 3-4, online: Internet Archive https://archive.org/details/mag_00007535/page/n43/mode/2up.

⁴⁰⁷ *Ibid* at 17

⁴⁰⁸ Warren K. Winkler *supra* note 405 at 3

⁴⁰⁹ Catherine Morris, *supra* note 344, OBA *supra* note 397 at 7

⁴¹⁰ OBA *supra* note 397

⁴¹¹ *Ibid*

parties, thereby avoiding further litigation.⁴¹² The mandatory mediation program was initially implemented for only two years. This was subject to evaluating the program's cost, speed, outcome, and satisfaction.⁴¹³

Two years after the amended Rule 24.1, particularly in 2001, an extensive study examined the impact of mandatory mediation in Ontario carried out by Hann and his team, resulting in a report.⁴¹⁴ Their work analyzed data from 23,000 cases, 3,000 mediations conducted under Rule 24.1, and feedback from 600 litigants, 1,130 lawyers, and 1,243 mediators through specially designed questionnaires. They concluded that mandatory mediation had the following effects:⁴¹⁵

- I. The duration required to resolve cases was notably shortened;
- II. The expenses incurred by litigants were lowered;
- III. Around 40% of cases were resolved earlier in the litigation process, and additional advantages were observed in many cases that did not reach full settlement; and
- IV. Overall, both litigants and lawyers reported considerable satisfaction with the pilot mediation process.

The Hann report suggested that compulsory mediation should be broadened to encompass additional civil cases in Ontario and expanded throughout the entire province.⁴¹⁶ Based on these favorable conclusions, the compulsory mediation program became permanent

⁴¹² Reinhard *supra* note 396 at 933

⁴¹³ OBA *supra* note 397

⁴¹⁴ Robert G Hann et al, "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report -- The First 23 Months" (12 March 2001), online: Internet Archive https://archive.org/details/mag_00041982

⁴¹⁵ *Ibid* at 2

⁴¹⁶ *Ibid*

and was expanded to include Windsor in 2002, but it was not further extended across the province.⁴¹⁷

iii). Ontario Rules Of Civil Procedure, Rule 24.1 On Mandatory Mediation

Purpose

The primary objectives of Rule 24.1 are to reduce the costs associated with litigation. Legal proceedings can be quite expensive, and this rule aims to make justice more accessible for the average Canadian. Additionally, by promoting mediation, the rule seeks to expedite the resolution of disputes, often leading to quicker settlements than those achievable through traditional court proceedings. The rule fosters fair and balanced agreements between parties, as mediation offers more flexible and mutually acceptable outcomes.

By lowering costs and simplifying the legal process, this rule strives to enhance the accessibility of the legal system for ordinary Canadians. Furthermore, litigation can be both stressful and emotionally taxing; by advocating for mediation, the rule aims to alleviate some of the psychological burdens associated with legal disputes.⁴¹⁸

According to the rule,

‘This Rule provides for mandatory mediation in case managed actions, in order to reduce costs and delay in litigation and facilitate the early and fair resolution of disputes.’⁴¹⁹

⁴¹⁷ OBA *supra* note 397 at 9

⁴¹⁸ Jessie Gomberg, "Rules of Civil Procedure Chapters, Disposition without Trial, Rule 24.1 - Mandatory Mediation" in Noel Semple, ed, *Civil Procedure and Practice in Ontario*, 2nd ed (Canadian Legal Information Institute, 2022) at 1, online: [CanLII https://canlii.ca/t/7hzxf](https://canlii.ca/t/7hzxf)

⁴¹⁹ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.01. See also Reinhard Ellger *supra* note 113 at 933. *Ibid*

Prerequisites of Mandatory Mediation

Mandatory mediation is an integral part of litigation proceedings under Ontario's civil procedure law. It requires that the parties involved initiate litigation before mediation can occur.⁴²⁰ Additionally, mandatory mediation must be conducted within 180 days following the defendant's filing of the first defense with the court where the case is being heard.⁴²¹ The procedure must occur within the jurisdictions of the three primary cities where the Ontario Mandatory Mediation Program (OMMP) is applicable, specifically Toronto, Ottawa, and Windsor.⁴²² Cases that qualify for the OMMP predominantly pertain to civil and commercial disputes, with inclusion of trust and estates issues.⁴²³

Although mediation is typically required to occur within 180 days after the initial defense is filed, there are certain circumstances that may warrant an extension beyond this timeframe. These circumstances include:⁴²⁴ (i) disputes involving multiple parties, (ii) cases with complex subject matter that entails a variety of technical issues, (iii) instances where additional time is necessary for parties to collect and assess supporting documents for their claims, and (iv) situations where it appears likely that the parties can reach a resolution through mediation, and adhering to the 180-day limit may impede progress. The power to grant an extension lies with the court.⁴²⁵

⁴²⁰ Reinhard Ellger *supra* 113 at 933, Jessie Gomberg *supra* 418 at 6

⁴²¹ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.09(1)

⁴²² *Rules of Civil Procedure*, *Ibid*, r. 24.1.04

⁴²³ Certain legal domains are exempt from the requirement for mandatory mediation. These exceptions include disputes under the Commercial List, mortgage-related actions, construction proceedings (with the exception of trust claims), bankruptcy issues, and matters pertaining to family law litigation.

⁴²⁴ Reinhard Ellger *supra* note 113 at 934. Jessie Gomberg *supra* notes 418 at 6

⁴²⁵ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.09(1)

Coordination of Mediation

Each city where mandatory mediation rules apply establishes a local mediation committee to oversee the mediation program. According to the rule, 'There shall be a local mediation committee in each county named in subrule 24.1.04(1):⁴²⁶ The committee's membership is selected by the Attorney General of Ontario and includes a diverse mix of Bar members, representatives from the public, and employees of the Ontario Ministry of Justice. The Chief Justice of Ontario appoints either a judge or a case management master to serve on the committee.

The committee's affairs are managed by a mediation coordinator, typically appointed by the Attorney General. The committee is responsible for compiling and maintaining a roster of mediators, monitoring the performance of those mediators listed,⁴²⁷ addressing complaints from parties or other stakeholders regarding mediators,⁴²⁸ and making decisions about adding or removing mediators from the roster.⁴²⁹

Appointment of Mediator(s)

Mandatory mediation is frequently conducted by a private mediator chosen from the OMMP roster. However, it is also possible to engage non-roster mediators for mandatory mediations. Opting for a non-roster mediator can be particularly advantageous if they possess

⁴²⁶ *Rules of Civil Procedure, Ibid*, r. 24.1.07(1)

⁴²⁷ *Rules of Civil Procedure, Ibid*, r. 24.1.07(4)

⁴²⁸ Government of Ontario, "File a complaint about a civil law mediator" (last modified 12 April 2023), online: Ontario.ca <https://www.ontario.ca/page/file-complaint-about-civil-law-mediator>.

⁴²⁹ The roster is accessible through the Office of the local mediation coordinator, as well as at the Superior Court of Justice locations in Toronto, Ottawa, and Windsor.

specialized knowledge relevant to the specific type of dispute being addressed.⁴³⁰ The appointment is laid down in the *OMMP Rule of Civil Procedure*. The rule makes allowances for the following in appointment of mediators: -

A mediation under this Rule shall be conducted by, (a) a person chosen by the agreement of the parties from the list for a county; (b) a person assigned by the mediation co-ordinator under subrule 24.1.09 (6) or (6.1) from the list for the county; or (c) a person who is not named on a list, if the parties consent. Every person who conducts a mediation under subrule (2), whether named on the list or not, is required to comply with this Rule.⁴³¹

If the parties are unable to reach an agreement on a mediator within 180 days following the filing of the first defense, a mediator from the designated list will be assigned by the mediation coordinator. In this case, the assigned mediator will promptly schedule a date for the mediation session, which is expected to occur within 90 days of the assignment. At least 20 days prior to the session, the mediator shall send a notice to all parties, indicating the date, time, and location of the session, along with a reminder that attendance is mandatory. Additionally, the assigned mediator will provide a copy of this notice to the mediation coordinator.⁴³²

Preparation for Mediation Session

Before the mediation session, the parties involved, and the mediator(s) are expected to establish an agenda for the process. This is essential to prevent any unexpected information disclosures or surprises during mediation, particularly concerning information that all parties should have access to. To facilitate this, each party is required to prepare a mediation

⁴³⁰ Nicholas McFarlane, "Summary of the Mandatory Mediation Process in Ontario" (21 March 2023), online: Justice Innovation Blog <https://www.yorku.ca/osgoode/jib/2023/03/21/summary-of-the-mandatory-mediation-process-in-ontario/>

⁴³¹ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.08(2)(3)

⁴³² Reinhard Ellger *supra* note 113 at 935

memorandum. This memorandum serves as a formal document outlining the factual and legal issues at stake in the dispute, as well as summarizing each party's position and interests.

Additionally, all parties must attach relevant documents or correspondence that have occurred between them prior to the mediation. If it becomes impractical to hold the mediation due to a party's non-compliance with these requirements, the mediator may cancel the session and will subsequently notify the parties by filing a certificate of non-compliance.⁴³³ There are significant consequences for any party that fails to meet their obligations under these rules.

According to the rule: -

At least seven days before the mediation session, every party shall prepare a statement in Form 24.1C and provide a copy to every other party and to the mediator. The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement. The party making the statement shall attach to it any documents that the party considers of central importance in the action. The plaintiff shall include a copy of the pleadings with the copy of the statement that is provided to the mediator. If it is not practical to conduct a mediation session because a party fails to comply with subrule (1), the mediator shall cancel the session and immediately file with the mediation co-ordinator a certificate of non-compliance (Form 24.1D).⁴³⁴

Conduct and Attendance at Mediation Session

Despite the voluntary nature of mediation, the OMMP generally mandates that all parties participate. Once the defense has been filed, it is essential for all parties, including their counsel, to attend the mediation session.⁴³⁵ The mediator(s) act as 'process managers' who oversee the mediation process, while the parties themselves determine the outcome. All parties must be present at the session within 30 minutes of the scheduled start time.⁴³⁶ If a party requires the

⁴³³ Jessie Gomberg supra note 418 at 8

⁴³⁴ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.10

⁴³⁵ *Ibid* r 24.1.11(1)

⁴³⁶ It is reasonable to conclude that the obligation to attend is confined to the initial 30 minutes of the mediation session. A party that chooses to leave after fulfilling this duty of initial attendance may do so without facing any

approval or authority from someone outside the mediation session to reach an agreement, they must make necessary arrangements for telephone access to that individual with final decision-making authority.⁴³⁷

Effects of Non-compliance with Attendance of Mediation Session

If a party does not attend the mediation session, the case management master or the case management judge, upon review, may impose sanctions on the non-compliant party. These sanctions could include striking out any documents filed by the party, dismissing the action, voiding the statement of defense, and ordering the defaulting party to bear the total costs incurred.⁴³⁸

Confidentiality of Mediation

Mediation must serve as a safe space for parties to express themselves without the fear of repercussions. It should be a process that allows individuals to acknowledge their mistakes without feeling vulnerable. Consequently, the confidentiality inherent in the mediation process—rooted in its nature as a private method of dispute resolution, protects parties from being held accountable in future litigation for anything stated during mediation sessions. This means that no statement made by a party, including any offer proposed, can be used as evidence in court.

penalties. Conversely, if a party does not attend a mediation session, the mediator is required to promptly submit a certificate of non-compliance to the mediation coordinator (Form 24.1D). See also *Ibid* r 24.1.12

⁴³⁷ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.11(2)

⁴³⁸ *Ibid* r 24.1.13

Additionally, even if a case is resolved, the details of the settlement remain confidential. Essentially, what occurs during mediation stays within the mediation itself.⁴³⁹ According to the rule, “All communications at a mediation session and the mediator’s notes and records shall be deemed to be without prejudice settlement discussions.”⁴⁴⁰

This provision was affirmed in *Rogacki v Belz* by the Court of Appeal for Ontario thus: -

‘By deeming “all communications at a mediation session and the mediator’s notes and records ... to be without prejudice settlement discussions”, rule 24.1.14 codifies the principle that communications made without prejudice in an attempt to resolve a dispute are not admissible in evidence unless they result in a concluded resolution of the dispute. As such, rule 24.1.14 is a necessary ingredient of Rule 24.1 as it furthers the public interest in promoting free and frank settlement discussions by protecting communications for that purpose from compelled disclosure in subsequent proceedings involving the parties to the settlement discussions, such as discovery or trial, in circumstances where the mediation fails to resolve the litigation.’⁴⁴¹

The court affirmed above that confidentiality is a sine qua non for the mediation process and is recognized under Ontario’s Rules of Civil Procedure.⁴⁴²

There are, however, instances where information obtained during mediation may be admissible as evidence in subsequent litigation. This is permitted as long as the integrity of the mediation process is not compromised.⁴⁴³ Additionally, disclosure may be necessary when it serves an overriding public interest, such as preventing the commission of a crime or addressing an ongoing criminal act. Consequently, confidentiality in mediation may be waived when criminality is involved. Another exception arises when evidence is required to determine the

⁴³⁹ Jessie Gomberg *supra* note 418 at 11

⁴⁴⁰ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.14

⁴⁴¹ *Rogacki v Belz*, 2003 CanLII 12834 (ON CA) at para 18

⁴⁴² See also, Louise Otis, “Confidentiality in Judicial Mediation” (2015) 1:1 J Intl Disp Settlement 201.

⁴⁴³ Reinhard Ellger *supra* note 113 at 939

content of an agreement reached between the parties, particularly if one party refuses to fulfill their obligations under the settlement agreement.⁴⁴⁴

Termination of Mediation

Upon the termination of mediation—either through mutual consent of the parties involved, or due to impracticability or unreasonable circumstances—the mediator is obligated to generate a report detailing the mediation process within ten days of termination.⁴⁴⁵ This report must be disseminated to all parties in dispute as well as the mediation coordinator. If the mediation successfully resolves all outstanding issues, the defendant is required to file a notice with the court no later than ten days following the execution of the settlement agreement.⁴⁴⁶

In instances where a party fails to comply with any terms of the signed agreement, any affected party may file a motion for judgment with the presiding judge to enforce the settlement. The court may grant judgment to uphold the terms of the agreement.⁴⁴⁷ It is noteworthy that a failure to meet formal requirements does not undermine the validity of the agreement, and it remains enforceable through litigation, provided the plaintiff can furnish adequate evidence. Should mediation prove unsuccessful in resolving the dispute, any existing litigation will proceed.

⁴⁴⁴ *Ibid.* See also Nicholas McFarlane *supra* note 430

⁴⁴⁵ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.15(1). See also Ontario, "Mandatory mediation for civil cases" (last modified 19 September 2023), online: Government of Ontario <https://www.ontario.ca/page/mandatory-mediation-civil-cases>

⁴⁴⁶ *Ibid* r 24.1.15(4)

⁴⁴⁷ Jessie Gomberg *supra* note 375 at 12

6. Court-Annexed Mediation Through Federal Laws

Despite the absence of a national mediation law, the Canadian Parliament has amended several laws to recognize mediation as a tool for resolving disputes within the scope of the legislation. The aim was to alleviate the heavy workload on courts by referring parties to mediation and to reduce costs for the judicial system by minimizing the number of litigation procedures. I will briefly discuss seven such pieces of legislation.

i). *Canada Transportation Act*

The *Canada Transportation Act* (CTA) is a federal law that governs the national transportation system in Canada. It was enacted in 1996.⁴⁴⁸ It consolidates and revises the *National Transportation Act, 1987* and the *Railway Act* with aims to ensure an efficient, accessible, and fair transportation system that serves the needs of all Canadians. This Act enables the Canadian Transportation Agency to resolve transportation-related disputes through mediation.

The Act gives the Canadian Transportation Agency authority to refer matters within its jurisdiction to mediation if all parties agree. It provides that 'If there is a dispute concerning a matter within the Agency's jurisdiction, all the parties to the dispute may, by agreement, make a request to the Agency for mediation. On receipt of the request, the Agency shall refer the dispute for mediation.'⁴⁴⁹

⁴⁴⁸ *Canada Transportation Act*, SC 1996, c 10

⁴⁴⁹ *Canada Transportation Act*, *Ibid*, s 36(1)

It also prescribes essential aspects of the mediation process, including appointing a mediator, ensuring confidentiality, and setting a 30-day time limit.⁴⁵⁰

The provision for mediation in the Act has two primary consequences:⁴⁵¹

- i. It temporarily halts any ongoing proceedings before the Agency that are related to the subject matter of the mediation. This pause remains in effect for the duration of the mediation process.
- ii. It extends the Agency's deadline for making decisions or determinations regarding the affected proceedings. The extension period is equal to the length of the mediation.

Furthermore, if the mediation results in an agreement between the parties, this agreement can be officially filed with the Agency. Once filed, the agreement carries the same weight and enforceability as an official order issued by the Agency itself.⁴⁵²

ii). *Canada Labour Code*

The *Canada Labour Code* is a piece of legislation passed by the Parliament of Canada that brings together various laws related to labour.⁴⁵³ Its main goal is to promote productivity by regulating strikes and lockouts, ensuring workplace safety and health, and setting employment

⁴⁵⁰ *Ibid*, s 36(2)-(5)

⁴⁵¹ *Ibid* s 36(6)

⁴⁵² *Ibid* s 36(7)

⁴⁵³ *Canada Labour Code*, RSC 1985, c L-2

standards.⁴⁵⁴ The code is divided into four parts: Industrial Relations; Occupational Health and Safety; Federal Labour Standards; and Administrative Monetary Penalties.⁴⁵⁵

Part I of the Canada Labour Code, also known as Industrial Relations, governs workplace relations and collective bargaining between unions and employers in federally regulated industries.⁴⁵⁶ These include broadcasting, telecommunications, chartered banks, postal services, airports, air transportation, shipping and navigation, as well as interprovincial or international transportation. It also covers businesses operating in the Territories or on First Nation reserves, along with the Royal Canadian Mounted Police.⁴⁵⁷

The Code establishes the Federal Mediation and Conciliation Service (FMCS). The FMCS plays a critical role in promoting harmonious relations between trade unions and employers. It aids in the negotiation of collective agreements, their subsequent renewal, and the management of relations arising from the implementation of these agreements.⁴⁵⁸ The FMCS also offers mediation services for grievances. These approaches are effective means of resolving disputes and enhancing industrial relations throughout the duration of the collective agreement.⁴⁵⁹

The legislation allows the Minister to designate mediators either upon request or independently, to help the parties resolve conflicts or disagreements. Furthermore, at the request

⁴⁵⁴ *Canada Labour Code, Ibid*, c L-2, ss 88.1, 89.1

⁴⁵⁵ *Canada Labour Code, supra* note 453

⁴⁵⁶ *Ibid* s 4

⁴⁵⁷ *Ibid* see generally interpretation.

⁴⁵⁸ *Canada Labour Code, RSC 1985*, c L-2, s 70(1)

⁴⁵⁹ Employment and Social Development Canada, "Federal Mediation and Conciliation Service: Review of Fiscal Year 2016 to 2017" (last modified 23 June 2023), online: Government of Canada <https://www.canada.ca/en/employment-social-development/services/labour-relations/reports/2017-federal-mediation-conciliation.html>.

of either the involved parties or the Minister, the designated mediator is able to propose solutions for resolving the conflict or disagreement.⁴⁶⁰ The various sections above highlight the significance of mediation in Canadian labor relations, presenting several pathways for resolving conflicts through supported negotiations.

iii). *Federal Courts Rules*

The *Federal Courts Rules* regulate the practice and procedure in the Federal Court of Appeal and the Federal Court of Canada.⁴⁶¹ These rules seek to ensure just, efficient, and cost-effective outcomes for every proceeding, while upholding the principle of proportionality.⁴⁶² The Federal Court Rules permit judges to mandate dispute resolution conferences for any issue in a proceeding. These conferences, which include mediation, are overseen by case management judges or prothonotaries and are subject to a 30-day time limit. It may also be in the form of early neutral evaluation, or a mini trial.

According to the Rule; -

A dispute resolution conference shall be conducted by a case management judge or prothonotary assigned under paragraph 383 (c), who may (a) conduct a mediation, to assist the parties by meeting with them together or separately to encourage and facilitate discussion between them in an attempt to reach a mutually acceptable resolution of the dispute; (b) conduct an early neutral evaluation of a proceeding, to evaluate the relative strengths and weaknesses of the positions advanced by the parties and render a non-binding opinion as to the probable outcome of the proceeding; or (c) conduct a mini-trial, presiding over presentation by counsel for the parties of their best case and rendering a non-binding opinion as to the probable outcome of the proceeding⁴⁶³

⁴⁶⁰ *Ibid* s 105

⁴⁶¹ *Federal Courts Rules, 1998, SOR/98-106*

⁴⁶² *Ibid*

⁴⁶³ *Ibid* r 387

The Rules further provide, if a settlement, whether partial or complete, is reached during a dispute resolution conference, it must be documented in writing, signed by the parties, and filed within 10 days of the settlement.⁴⁶⁴ If no resolution is achieved, or if only a partial resolution occurs, the case will proceed to court. A case management judge who conducts the dispute resolution conference is not permitted to preside over the subsequent hearing unless all parties provide their consent.⁴⁶⁵

Lastly, 'within 60 days after the close of pleadings, the solicitors for the parties shall discuss the possibility of settling any or all of the issues in the action and of bringing a motion to refer any unsettled issues to a dispute resolution conference.'⁴⁶⁶

In conclusion, the Federal Courts Rules in Canada have evolved to strongly endorse mediation as an effective tool for resolving disputes, acknowledging its value in achieving fair, efficient, and cost-effective outcomes for litigants.

iv). *Bankruptcy and Insolvency Act*⁴⁶⁷

The *Bankruptcy and Insolvency Act* (BIA) constitutes the federal legal framework regulating bankruptcy and insolvency processes in Canada.⁴⁶⁸ It serves as the foundational statute for addressing financial distress among individuals, businesses, and corporations. The Supreme Court of Canada elucidated the BIA's role within the broader jurisdiction of Canadian insolvency

⁴⁶⁴ *Ibid* r 389

⁴⁶⁵ *Ibid* r 391

⁴⁶⁶ *Ibid* r 257

⁴⁶⁷ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

⁴⁶⁸ Kairo Anggadol "A Guide About Insolvency and Bankruptcy Act in Canada." Lexpert, 2023. <https://www.lexpert.ca/news/legal-faq/a-guide-about-insolvency-and-bankruptcy-act-in-canada/377320>

law in the landmark case of *Century Services Inc. v. Canada (Attorney General)*, emphasizing its significance in the structured management of insolvency proceedings:

Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing \$1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.⁴⁶⁹

This Act encourages mediation in bankruptcy and insolvency matters by recommending mediation in two main sections. The first section deals with surplus income mediation which is used when there is a disagreement over the amount of money the bankrupt is required to pay to creditors.

According to the first part of the first section;-

If the trustee and the bankrupt are not in agreement with the amount that the bankrupt is required to pay under subsection (4) or (5.1), the trustee shall, without delay, in the prescribed form, send to the official receiver a request that the matter be determined by mediation and send a copy of the request to the bankrupt⁴⁷⁰

The second part of the first section provides:

On a creditor's request made within 30 days after the day on which the trustee informed the creditor of the amount fixed under subsection (4) or (5.1), the trustee shall, within five days after the day on which the 30-day period ends, send to the official receiver a request, in the prescribed form, that the matter of the amount that the bankrupt is required to pay be determined by mediation and send a copy of the request to the bankrupt and the creditor.⁴⁷¹

The combined provisions mentioned above indicate that the *Bankruptcy and Insolvency Act* (BIA) allows the trustee to seek mediation if the bankrupt disputes the amount of surplus

⁴⁶⁹ *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 13.

⁴⁷⁰ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 68(6)

⁴⁷¹ *Ibid* s 68(7)

income owed. Additionally, it also enables creditors to request mediation when they have disagreements regarding the surplus income payments. The second section of the *Bankruptcy and Insolvency Act* (BIA) that advises the use of mediation relates to the discharge of the bankrupt. This is applicable in two specific situations: first, when the trustee opposes the discharge based solely on the bankrupt's failure to meet a payment obligation set out in section 68; and second, when the bankrupt, if able to make a feasible proposal, chooses bankruptcy instead of proposing a plan to creditors to resolve their debts.⁴⁷²

It provides that; -

If the discharge of a bankrupt individual is opposed by a creditor or the trustee solely on grounds referred to in either one or both of paragraphs 173(1)(m) and (n), the trustee shall send an application for mediation, in the prescribed form, to the official receiver within five days after the day on which the bankrupt would have been automatically discharged had the opposition not been filed or within any further time after that day that the official receiver may allow.⁴⁷³

Mediation under section 170.1 is required by law. The trustee is obligated to request mediation when creditors challenge the bankrupt's discharge on these grounds.

v). *Canadian Human Rights Act*⁴⁷⁴

The Canadian Human Rights Act (CHRA) is a federal law enacted in 1977 to protect individuals from discrimination in Canada. It applies to federally regulated activities and aims to ensure equal opportunity for all Canadians.⁴⁷⁵ The Canadian Human Rights Act provides for

⁴⁷² Canada, Office of the Superintendent of Bankruptcy, "Mediation under Section 170.1 of the BIA" (27 July 2011), online: Innovation, Science and Economic Development Canada <ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/trustees/osb-position-papers/mediation-under-section-1701-bia>

⁴⁷³ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 170.1(1)

⁴⁷⁴ *Canadian Human Rights Act*, RSC 1985, c H-6

⁴⁷⁵ Clym, "Canadian Human Rights Act" (last visited 5 March 2025), online: Clym <https://clym.io/accessibility-regulations/canadian-human-rights-act>.

mediation as part of the complaint resolution process. According to the Act 'the minister may refer the matter for mediation, if the Minister is satisfied that the issues in relation to the request may be appropriately resolved by mediation'⁴⁷⁶

vi). *Farm Debt Mediation Act*⁴⁷⁷

The *Farm Debt Mediation Act* (FDMA), which was enacted in 1997 and came into effect in 1998, establishes a federal framework designed to help insolvent farmers tackle their financial challenges. This legislation allows farmers to engage in mediation with their creditors to find workable solutions. Administered by Agriculture and Agri-Food Canada (AAFC), the FDMA replaced the previous *Farm Debt Review Act*, aiming to streamline processes and better cater to the needs of commercial farmers.⁴⁷⁸

The Act provides: -

Forthwith after the report mentioned in subsection 9(4) has been prepared, the administrator shall (a) in accordance with the regulations, appoint as a mediator any person who is unbiased and free from any conflict of interest relative to the application in question; (b) inform (i) in the case of an application made under paragraph 5(1)(a), the farmer, all of the creditors listed in the application and the Minister, if the Minister was given notice of the application by the administrator under subparagraph 7(1)(a)(iii), of the mediator's appointment, or (ii) in the case of an application made under paragraph 5(1)(b), the farmer, all of the secured creditors listed in the application, all of the creditors mentioned in a recommendation under paragraph 9(2)(b) and the Minister, if the Minister was given notice of the application by the administrator under subparagraph 7(1)(a)(iii) or is mentioned in the recommendation, of the mediator's appointment; and (c) provide a copy of the report mentioned in subsection 9(4) to the mediator and to the persons and entities that will be participating in the mediation.⁴⁷⁹

⁴⁷⁶ *Canadian Human Rights Act*, RSC 1985, c H-6, s 48.3(2)(b)

⁴⁷⁷ *Farm Debt Mediation Act*, SC 1997, c 21

⁴⁷⁸ Agriculture and Agri-Food Canada, "2021 Report to Parliament" (December 2021), online: Government of Canada <https://agriculture.canada.ca/en/about-our-department/transparency-and-corporate-reporting/farm-debt-mediation-service-review>

⁴⁷⁹ *Ibid* s 10(1)

The Farm Debt Mediation Act continues to be an essential resource for Canadian farmers experiencing financial hardship, allowing them to maintain their farming operations

vii). *Nunavut Waters and Nunavut Surface Rights Tribunal Act (NWNSRT)*⁴⁸⁰

The Act is a key piece of Canadian legislation that brings to life important provisions of the Nunavut Land Claims Agreement, which was officially implemented on July 9, 1993. This Act, which received Royal Assent on April 30, 2002, establishes two vital institutions for public governance in Nunavut: Nunavut Water Board⁴⁸¹ and Nunavut Surface Rights Tribunal (NSRT).⁴⁸²

The Nunavut Waters and Nunavut Surface Rights Tribunal Act (NWNSRT) plays a significant role in promoting mediation and dispute resolution in Nunavut through various mechanisms designed to facilitate dialogue and negotiation among stakeholders. Here are the key aspects of how the Act fosters these processes: -

The NWNSRT establishes the NSRT as a public government institution dedicated to resolving disputes concerning surface rights and land access in Nunavut. The Tribunal's jurisdiction covers conflicts between Inuit and parties seeking access to Inuit-owned land, as well as addressing issues related to compensation for damages to wildlife and other resources resulting from development activities.⁴⁸³

⁴⁸⁰ *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, SC 2002, c 10

⁴⁸¹ *Ibid* s 14

⁴⁸² *Ibid* s 95

⁴⁸³ Canada, Library of Parliament, "Legislative History of Bill C-62: Nunavut Waters and Nunavut Surface Rights Tribunal Act" (4 December 1998), online: <publications.gc.ca/Collection-R/LoPBdP/LS/361/c62-e.htm> [perma.cc/XXXX-XXXX]. See also, Nunavut Surface Rights Tribunal, "*Rules of Process and Procedure*" (2023), online: https://nsrt-nunavut.com/sites/default/files/rules_of_process_and_procedure_final_draft_0.pdf.

A key provision of the NWNSRT Act is that any party seeking to apply to the Tribunal must first endeavor to resolve the dispute through negotiation. Specifically, it stipulates that no application may be submitted unless there has been a satisfactory attempt to resolve the matter through negotiation. This requirement encourages parties to pursue amicable solutions before resorting to formal proceedings.⁴⁸⁴

According to its provision; -

No person may apply to the Tribunal for an order unless the person has attempted to resolve the matter in dispute by negotiation in accordance with the rules made under section 130 or, until such rules have been made, in a manner satisfactory to the Tribunal. The Tribunal may not hear or make an order in respect of any matter that was resolved by negotiation unless the parties consent or it appears, in the opinion of the Tribunal, that there has been a material change in the facts or circumstances that formed the basis of the negotiated resolution.⁴⁸⁵

The Nunavut Surface Rights Tribunal has established specific rules that define the procedures for mediation. These rules aim to ensure a fair, transparent, and accessible process for resolving disputes. The Tribunal offers mediation sessions where parties can engage in discussions facilitated by a mediator, who assists in clarifying disputes and promotes collaborative problem-solving.⁴⁸⁶

These federal legislations demonstrate Canada's commitment to promoting mediation as an effective means of dispute resolution across various sectors and legal domains.

⁴⁸⁴ *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, SC 2002, c 10, s 117

⁴⁸⁵ *Ibid*

⁴⁸⁶ *Ibid* s 130. See also, Nunavut Surface Rights Tribunal, "Rules of Process and Procedure" (2023), online: https://nsrt-nunavut.com/sites/default/files/rules_of_process_and_procedure_final_draft_0.pdf

7. Conclusion

This Part has critically examined the practice of mediation in Canada, with a specific focus on Ontario, tracing its historical progression through to the current enabling legislation. Part 4 will delve into the existing body of literature regarding mediation styles. The methodologies or approaches employed by mediators significantly enhance the mediation process and instill confidence in the parties involved. These styles serve as essential tools that can either facilitate compromise if appropriately used or further polarize the parties if there is no correlation between the style and the nature of dispute. Skilled mediators are adept at discerning the most appropriate approach to adopt prior to the commencement of sessions. The core of this discussion will be elaborated in Part 4.

PART 4: LITERATURE REVIEW

1. Introduction

Irrespective of the country, the success or otherwise of mediation largely depends on the orientation or styles of the mediators. Hence, this part will deal with what may be referred to as variants of mediation and their processes. I will be reviewing existing literature on these. The concept or practice of mediation is not novel. This was well established in previous parts of the thesis. Nowadays, mediation as a tool has become notorious and ubiquitous in the administration of justice and has dovetailed into resolving criminal matters in some ways.⁴⁸⁷ The versatility of mediation as a conflict resolution tool is evident in its application across diverse domains: (i) international conflict between countries and governments;⁴⁸⁸ (ii) internal conflicts comprising

⁴⁸⁷ In Nigeria Restorative Justice approach embodies ADR in criminal matter. This include plea-bargain and victims-offenders mediation and non-custodian sentencing. See ACJA *supra* note 222, and UDRC *supra* note 216 at 16. In the Canadian criminal justice system, Alternative Dispute Resolution (ADR) is utilized through Sentencing Circles. These circles, which may be integrated into the court process but do not constitute separate courts, bring together various stakeholders. Participants include the judge, prosecutor, defense counsel, police officers, social service providers, community elders, as well as the offender, the victim, and their families and supporters. In a circle format, they engage in discussions regarding the offense, contributing factors, potential sentencing options, and strategies for the offender's reintegration into the community. See <https://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/04.html>.

⁴⁸⁸ Kyle Beardsley & Nathan Danneman, "Mediation in International Conflicts" in *Emerging Trends in the Social and Behavioral Sciences* (Hoboken, NJ: John Wiley & Sons, Inc, 2015) at 2

Online: <https://emergingtrends.stanford.edu/files/original/d610d7af4805765574252c5345621ca5ed4cacfa.pdf>.

neighborhood and ethnic disputes,⁴⁸⁹ (iii) legislative dispute,⁴⁹⁰ (iv) bankruptcies,⁴⁹¹ and (v) family dispute.⁴⁹²

Mediators have been useful in many contexts (i) settling issues with separating divorcing parties,⁴⁹³ (ii) disputes involving managing personal-injury and commercial lawsuits,⁴⁹⁴ (iii) assisting disputants draft fresh agreements, (iv) the management of difficult and complex conversation between parties especially in the areas of environmental,⁴⁹⁵ maritime,⁴⁹⁶ letter of credit,⁴⁹⁷ and aviation disputes.⁴⁹⁸ Mediators play a crucial role in facilitating conflict resolution between parties, employing a diverse range of styles and approaches. Just as medical professionals, engineers and counselors employ various strategies to attain specific outcomes,

⁴⁸⁹ *Ibid* at 8 and 10

⁴⁹⁰ Michael O'Keefe, "Resolving Disputes to Which the Government Is a Party: Exploring ADR and Administrative Disputes Involving the Government of Canada," online: University of Toronto Faculty of Law Review, <https://www.utflr.ca/blog/resolving-disputes>.

⁴⁹¹ Julia Winters, "Mediation in Bankruptcy — An Important, Albeit Unwieldy Tool" (2022) 38:11 *Rev Banking & Financial Services* 121. See also, Innovation, Science and Economic Development Canada, "All About Bankruptcy Mediation" (Ottawa: Innovation, Science and Economic Development Canada, 2015).

⁴⁹² Effective Dispute Solutions, "Family Divorce Separation Case Study" (last visited 18 November 2024), online: Effective Dispute Solutions <https://effectivedisputesolutions.co.uk/mediation/case-studies/family-divorce-separation/>.

⁴⁹³ Canada, Department of Justice, *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results*, by C James Richardson (Ottawa: Department of Justice Canada, 1988). See also, Kenneth Kressel, "Mediation" in Morton Deutsch & Peter T Coleman, eds, *The Handbook of Conflict Resolution: Theory and Practice* (San Francisco: Jossey-Bass Publishers, 2000) 522

⁴⁹⁴ Kelly Greenway Bruce, "Can I Go Through Mediation for A Personal Injury Case?" (18 November 2024), online: *Oshawa Lawyers* <www.oshawalawyers.com/post/can-i-go-through-mediation-for-a-personal-injury-case>

⁴⁹⁵ Krista E Wiegand, "Mediation in Territorial, Maritime and River Disputes" (2014) 19:2 *Intl Negotiation* 343 at 347-350.

⁴⁹⁶ *Ibid*

⁴⁹⁷ Trade Finance Global, "Dispute Resolution" (last visited 21 December 2024), online: *Trade Finance Global* <https://www.tradefinanceglobal.com/letters-of-credit/dispute-resolution/>

⁴⁹⁸ UK, Civil Aviation Authority, *Consumer Complaints Handling and ADR: CAA Policy Statement and Notice of Approval Criteria for Applicant ADR Bodies*, CAP 1286 (London: CAA, 2016) at 14-21. See also, Civil Aviation Authority, "Alternative Dispute Resolution" (last visited 21 December 2024), online: Civil Aviation Authority <

mediators also utilize different techniques to assist parties in reaching mutually beneficial outcomes. According to Mayer: -

Mediators bring diverse personal styles, skills, and procedures, and there are certainly many variations among mediators in their values and ethical principles.... The commitment of mediators; their ability to connect with each disputants; their optimism, integrity, and openness; and their clarity about their values are often the most powerful contributions they have to make.⁴⁹⁹

Styles or orientation of mediation are influenced by different philosophies, personal hunches and set goals. Confining practitioners to one form of approach may not match with the general mediation practice. While Leonard Riskin's work⁵⁰⁰ serves as a significant foundation in scholarly discussions on mediator methods and styles, there have been various categorizations of these approaches prior to Riskin. Mediation is a craft that can be practiced in diverse ways, depending on the mediator's expertise.⁵⁰¹ The most prominent mediation styles to be discussed in this part (1) facilitative, (2) evaluative, (3) transformative, and (4) narrative.⁵⁰²

In Canada, there is an abundance of research and scholarly publications focused on mediation orientations and typologies. In contrast, Nigeria lacks comprehensive literature and textbooks on this topic. The references to Nigerian literature in this field are scarce, which has adversely affected mediation practices. Nigeria stands to benefit from Canada's experience and the strategies they utilized to attain their level of expertise. In Part 5 of the thesis, I aim to analyze

⁴⁹⁹ Bernard Mayer, *The Dynamics of Conflict: A Guide to Engagement and Intervention*, 2nd ed (San Francisco: Jossey-Bass, 2012) at 275

⁵⁰⁰ Leonard L Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" (1996) 1:7 Harv Negot L Rev 7.

⁵⁰¹ Nicole K Levy, "Comparing the 3 Major Styles of Mediation" (2018), online: South Shore Divorce Mediation <https://madivorcemediators.com/comparing-the-3-major-styles-of-mediation/>

⁵⁰² Julie Macfarlane *et al*, *supra* note 63 at 297.

the factors contributing to Nigeria's current position and investigate how the country can elevate its mediation practices to meet the standards established by Canada.

The four styles are not the same in emphasis and goals.⁵⁰³ Their choices in each case is dependent on the nature of the dispute, the cultural nuances of the parties, the goal of the mediation, the mediator professional background or type of training and the personalities of parties. In many instances, these categorisations show a mediator as being either a passive facilitator or an active refiner of solutions. Peter Bishop and his team,⁵⁰⁴ in their book 'The Art and Practice of Mediation' demonstrated different annotations and features of a pragmatic problem-solving method as against those whose goal is social and individual transformation.

Continuum of Mediation Goals.

Pragmatic Problem-Solving Process Goals	Social & Individual transformation Process Goal
content	process
positional	interest-based
dealmaker	orchestrator
bargaining	therapeutic
problem-solving	transformative
facilitator	activist

⁵⁰³ *Ibid.* See also Zena Zumeta, "Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation" (25 October 2021), online (pdf): Columbia University Office of the Ombuds.

⁵⁰⁴ Peter Bishop *et al supra* note 105 at 70

evaluative	Facilitative
passive	Active
individualist	relational

Bishop *et al* assert that the classification is not cast in stone and mediator are allowed flexibility while responding to the dynamics of the conflict situation. This perspective aligns with Picard's⁵⁰⁵ research which indicates that mediators may adjust their strategies based on the specific characteristics of the dispute and the parties involved.

2. Mediation Styles and Orientations

i) Facilitative Mediation

In Julie Macfarlane's book on mediation,⁵⁰⁶ while citing Bernard Mayer's work, she submits that most of the classic definition of mediation include some reference to the mediator's facilitative role. She opines that:-

[One] of the clearest summaries of facilitative mediation describe[s] it as an approach in which the mediator structures a process to assist the parties in reaching a mutually agreeable resolution. The mediator asks questions, validates and normalizes parties' point of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution. The facilitative mediator does not make recommendations to the parties, gives his or her own advice or opinion as to the outcome of the case, or predicts what a court would do in

⁵⁰⁵ Cheryl A Picard, "The Many Meanings of Mediation: A Sociological Study of Mediation in Canada" (PhD Dissertation, Carleton University, 2000)

⁵⁰⁶ Julie Macfarlane *supra* note 63 at 298

the case. The mediator is in charge of the process, while the parties are in charge of the outcome.⁵⁰⁷

Bernard Mayer went on to identify major features or characteristics of Facilitative mediation. He terms them as hallmarks of facilitative mediation.⁵⁰⁸

- i. Facilitative mediation emphasizes a process-oriented approach. In this model, mediators prioritize the dynamics of interaction and consciously avoid positioning themselves as subject matter experts, regardless of their expertise.⁵⁰⁹ The role of the facilitative mediator is not to focus on the most favorable outcome, the potential result if the case were to proceed to adjudication, or any specific outcome at all. Instead, they facilitate a process that empowers the parties to engage in their own deliberations. While they may offer recommendations concerning procedural aspects, such as the venue, ground rules, or the structure of caucuses, they refrain from making settlement suggestions, adhering strictly to the facilitative method.⁵¹⁰
- ii. Facilitative mediation is inherently client-centered, prioritizing the needs and interests of the parties involved. While facilitative mediators may adopt different levels of passivity or intervention in the process, their primary role is to assist the participants in engaging deeply with the complexities of the conflict. This includes unpacking the underlying issues, exploring interests, evaluating options, and assessing

⁵⁰⁷ *Ibid* at 298-299. Additionally, refer to Kressel, *supra* note 493 at 535. Kenneth describes this as a settlement-oriented mediator whose main objective is to help the parties arrive at an agreement that is acceptable to them. The mediator emphasizes the importance of maintaining neutrality and believes that the primary responsibility for resolving the issue lies with the parties involved.

⁵⁰⁸ Bernard Mayer, *supra* note 80 at 32. *Ibid*

⁵⁰⁹ Zena Zumeta *supra* note 503

⁵¹⁰ A mediator who facilitates also helps with any procedural inquiries that come up while adjusting interests and stances in a way that allows each party to comprehend their own objectives and the objectives of the other party within the framework of a mutually agreed settlement.

- the implications of various solutions. The focus remains on empowering the parties to collaboratively navigate their path toward resolution.⁵¹¹
- iii. Facilitative mediation centers around effective communication. The primary role of a mediator, in this context, is to facilitate dialogue between the parties involved. Facilitative mediators view their role as enabling a constructive communication process, aiming to assist the parties in expressing their concerns and addressing the issues they wish to resolve.⁵¹²
 - iv. Facilitative mediation operates on an interest-based framework, prioritizing the integrative aspects of conflict resolution over the distributive components. This approach emphasizes the identification of creative options that enhance the likelihood of all parties attaining their objectives. While facilitative mediators predominantly concentrate on fostering collaboration and shared interests, they are also adept at guiding parties through the negotiation of limited resource allocation when required. Essentially, facilitative mediators articulate their methodology as a focus on interests in the mediation process, facilitating a deeper understanding and resolution of the underlying issues at play.⁵¹³

Cheryl Picard's research⁵¹⁴ revealed that, based on interviews with mediators, most participants recognized that they had multiple responsibilities as a mediator. The primary role

⁵¹¹ Steve Hindmarsh, "Models of Mediation - Facilitative & Evaluative" (2024), online: *Steve Hindmarsh* <stevehindmarsh.co.uk/help-and-advice/models-of-mediation/

⁵¹² Transforming Conflict LLC, "Mediation" (2024), online: <https://transformingconflictllc.com/mediation/>

⁵¹³ See also Neil Gold, "Prospects, Problems and Potential: An Assessment of Trends and Issues Regarding Mediation in Canada" (1997) 76 *J Arb Study* 84

⁵¹⁴ Picard *supra* note 505 at 143

that most mediators identified with was that of facilitation. There are three interpretations of the facilitator role - "facilitating process," "facilitating communication," and "facilitating resolution." Women tend to describe their role more frequently as "facilitating communication," while men tend to describe their role more frequently as "facilitating process." Only a small number of respondents characterized their role as "facilitating resolution."⁵¹⁵

Facilitative style has been argued to be the backdrop for all mediation orientations.⁵¹⁶ In the context of mediation, facilitative mediators play a vital role akin to that of orchestrators. They skillfully navigate and oversee the communication process, ensuring that the voices, thoughts, feelings, and ideas of the parties involved are given utmost importance. This style showcases more party autonomy and underscores party-self-determined⁵¹⁷ kinds of mediation. The parties themselves, sometimes assisted by their counsel, wield the most appreciable dominion over the decision-making that transpires in the course of the mediation.⁵¹⁸

⁵¹⁵ According to Picard's study, many participants regard their role primarily as one of facilitation. When asked to describe their role to the parties at the outset of mediation, eighty-nine percent of participants provided at least one response categorized as "facilitator" in an open-ended question format. This finding aligns with the understanding that mediation, in its purest form, is facilitative. Additionally, eight other role categories were identified from the responses, though none accounted for more than ten percent of the total. These included "monitor" (9% of responses), "advisor" (5% of responses), "coach" (4% of responses), "normalizer" (2% of responses), "agent of reality" (1% of responses), and "recorder" (1% of responses). Given the low percentages, further analysis of each category was deemed unnecessary.

⁵¹⁶ Kenneth M Roberts, "Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement" (2007) 39:1 Loy U Chicago LJ 187 at 193. Also, Benard Mayer *supra* note 80 at 30

⁵¹⁷ Jennifer L. Schulz *supra* note 81 at 24. Self-determination in mediation refers to the inherent right of the parties involved to independently and voluntarily arrive at decisions concerning the resolution of their disputes, free from coercion or undue influence. This concept is a cornerstone of the mediation process, necessitating that mediators not only uphold this principle but actively foster an environment that supports autonomous decision-making by the parties.

⁵¹⁸ Stefanie Goldberg, "Triaging and Mediating to meet the Needs of Families under The Family Dispute Resolution (Pilot Project) Act of Manitoba" (LLM Thesis, University of Manitoba, 2020) [unpublished] at 20.

Marcus Sixta⁵¹⁹ suggests that this mediation style is particularly beneficial for individuals who wish to preserve their relationships and are open to exploring creative solutions to their conflicts. Examples of this include (i) child custody arrangements, where the divorcing parties will continue to have an ongoing parenting relationship, and (ii) employment contracts, where the parties are inclined to collaborate or operate in a partnership. However, Sixta notes that a potential drawback of facilitative mediation is that it may only be suitable for parties willing to make concessions or seek resolution outside of the legal framework.

Semple and Bala,⁵²⁰ along with Scott Hughes,⁵²¹ Jeffrey Stemple,⁵²² and Carolyn Clark Camp,⁵²³ support the use of facilitative mediation, particularly in the context of family mediation, with a specific focus on child custody. According to Semple and Bala, facilitative mediation, characterized by collaborative communication and an interest-based approach, is most suitable for parties navigating child custody and access issues, as it fosters direct communication and encourages shared responsibility in parenting. Scott believes that facilitative mediation has the potential to enhance the ongoing relationship between the parties involved. He posits that this

⁵¹⁹ Marcus M Sixta, "What Style of Mediation Is Right For My Divorce?" (19 November 2024), online: *Crossroads Law* <www.crossroadslaw.ca/blog/what-style-of-mediation-is-right-for-my-divorce/>[1].

⁵²⁰ Noel Semple & Nicholas Bala, "Reforming Ontario's Family Justice System: An Evidence-Based Approach" in *Association of Family and Conciliation Courts, Ontario Chapter* (Toronto: AFCC Ontario, 2013) 29

⁵²¹ Scott H Hughes, "Facilitative Mediation or Evaluative Mediation: May Your Choice Be a Wise One" (1998) 59:4 *Ala Law* 246 at 249.

⁵²² Jeffrey W Stemple, "Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime" (2000) 2000 *J Disp Resol* 371

⁵²³ Carolynn Clark Camp, "Mediating the Indissoluble Family: Mediator Style in Domestic Relations Cases" (2012) 26:2 *BYU Journal of Public Law* 187. Carolynn Clark Camp posits that facilitative mediation techniques are more effective than evaluative approaches for resolving family cases, especially those involving children. Camp argues that facilitative mediation establishes a framework that fosters open and direct communication between the parties. It encourages the exploration of various customized options generated by the individuals involved, allowing them to make choices from these options without feeling pressured. This article was cited by Stefanie Goldberg *supra* note 581 at 24

approach, in contrast to evaluative mediation, can be integrative rather than purely distributive, creating opportunities for parties to expand the "pie" rather than merely dividing it. Both Stemple and Clark Camp assert that facilitative mediation is more advantageous for resolving family disputes, a sentiment echoed by Semple and Scott.

Daniel Louis suggests that facilitative mediation is particularly effective for addressing environmental disputes. This method proves invaluable in scenarios involving prospective permitting, especially when the stipulations of permits or operating standards are contested. In the realm of environmental project development or modification, which often encompasses diverse interests and multiple stakeholders, the facilitative approach emphasizes enhancing dialogue among parties and empowering them to reframe their positions. This strategy, according to Louis, is perceived as less adversarial and more conducive to collaborative business practices, ultimately leading to more sustainable outcomes.⁵²⁴

Katie Shonk emphasizes that facilitative mediation is particularly effective in addressing certain workplace conflicts, specifically task conflicts. She believes that the involvement of leaders within an organization can greatly enhance this process. By acting as mediators, managers can focus on uncovering the underlying interests that drive the positions of the parties involved. This can be accomplished through active listening techniques, such as asking questions, restating what has been communicated to ensure clarity, and probing further with deeper inquiries. This method fosters a collaborative problem-solving environment, allowing the parties

⁵²⁴ Daniel E Louis, "Challenges in Multiparty Environmental Mediation" (1999) 19:1 J Nat'l Ass'n Admin L Judges 77 at 97.

to brainstorm potential solutions together. In Shonk's view, when individuals collaborate to create solutions, rather than having a resolution imposed upon them, they are more likely to uphold the agreement and strengthen their working relationships.⁵²⁵

Despite the numerous praises of the facilitative model or style, it has some identified downsides. There are cases that require expert assessment of the situation without which the matter may not be resolved. The incidence of deadlock or impasse is often common in a facilitative styled mediation process. Examples here include insurance claims, family mediation that involve property or high-conflict divorce, dispute on audited accounts where a peer-review may be required, medical negligence and banker's customer's relationship to mention but a few.

In some cases, the limitations of strictly facilitative mediation may put certain parties at a disadvantage by not providing them with the necessary and relevant information.⁵²⁶ For example, when dealing with complex family issues such as major medical, educational, and religious decisions, parties may require more support than a facilitative mediator can offer.⁵²⁷ In such situations, parties might benefit from a more directive approach, such as evaluative mediation.⁵²⁸ In evaluative mediation, mediators can leverage their expertise to assist parties in addressing intricate issues and making well-informed decisions.⁵²⁹ Advocates of evaluative

⁵²⁵ Katie Shonk- "Types of Conflict and How to Address Them, (23 April 2024), online: Program on Negotiation at Harvard Law School <https://www.pon.harvard.edu/daily/conflict-resolution/types-conflict/>. Also Benard Mayer *supra* note 81 at 45

⁵²⁶ Julie Marfarlane *supra* note 64 at 377. See also, HiiL, "Guideline for employment problems / SHARING: 5.2 Facilitative mediation" (2024), online: HiiL Dashboard <https://dashboard.hiil.org/treatment-guidelines/employment-problems/recommendations-facilitative-mediation/>

⁵²⁷ Peter Salem, Debra Kulak & Robin M Deutsch, "Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen" (2007) 27:4 Pace L Rev 741 at 760.

⁵²⁸ *Ibid*

⁵²⁹ Stefanie Goldberg *supra* note 581 at 25.

mediation, including Barbara J. Hart, Lisa G. Lerman, and Jeffrey Stempel, have contended that the facilitative approach can serve to disempower people and exacerbate power differentials between parties, as it does not provide them with the type of information available in evaluative mediation.⁵³⁰

ii). Evaluative Mediation

Evaluative mediation is likened to a mediation-arbitration (med-arb) process, a hybrid form of dispute-resolution mechanism. This type of mediation process deals with statutory rights, and when compared this way undermines mediation uniqueness as a dispute resolution toolkit.

According to the Oregon Mediation Association-:

A mediator who uses an evaluative approach is likely to be appreciated for his/her no-nonsense style. Evaluative mediators work quickly and efficiently to get to the point and write up a solution. They are more likely to weigh in on options and make recommendations based on their experience. Evaluative mediators are especially useful when time is short and the problem is relatively concrete, when it seems likely that the case may otherwise end up in court, or when the parties want recommendations from a neutral party.⁵³¹

According to Noel Semple and Nicholas Bala,⁵³²

An important variation of evaluative mediation is Early Neutral Evaluation (ENE). In ENE, they continue, a judge or legal professional offers an assessment of the merits at an early stage in the process, facilitating a resolution within the range of likely outcomes of a litigated resolution.... some American states have formalized Early Neutral Evaluation through a judge who is not

⁵³⁰ Benard Mayer *supra* note 81 at 49. Also, Semple argues that this dynamic arises from the male's higher earnings, leading individuals who control more resources—primarily the male—to dominate the process. Therefore, permitting both parties to engage in facilitative-style mediation without the mediator's intervention can prove to be disastrous. See also, Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24:1 CJWL 207

⁵³¹See <https://ormediation.org/find-a-mediator/choosing-the-right-mediator/mediator-styles/>. Kenneth Kressel characterizes this approach as that of a "problem-solving mediator." In this context, the mediator takes on the responsibility of accurately identifying the key sources of the conflict and operates under the assumption that the leadership of the problem-solving process lies with them, rather than with the parties involved. See Kenneth Kressel, *supra* note 493, at 535.

⁵³² Noel Semple & Nicholas Bala, "Reforming Ontario's Family Justice System: An Evidence-Based Approach" (2013) 32:2 Windsor YB Access Just 27

assigned to the case that will go to trial. In Ontario, certain locations employ volunteer senior lawyers, known as Dispute Resolution Officers, to provide this type of mediation for child support variation cases.

Evaluation typically encompasses a variety of activities, including articulating an assessment of a party's position, proposing potential resolutions, and forecasting the likely outcome should the case be adjudicated in an alternative venue.⁵³³ Dorothy described the role of evaluative mediators as having a significant influence on the content and process of the dispute while assessing the case.⁵³⁴ Evaluative mediators generally believe in their capability to guide the mediation process and offer judgments about its content, often providing direct advice to the parties on their decisions.⁵³⁵

The following example demonstrates the effectiveness of evaluative mediation in handling complex technical disputes, where a thorough, expert-driven analysis can assist the parties in progressing toward an amicable resolution. This illustration is drawn from Gordon Tregaskis' professional experience as a mediator: -⁵³⁶

This case revolved around a complex construction dispute exceeding US\$1 billion between an employer and a contractor on a significant mega project in the Middle East. The conflict stemmed from issues related to contract variations, liquidated damages, and disputes over extensions of time that were not issued. To navigate the intricate nature of the dispute, a multidisciplinary team was assembled, comprising surveyors, engineers, planners, as well as forensic and commercial claims consultants. This diversity of expertise proved crucial in managing the multifaceted issues at hand. The mediation process was protracted, extending over 19 months, which was necessary given the complexity of the matters involved and the considerable volume of documentation. A "straight edge analysis tool" was employed in the mediation, to which both parties mutually

⁵³³ L. Randolph Lowry, "TO EVALUATE OR NOT: That Is Not the Question" (2000) 38:1 Fam & Concil Cts Rev 48. See also, Randolph L Lowry, "Evaluative Mediation" in Jay Folberg, Ann L Milne & Peter Salem, eds, *Divorce and Family Mediation: Models, Techniques, and Applications* (New York: Guilford Press, 2004) 73. See also, Jennifer L Schulz, *supra* note 81 at 27.

⁵³⁴ Dorothy J Della Noce, "Evaluative Mediation: In Search of Practice Competencies" (2009) 27:2 Confl Resolut Q 193 at 194.

⁵³⁵ Stefanie Goldberg *supra* note 581 at 29.

⁵³⁶ Gordon Tregaskis, "Part 3: Example of an Evaluative Mediation in Practice" (last visited 20 November 2024), online: Dispute Resolution Agency <https://www.disputeresolutionagency.com/part-3-example-of-an-evaluative-mediation-in-practice>

agreed. This involved a detailed windows analysis based on a Primavera P6 programme, utilizing both as-built records and relevant correspondence. Despite initial contention, the parties began to collaborate as they recognized the critical importance of their contributions to the analytical model. Ultimately, they arrived at a settlement agreement on their own accord after completing 15 out of the 23 analysis windows. The evaluative mediation was co-funded by both parties, which could potentially reduce their costs by 50% compared to appointing separate claims consultants and legal teams. Post-resolution, the parties were able to continue their collaboration on an extension project, indicating a successful restoration of their business relationship. The mediation facilitated the avoidance of protracted and costly litigation, particularly given the complexities of the case and the language barrier posed by the different legal contexts (English documentation versus Arabic-speaking local courts).

There are concerns within the mediation community about the ethical implications and effectiveness of evaluative mediation, with John Lande focusing particularly on the potential for confusion among disputants, coercion, and the perceived shortcomings in the evaluative process and techniques.⁵³⁷ Kimberlee Kovach and Lela Love have been vocal about the debate surrounding the role of evaluative mediation within the mediation process, arguing that it might be somewhat contradictory.⁵³⁸ In their analysis, evaluative mediation undermines the principle of neutrality, as the mediator's assessment tends to inherently favor one party over the other.⁵³⁹

Robert Rubinson shares this sentiment that evaluative mediation, unlike facilitative mediation, carries a more partisan nature, which raises questions about its classification as genuine mediation.⁵⁴⁰ Rather, they propose that it may fall under the umbrella of third-party-assisted conflict resolution, but should not be considered a true form of mediation.

⁵³⁷ John Lande, "Stop Bickering! A Call for Collaboration" (1998) 16:1 Alternatives 10 at 11.

⁵³⁸ Kimberlee K. Kovach & Lela P. Love, "Evaluative Mediation is an Oxymoron" (1996) 14:3 Alternative to High Cost Litigation 31

⁵³⁹ *ibid*

⁵⁴⁰ Robert Rubinson, "Indigency, Secrecy, and Questions of Quality: Minimizing the Risk of 'Bad' Mediation for Low-Income Litigants" (2017) 100 Marquette L Rev 1353 at 1358, online: ScholarWorks@University of Baltimore School of Law <scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2060&context=all_fac>

In Ontario, the mandatory mediation process (OMMP) primarily adopts an evaluative approach, emphasizing entitlements, efficient case management, and connections to the court system. It aims for quick settlements and cost avoidance in trials, with limited focus on broader goals like relational needs and transformation.⁵⁴¹ Mediators are provided at a cost to the parties for a three-hour session and one-hour preparation time.⁵⁴² The scheduled fees may be prohibitive for some individuals,⁵⁴³ which is why the OMMP has established opportunities for those who cannot afford mediation costs to gain access.⁵⁴⁴ Parties are encouraged to either secure a legal aid certificate or apply for pro bono mediation through their local community.⁵⁴⁵

Those seeking assistance through the local committee will undergo an eligibility assessment, with exceptions for certain categories.⁵⁴⁶ If a settlement is not reached, the parties either pay for further mediation or opt for court proceedings. The selection of mediators from a roster is typically influenced by the parties' lawyers, favoring those who adopt an evaluative

⁵⁴¹ *Rules of Civil Procedure*, R.R.O *supra* note 419 r 24.1.(01)

⁵⁴² Fees for mediation sessions conducted through OMMP are governed by either [Ontario Regulation 451/98](#) (for cases subject to Rule 24.1) or [Ontario Regulation 43/05](#) (for cases subject to Rule 75.1) under the [Administration of Justice Act](#)

⁵⁴³ If the mediator is listed on the Ontario Mandatory Mediation Program's roster, the fees for a mediation session lasting up to three hours, along with 30 minutes of preparation per party (equivalent to one hour for both), are structured as follows: Two parties (\$600 plus GST), Three parties (\$675 plus GST), Four parties (\$750 plus GST), and Five or more parties (\$825 plus GST). Please note that these fees do not encompass any legal fees incurred. Additionally, the mediator may charge for expenses, provided that all parties agree to them prior to the commencement of the mediation. This is why many individuals often pursue a legal aid certificate or apply to their local mediation committee coordinator for pro bono services. See also, Government of Ontario, "Mandatory Mediation in Civil Cases" (last modified 23 April 2023), online: Ontario.ca <www.ontario.ca/page/mandatory-mediation-civil-cases>.

⁵⁴⁴ *Ibid*

⁵⁴⁵ Ontario, "Mandatory Mediation Access Plan" (last modified 15 November 2023), online: Government of Ontario <www.ontario.ca/page/mandatory-mediation-access-plan>.

⁵⁴⁶ *Ibid*:- Pro bono mediation services will be offered without the application of an eligibility test if the primary source of family income is derived from one of the following sources: - Social assistance - Old Age Security with a guaranteed income supplement - War Veterans Allowance - Canada Pension Plan (only if it is the primary source of income) - Temporary Workers' Compensation Benefits that are at risk

mediation model. A “good” mediator is one who can get a settlement within the first session of three hours. This situation results in a loss of focus on facilitative and transformative model concerns, which are needs-based and concentrate on the parties reaching a solution themselves.⁵⁴⁷

In the context of environmental enforcement and disputes involving a limited number of parties, such as the government and the defendant, evaluative mediation can be beneficial. This often occurs when the mediator provides likely outcomes, risks, and analyzes the dispute after reviewing depositions, reports, and pleadings. Sometimes, both parties will request an evaluation from the mediator.⁵⁴⁸ When the disputing parties are bargaining in good faith and genuinely seek the mediator's evaluation, it may not have adverse consequences. Evaluative mediation is most suitable when the parties are unaware of their legal rights.⁵⁴⁹ Cases requiring expert analysis and those in which industry customs are crucial for resolving the dispute are likely to be resolved through evaluation.⁵⁵⁰ Additionally, a mini-trial involves an evaluative form of mediation.⁵⁵¹

⁵⁴⁷ Picard *supra* note 505 at 79

⁵⁴⁸ Daniel Louis *supra* note 524

⁵⁴⁹ Couples often pursue evaluative mediation to resolve complex-child custody disputes, particularly when both parties are seeking sole custody and rejecting the possibility of visitation by the other parent. An evaluative mediator can emphasize that child welfare regulations primarily support the principle of co-parenting and underscore the importance of both parents being actively involved in the child's life. By clarifying the legal implications and weaknesses inherent in each party's stance, the mediator can facilitate a deeper understanding of the situation. This process can ultimately lead to a more balanced and legally sound custody arrangement that aligns with the best interests of the child. In another scenario, consider a situation where a party with a legal entitlement to 65% accepts a settlement of only 30%. An evaluative mediator may intervene to balance the party's autonomy with considerations of equitable outcomes. In contrast, a facilitative mediator typically refrains from addressing fairness concerns. See "About Evaluative Mediation", *Hello Divorce*, [February 08, 2023], <https://hellodivorce.com/divorce-mediation/evaluative-mediation>.

⁵⁵⁰ *Ibid*

⁵⁵¹ Alero Akeredolu *supra* note 30 at 21.

iii). Transformative Style

Transformative mediation aims to convert a negative dispute into a positive event.⁵⁵² It emphasizes empowering the parties and acknowledging each party's needs, interests, and values.⁵⁵³ Empowerment involves enhancing individuals' abilities to think, choose, and take action in conflict situations.⁵⁵⁴ This occurs when individuals gain a clearer understanding of their objectives and their significance.⁵⁵⁵ According to Bush and Folger, empowerment leads to an increased sense of self-value, security, self-governance, and independence for the parties.⁵⁵⁶ Recognition involves developing greater empathy and responsiveness towards the other party's circumstances.⁵⁵⁷ In mediation, parties achieve recognition when they feel less threatened and become more open to the other party.⁵⁵⁸

In defining what a successful mediation is, Bush and Folger put it succinctly: -

For mediation to be deemed successful, it is essential that the parties involved are thoroughly informed about the opportunities for empowerment and recognition available to them throughout the process. Additionally, the parties should receive guidance in clarifying their goals, exploring their options, and identifying their resources to facilitate informed and intentional decision-making

⁵⁵² Robert A Baruch Bush & Joseph P Folger, *The Promise of Mediation* (San Francisco: Jossey-Bass, 1994) at 27–40. See also Julie Macfarlane *supra* note 63 at 300-302, and Amanda E Boniface, "African-Style Mediation and Western-Style Divorce and Family Mediation: Reflections for the South African Context" (2012) 15:5 PER/PELJ 381

⁵⁵³ Zena Zumeta *supra* note 503 at 3; Amanda E Boniface, *Ibid*

⁵⁵⁴ Robert J. Condlin, "The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype" (2013) Digital Commons - Cardozo J Conflict Resol 620.; Peter Bishop *supra* note 105 at 75. *Ibid*

⁵⁵⁵ *Ibid*. See also, Lisa Singh- "Transformative Mediation: An Often Misunderstood Model" (2023), online: LinkedIn <www.linkedin.com/pulse/transformative-mediation-often-misunderstood-model-lisa-singh>. See also, Kenneth Kressel *supra* note 493 at 536

⁵⁵⁶ Lisa P Gaynier, "Transformative Mediation: In Search of a Theory of Practice" (2005) 22:3 Conflict Resolution Q 397 at 398-402. See also Bush and Folger *supra* note 552

⁵⁵⁷ *Ibid*

⁵⁵⁸ Peter Bishop *supra* note 105 at 76

at each juncture. Moreover, it is vital that the parties receive support in acknowledging contributions wherever they feel it is warranted.⁵⁵⁹

The earliest Gestalt psychologists' work influenced Bush and Folger's focus on addressing disputants' moment by moment.⁵⁶⁰ This helps individuals address unresolved issues to create a sense of completeness.⁵⁶¹ For instance, in the landlord-tenant case discussed by Bush and Folger,⁵⁶² the mediator helps the tenant express her frustration towards the landlord, believing that he reported her to child welfare. Regardless of whether he actually did or not, she has unresolved emotions that affect all her future interactions with him regarding the overdue rent.⁵⁶³

What is the purpose of the intervenor? According to a Gestalt practitioner, it is to facilitate the establishment of positive "contact" between the disputing parties in Transformative Mediation.⁵⁶⁴ Contact refers to a significant interaction between the two parties: understanding and empathizing with the other's perspective, even if not in agreement; recognizing one's adversary as a person with emotions, values, and needs as legitimate as one's own; or recalling

⁵⁵⁹ Bush and Folger *supra* note 552 at 94; Peter Bishop *supra* note 106 at 75

⁵⁶⁰ Gaynier LP *supra* note 556 at 405

⁵⁶¹ *Ibid*

⁵⁶² Robert Condlin *supra* note 554 at 637-643

⁵⁶³ Nicole K. Levy *supra* note 501 at 3, articulates the framework of Transformative Mediation, which commences with the mediator observing the disputants as they engage in dialogue or present their grievances. As the process progresses, the mediator provides feedback on the substantive issues as well as the parties' communication styles, interpersonal dynamics, and inherent power imbalances. The mediator systematically assesses these elements to facilitate a more equitable negotiation environment. It is important to note that this form of mediation does not aim to be a therapeutic endeavor; the mediator's objective is not to significantly repair the parties' relationship but to recalibrate their negotiating power in a structured setting conducive to dispute resolution. The additional relational benefits gained by participants are typically secondary and not the primary focus of this approach. Transformative mediation is recognized as a particularly complex method of mediation and carries potential challenges. In striving to equalize power dynamics, there exists a risk that the mediator may inadvertently veer toward advocacy for one party over the other. For transformative mediation to yield desired results, there must be a mutual acknowledgment by both parties that their relational dynamics are obstructing resolution, along with a consensus that the transformative model is both appropriate and necessary for their situation.

⁵⁶⁴ Gaynier *supra* note 556 at 405-406

any positive or trustworthy prior relationships between the disputants.⁵⁶⁵ In essence, contact involves a shift (in emotions, viewpoints, and understandings), no matter how small, in the parties' approach to the conflict and to each other.⁵⁶⁶ Gaynier suggests that based on this theory, the mediator's intention would be to "facilitate the development of positive 'contact' between the parties."⁵⁶⁷

There are numerous accounts of successful mediation using transformative style. In the 1990s, the United States Postal Service ("USPS") responded to the increasing number of equal employment opportunity complaints by implementing innovative strategies.⁵⁶⁸ One such initiative was the implementation of the Resolve Employment Disputes Reach Equitable Solutions Swiftly ("REDRESS") program in 1994, initially introduced as a pilot project in the Florida Panhandle.⁵⁶⁹ This program utilized mediation techniques and was later expanded nationwide, with outside mediators trained in transformative mediation practices being engaged to facilitate the process.⁵⁷⁰

By 2001, the USPS had conducted over 14,000 transformative REDRESS mediations, leading to a significant decrease in equal employment opportunity complaint filings.⁵⁷¹ Research findings also highlighted additional positive impacts, including improved workplace culture,

⁵⁶⁵ *Ibid*

⁵⁶⁶ *Ibid*

⁵⁶⁷ *Ibid*

⁵⁶⁸ Tina Nabatchi & Lisa B Bingham, "Transformative Mediation in the USPS Redress Program: Observations of ADR Specialists" (2001) 18:2 Hofstra Lab & Empl LJ 399 at 403. See also, Joseph Folger & Robert A Baruch Bush, "Transformative Mediation: A Self-Assessment" (2014) 2:1 Intl J Conflict Engagement & Resolution 20

⁵⁶⁹ Tina Nabatchi, Lisa Blomgren Bingham & Yuseok Moon, "Evaluating Transformative Practice in the U.S. Postal Service REDRESS Program" (2010) 27:3 Confl Resol Q 257 at 258-259

⁵⁷⁰ *Ibid*. Tina Nabatchi *supra* note 568

⁵⁷¹ Tina Nabatchi *supra* note 568 at 405

establishing the program's effectiveness in not only resolving conflicts but also in positively transforming workplace dynamics.⁵⁷²

Transformative-style mediation is also valuable in managing violent conflict,⁵⁷³ communal conflict,⁵⁷⁴ and conflict between Nations or among multi-party states.⁵⁷⁵ Transformative mediation follows a relational model by improving the communications of participants, most violent conflict escalates with breakdown in communication between parties. Transformative mediation is most effective when one party is reluctant to engage in mediation due to a power disparity, lack of boundaries, or informational imbalance that both parties acknowledge.

The Boko Haram and Kidnapping could have been better addressed using transformative mediation.⁵⁷⁶ In most cases, the non-state actors are unwilling to participate in mediation. The

⁵⁷² Antes, J., Folger, J., and Della Noce, D. "Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS Program." *Hofstra Law and Employment Journal*, 2001, 18 (2), 429–467; Stefanie Goldberg *supra* note 581 p. 42

⁵⁷³ Christine Bell, "'Multimediation': Adapting Response to Fragmentation" (2023) Conciliation Resources, online: <https://www.c-r.org/accord/still-time-talk/%E2%80%98multimediation%E2%80%99-adapting-response-fragmentation>.

⁵⁷⁴ Coy, P. G. (2009). Conflict Resolution, Conflict Transformation, and Peacebuilding. In T. McAlwee, B. W. Hall, J. Liechty, & J. Garber (Eds.), *Peace, Justice and Security Studies* (pp. 63-78). Lynne Rienner Publishers.

⁵⁷⁵ Robert A Baruch Bush & Joseph P Folger, "Transformative Mediation" (October 2003, updated 2013), online: Beyond Intractability <www.beyondintractability.org/essay/transformative_mediation>

⁵⁷⁶ Francesca Batault, Malik Samuel, Celestin Delanga, Mohammed Bukar, Fatima Yetcha Ajimi Badu, Fanna Abdu Muhammad, Fatima Ajimi, Sani Boubacar, and Siobhan O'Neil, *Prospects for Dialogue and Negotiation to Address the Conflict in the Lake Chad Basin* (UNIDIR, Geneva, 2024) [online: https://unidir.org/wp-content/uploads/2024/05/UNIDIR_ISS_Prospects_Dialogue_Negotiation_Address_Conflict_Lake_Chad_Basin.pdf]. Applying transformative mediation to address the challenges posed by Boko Haram and kidnapping involves several important steps. Bush and Folger have identified two critical elements: 'Empowerment' and 'Recognition'. In this context, 'empowerment' encourages both the government and members of Boko Haram to acknowledge their own needs and interests. This process may include understanding the grievances that motivate Boko Haram's actions, such as perceived injustices, political marginalization, extrajudicial killings, the detention of group members, and a lack of accountability. 'Recognition' plays a vital role in fostering mutual respect by acknowledging the humanity and dignity of all parties involved, which can help build trust and facilitate dialogue. This also entails using dialogue to explore solutions for addressing these grievances, potentially through transitional

ongoing wars between Russia and Ukraine and Israel and Palestine failed in most intervention to stop it because wrong approach was used. A non-kinetic and non-sanction measures including a mediation approach that is transformative in nature will be appropriate. Similarly, the restorative and reconciliation efforts of Canadian government with the indigenous can be better realised through a series of mediation program that is transformative in style.

The emphasis of transformative mediation on relationship issues has drawn criticism for being unsuitable in all contexts.⁵⁷⁷ This perspective is echoed by Timothy Hedeem, who highlights the challenges posed by the presumption of universality and the asserted exclusivity of transformative practices.⁵⁷⁸ Mareschal suggests that a concurrent use of both problem-solving and transformative approaches—a 'bifocal approach'—can prove to be more effective.⁵⁷⁹ In her article titled "Transformative Mediation: The Opportunity and the Challenge," Anne Ardagh posits that this mediation style may not produce superior outcomes relative to other mediation approaches. She argues that while transformative mediation emphasizes personal empowerment and recognition, it may not necessarily lead to enhanced results in compared to other mediation orientations.

justice mechanisms or community-led reconciliation efforts. Moreover, engaging local communities in the mediation process is essential for promoting reconciliation and acceptance. This can involve community leaders, religious figures, or civil society organizations facilitating dialogue between communities and Boko Haram affiliates. Finally, establishing trust through consistent communication and the fulfillment of commitments is crucial for encouraging defectors and facilitating negotiations. See also, Egbusie PO & Albert MO. Restorative Justice and its Implications on Transformative Peacebuilding among Victims of the Boko Haram Terrorism in North-Eastern Nigeria. *International Journal of Peace and Conflict Studies* 2022; 7(3): 1-8.

⁵⁷⁷ Roger Seaman, *Explorative Mediation at Work: The Importance of Dialogue for Mediation Practice* (Palgrave Macmillan, 2016) at 169-175. See also, R. J. Ridley-Duff & A. J. Bennett, "Mediation: developing a theoretical framework to understand alternative dispute resolution" (Paper delivered at the British Academy of Management Conference, University of Sheffield, 14-16 September 2010).

⁵⁷⁸ Lisa Gaynier *supra* note 556 at 401

⁵⁷⁹ Mareschal P, "Solving Problems and Transforming Relationships: The Bifocal Approach to Mediation" (2003) 33:4 *Am Rev Pub Admin* 423 at 443.

Anne submits that: -

Bush and Folger acknowledge that settlement rates within the transformative framework are considerably lower, approximately 60 percent. It's important to note that achieving agreement in their model does not necessarily equate to successful mediation. In response to the idea of legislating mediation to promote agreement, their recommendation is for mediators to either refrain from participating in such programs or to label these approaches differently, such as 'settlement conferences.'⁵⁸⁰

Irrespective of Anne's view vis-à-vis Bush and Folger purported acceptance of the limit of this orientation, Bush and Folger are still with conviction that transformative mediation is superior to facilitative mediation, as they believe that the latter has strayed from its original intent. They argue that facilitative mediation has drifted away from its fundamental principles of promoting self-determination and fostering effective communication.⁵⁸¹ They argue that facilitative mediators often prioritize predetermined outcomes for clients, which undermines the fundamental aim of mediation: to empower the parties involved. By focusing on specific results, these mediators may inadvertently hinder the potential for transformative shifts in recognition and agency among the disputants, thereby limiting the efficacy of the mediation process in fostering genuine ownership of solutions.⁵⁸²

Bush and Folger continue their argument that facilitative mediation mirrors the directive, top-down resolution strategies of traditional conflict intervention processes that it was intended to replace. This phenomenon occurs as it inadvertently constrains the parties' active participation

⁵⁸⁰ Anne Ardagh, "Transformative Mediation: The Opportunity and the Challenge" (1999) 2:1 ADR Bulletin at 4, online: Bond University <http://epublications.bond.edu.au/adr/vol2/iss1/1>

⁵⁸¹ Joseph Folger & Robert A Baruch Bush *supra* note 552 at 25-26.

⁵⁸² Bernard Mayer *supra* note 80 at 50

in the conflict,⁵⁸³ evoking characteristics similar to the evaluative mediation model that it seeks to challenge.⁵⁸⁴

iv). Narrative Mediation

The narrative approach to mediation underscores the profound influence of individuals' conflict narratives on their conduct during disputes. These narratives represent the personal accounts individuals construct regarding their relational histories. This approach is fundamentally rooted in a philosophical framework rather than merely the use of specific techniques.⁵⁸⁵ When a relationship has a history of conflict, addressing specific issues in the current dispute can be difficult because past narratives continue to shape the actions and perspectives of the parties involved.⁵⁸⁶

This phenomenon extends beyond interpersonal relationships and can also be observed in family dynamics, small groups, and within workplace or neighborhood settings. For example, these contentious narratives often heavily influence conflicts among siblings, co-workers, and neighbors. Likewise, tensions may emerge among members of diverse ethnic, religious, or national groups, as seen in the enduring conflicts between Russia and Ukraine, Israelis and Palestinians, the Igbo and Hausa-Fulani nations in Nigeria, and the conflict created by the residential school conundrum in Canada vis-à-vis the Aboriginal struggles in their ancestral land.

⁵⁸³ Bush & Folger *supra* note 552 at 21

⁵⁸⁴ *Ibid* at 101.

⁵⁸⁵ John Winslade & Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution*, 1st ed (San Francisco: Jossey-Bass, 2000) at 32.

⁵⁸⁶ Peter Bishop *supra* note 105 at 76.

These narratives profoundly shape perceptions, responses, and interactions, underscoring the complex and deeply rooted influence of past experiences on present conflicts.

Using the narrative approach, the mediator encourages parties to tell their personal account of the conflict (conflict stories) with the hope they would be able to produce an “alternate” story that will lead them to a resolution of their dispute.⁵⁸⁷ John Winslade and Gerald Monk developed a style of mediation grounded in post-modernist theory, which views conflict as socially constructed. This approach, known as narrative mediation, has its roots in Foucault's work on social constructivism⁵⁸⁸ and narrative therapy⁵⁸⁹ practices. As Winslade and Monk put it

In narrative mediation, storytelling is used as a metaphor and a technique to reframe the parties' relationship, allowing them to solve problems and develop new attitudes towards conflict. The process involves breaking the parties' cycle of conflict by deconstructing their negative "conflict-saturated" stories and collaborating to create a new story that is incompatible with their previous conflict cycle.⁵⁹⁰

In this approach, mediators do not seek to create a singular "objective" narrative. Instead, they recognize and value everyone's perspective as a reflection of their lived experience, working to pinpoint areas where differing viewpoints may intersect.⁵⁹¹ A crucial role of the mediator is to encourage the parties to reassess their rigid and negative interpretations of one another's actions.⁵⁹² The mediator fosters trust and facilitates discussions that externalize, rather than

⁵⁸⁷ *Ibid*

⁵⁸⁸ “Social constructionism” is a term used for introducing the awareness of how our ways of life are constantly socially developing and changing over time. The way we communicate with each other, how we get our needs met, how we organize ourselves, are all constructed relationally and are continually being redefined. Accessible at Milliken, B. (n.d.). “What is Social Construction Therapy? Social Construction Therapy”- Retrieved November 25, 2024, from <https://socialconstructiontherapy.com/what-are-social-construction-therapies.php>.

⁵⁸⁹ Tina Besley, "Foucault and the Turn to Narrative Therapy" (2002) 30(2) *British Journal of Guidance & Counselling* 125-143.

⁵⁹⁰ John Winslade & Gerald Monk *supra* note 583 at 1-15

⁵⁹¹ *Ibid* at 3

⁵⁹² Peter Bishop *supra* note 105 at 76

internalize, the conflict. This involves exploring the impact of the conflict on each party, deconstructing predominant narratives, and cultivating a shared understanding of both the conflict and its potential resolution.⁵⁹³

As identified by Winslade and Monk, narrative mediation has three distinct phases.⁵⁹⁴

The first phase is Engagement,⁵⁹⁵ during which the mediator focuses on establishing a strong relationship with the conflicting parties. This involves paying attention to the physical setting and the nonverbal behaviour displayed by all parties involved. Moreover, the mediator also considers the roles that both the mediator and the parties will assume as part of the mediation process.

The second phase⁵⁹⁶ involves Deconstructing the conflict-saturated story. Here, the mediator actively works to separate the conflicting parties from their perceptions and understandings of the conflict. This is achieved by undermining the certainties on which the conflict feeds and by inviting the parties to view the plot of the dispute from a different vantage point. The underlying assumption is that elements of cooperation, points of agreement, and mutual respect have been overlooked in the conflict-saturated story.

Finally, the third phase⁵⁹⁷ focuses on Constructing an alternate story. At this point, the mediator is occupied with crafting alternative, more preferred storylines for individuals who were

⁵⁹³ *Ibid*

⁵⁹⁴ Winslade & Monk *supra* note 583 at 58

⁵⁹⁵ *Ibid* at 62

⁵⁹⁶ *Ibid* at 72

⁵⁹⁷ *Ibid* at 82

previously engulfed in a conflict-saturated relationship. The goal is to develop a more cooperative attitude, which may be more critical than simply reaching an agreement.

This Part 4 has examined mediation orientations and styles in depth. It is clear that no single approach is universally applicable; while disputes may share similarities, they often require tailored methodologies. For example, divorce mediation can adopt various styles depending on the specific dynamics and complexities of the case at hand. Consequently, mediators must refine their skills in discerning the most suitable strategies to facilitate the process effectively.

3. Conclusion

I will conclude with Professor Randolph Lowry's analytical perspective on the mediator's role: -

Evaluation, in the context of assessing the dynamics of negotiation, is an essential preliminary step in facilitating the mediation process. A facilitator, positioned uniquely as a neutral party, evaluates the nuances of communication and employs various techniques to steer the dialogue towards resolution. This includes exploring specific accounts of past events, posing a range of questions to encourage the parties to reflect on different aspects of the case, probing for underlying interests, and fostering the exploration of potential solutions. All these actions illustrate the mediator's evaluative role, even if this evaluation remains primarily internal. The mediator, as a facilitator, assesses the parties involved, their positions, their perspectives, and the obstacles hindering resolution. Without evaluation, mediators would be unable to effectively utilize their role and the techniques inherent in the mediation process to guide parties towards a settlement.⁵⁹⁸

Part 5 will explore the challenges confronting mediation practice in Nigeria, with a particular emphasis on court-connected mediation. It will also highlight lessons that Nigeria can derive from the Canadian mediation framework, specifically the Ontario Mandatory Mediation Program. The section will conclude with recommendations for policy actions targeted at Nigerian decision-makers.

⁵⁹⁸ Randolph Lowry *supra* note 533 at 49-50

**PART 5: CHALLENGES OF MEDIATION PRACTICES IN NIGERIA AND TRANSFERABLE LESSONS
FROM CANADA TO OVERCOME THEM, RECOMMENDATIONS FOR POLICY REFORMS AND
PROCEDURAL CHANGES FOR MEDIATION IN NIGERIA**

1. Introduction

In Part 4, an extensive literature review was conducted. It explored various mediation approaches and typologies utilized by practitioners in the field. It noted that Nigeria's limited research hinders the development of mediation methodologies and has limited practitioner capacities in court-connected mediation. This is further compounded by the delayed integration of mediation into Nigeria's formal justice system. Apart from research challenges, two additional hurdles include judicial autonomy and the procedural framework of mediation. This Part will delve into these three challenges and examine how Nigeria can benefit from emulating the Canadian justice system. The focus will be on identifying transferable lessons from the Canadian system to enhance mediation practices and their potential adaptation within the Nigerian context.

2. Challenges of Mediation Practices in Nigeria and transferable lessons from Canada

In the context of my introduction in this Part, I mentioned that the main challenges facing mediation practices in Nigeria include a lack of research, insufficient judicial autonomy, and structural and procedural deficiencies in the mediation process. These issues have significantly hindered the development and effectiveness of mediation in Nigeria. While acknowledging that Canadian mediation practices also face challenges, the court-connected mediation system

described in this thesis is more advanced in Canada, benefitting from robust systemic support compared to Nigeria.

i). Absence of Judicial Autonomy affect the practice of mediation in Nigeria.

In a constitutional democracy and under the rule of law, judicial independence is a crucial component.⁵⁹⁹ The proper functioning of constitutionalism and the separation of powers relies on the assurance of judicial independence as guaranteed within the Constitution.⁶⁰⁰ Upholding the rule of law through established principles and regulations is essential, as it prevents the government from being subject to the discretion or whims of individuals.⁶⁰¹ This concept is consistent with John Locke's theory of a governmental structure that includes the legislative, executive, and judicial branches in order to prevent the concentration of power, absolute authority, and corruption.⁶⁰²

In this framework, the legislative arm is responsible for enacting laws, the executive arm for enforcing these laws, and the judicial arm for interpreting the laws, punishing violators, and ensuring each branch complies with the laws.⁶⁰³ The concentration of government powers in the hands of a single individual defines a dictatorship.⁶⁰⁴ This regrettably characterized Nigeria from

⁵⁹⁹ Ishmael Gwunireama, "The Executive and Independence of the Judiciary in Nigeria" (2022) *J Arts Human & Soc Studies* 1.

⁶⁰⁰ *Ibid*

⁶⁰¹ James A Grant, "The Ideals of the Rule of Law" (2017) 37:2 *Oxford J Legal Stud* 383.

⁶⁰² Louis Fisher, "The Unitary Executive and Inherent Executive Power" (2010) 12:2 *U Pa J Const L* 569

⁶⁰³ Ahmad Haruna Danmaigauta & Mohammed Bashir Tanko, "Judicial Review of Legislative Actions under the Constitution of The Federal Republic Of Nigeria 1999 (As Amended)" (2020) 1:3 *Intl J Comp L & Legal Philosophy* 1.

⁶⁰⁴ Ben O. Nwabueze, *The Presidential Constitution of Nigeria* (London, UK: C. Hurst; Enugu, Nigeria: Nwamife Publishers, 1982)

1966 to 1999 when the military suspended the country's constitutional democracy,⁶⁰⁵ and military leaders overthrew the rule of law.⁶⁰⁶ This era marked the beginning of the lack of judicial independence in Nigeria, more precisely reflected in Decree 24, which was later renamed the 1999 Constitution and transferred power to the democratically elected president by the military leader on May 29, 1999.

Autonomy, as defined by *Black's Law Dictionary*, pertains to self-government and independence.⁶⁰⁷ In the legal context of a nation, the judiciary comprises the entire court system, which is responsible for dispensing justice.⁶⁰⁸ The judiciary consists of two distinct entities: the bar, comprising advocates and legal practitioners, and the bench, consisting of judges. Both the bar and the bench are integral to the everyday functioning of the judiciary.⁶⁰⁹

The major role of an independent judiciary is to uphold the rule of law and maintain the supremacy of law. Essential tenets for a self-governing judiciary include guaranteeing judges' security of tenure, providing them with commensurable compensation, and ensuring access to sufficient funding.⁶¹⁰ In the Nigerian context, the Constitution of the Federal Republic of Nigeria

⁶⁰⁵ The first step a military junta does on assumption of power is to suspend all a nation's constitution and promulgate decree instead. The validly elected legislatures were sacked, and the provincial or supreme ruling council of the military made the law.

⁶⁰⁶ Nigeria, Military Coups (1966-1999). Six major coups were carried out from 1966 to 1999 in Nigerian State. Two coups happened in 1966 alone: the January 15 and July 29, 1966.

⁶⁰⁷ Bryan A Garner, ed, *Black's Law Dictionary*, 12th ed (St Paul, Minn: Thomson West, 2024) at 165. Applying this concept to the judicial branch, we can understand judicial autonomy as the independence and self-governance of the judiciary within the legal system. Judicial autonomy likely encompasses the following key aspects (i) independence from other branches of government (ii) freedom to make decisions without external influence (iii) Self-governance in terms of internal operations and procedures, and (iv) Protection from political or other pressures that could compromise impartiality

⁶⁰⁸ Oluseyi Ajiboye, "The Feasibility of Judicial Autonomy In The Face of The Nigerian Judiciary Reality" (2021) Social Science Research Network, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3924899.

⁶⁰⁹ *Ibid*

⁶¹⁰ Supreme Court of Canada, "Judicial Independence" (2021), online: <https://www.scc-csc.ca/about-apropos/work-travail/independence-independance/> [accessed March 8, 2025]. See also, Constitutional Studies, "Judicial

1999 (as amended) clearly delineates the separation of powers.⁶¹¹ The legislative powers are vested in the National Assembly. According to the provision;-

(1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives. (2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative list;- set out in Part I of the Second Schedule to this Constitution. The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.⁶¹²

Also, the executive authority is vested in the President. It provides that;-

Executive Powers; (1) Subject to the provisions of this Constitution, the executive powers of the Federation- (a) shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and (b) shall extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws. The executive power at the State is vested in the Governors while at the Local Government (Counties) is vested in the Local Government Chairman.⁶¹³

And the judicial powers are entrusted to the Courts. Accordingly,

(1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation. (2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.⁶¹⁴

Independence" (online: Constitutional Studies <https://www.constitutionalstudies.ca/ccs-term/judicial-independence/> accessed March 8, 2025). Also, Library of Parliament, *Legislative Summary of Bill S-13: An Act to amend the Interpretation Act and to make related amendments to other Acts* (2023) Library of Parliament-Research Publication, online: https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/381LS513E.

⁶¹¹ *Constitution of the Federal Republic of Nigeria, 1999, as amended by Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010, Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010, Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010, Constitution of the Federal Republic of Nigeria (Fourth Alteration) Act, 2017, and Constitution of the Federal Republic of Nigeria (Fifth Alteration) Act, 2023*

⁶¹² CFRN, 1999, s. 4

⁶¹³ *Ibid* s. 5

⁶¹⁴ *Ibid* s. 6

The three branches of government—executive, legislative, and judicial—are each of equal significance within the framework of governance. Their structures are intentionally designed to establish a system of checks and balances, ensuring that no single branch exercises unilateral power over the others.⁶¹⁵ However, the judiciary frequently contends with challenges arising from encroachments on its authority and functions by other branches of government. This situation has substantial ramifications for mediation practices within the Nigerian legal framework, particularly concerning mediations that take place within the court system.

Kayode Eso⁶¹⁶ emphasized that true judicial independence requires the courts and judiciary to be insulated from executive interference, which is crucial for them to effectively fulfill their constitutionally-mandated functions. He argued that safeguarding this autonomy is essential to uphold the rule of law and maintain the integrity of the judicial process. According to Eso,

The ideal court system should be independent of the executive branch, free from political, ethnic, or religious influences. It should also be well-funded to prevent it from becoming reliant on the executive branch for financial support. The courts should be staffed with highly qualified individuals who are motivated by the honor and dignity of the office, as well as attractive working conditions, rather than by factors such as patriotism. Additionally, the courts should be capable of delivering fair verdicts, free from ignorance, corruption, favoritism, prejudice, fear, or external influence.⁶¹⁷

⁶¹⁵ Francisca O Anyim-Ben, Samuel N Okereke & Ngozi Chijioke, "The Doctrine of Separation of Powers and Checks and Balances in the Nigerian Executive-Legislative Relationship" (2017) 9:1 Nnamdi Azikiwe Journal of Philosophy. See also, Shikyil Sylvester, "Legislative–Executive Relations in Presidential Democracies: The Case of Nigeria" in Charles M. Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press, Year of Publication) [<https://oxcon.ouplaw.com/display/10.1093/law/9780198759799.001.0001/law-9780198759799-chapter-6?prd=OXCON>] [Accessed March 8, 2025].

⁶¹⁶ For information on Kayode Eso see, "Samuel Obakayode 'Kayode' Eso" (30 November 2024), online: *Wikipedia*, https://en.wikipedia.org/wiki/Kayode_Eso. Eso served as the founding chair of the Negotiation and Conflict Management Group (NCMG), a prominent non-governmental organization that played a key role in establishing Africa's first court-connected mediation and alternative dispute resolution (ADR) system, known as the Lagos State Multi-Door Courthouse. For more details, see Kehinde Aina Blackson's "Twenty One 1996-2017" (2024) on page 9, available online at Aina Blankson <https://www.ainablankson.com/wp-content/uploads/2024/06/twenty-one.pdf>.

⁶¹⁷ Ishmael, *supra* note 599 at 60.

Instances of Executive Interferences in Judicial Arm in Nigeria

A self-governing judiciary flourishes in an environment of 'uncontaminated democracy' and the rule of law.⁶¹⁸ What would happen if the executive were to withhold development funds intended for the judiciary and excessively interfere in the appointment of judges, ultimately acquiring the illegitimate authority to hire and dismiss judges at will? The consequences would be palpable. In 2014, there was a significant dispute between the Executive Governor of Rivers State and the National Judicial Council (NJC) over the appointment of a successor to the retiring Chief Judge of the State. This resulted in the gates of the Rivers State High Court being barricaded and court activities disrupted.⁶¹⁹ Both parties claimed authority under the Constitution. This escalated the conflict.⁶²⁰

The elevation of judicial officers to higher positions raises significant concerns regarding the integrity of the selection process. Given that the executive branch is responsible for nominations, there exists a potential for manipulation that could compromise the autonomy of

⁶¹⁸ April Dawn Wilson- "Irving Babbitt on the Individual and Political Imagination" (PhD Dissertation, Purdue University, 1992) [unpublished]

⁶¹⁹ Timothy Enietan-Matthew, "CJN Slams Amaechi over closure of courts in River State" (8 December 2014), online: The Daily Post: <https://dailypost.ng/2014/12/08/cjn-slams-amaechi-closure-courts-rivers-state/> The CJN was quoted thus: "But the violation of the principle of checks and balances by the state governor in Rivers State as enshrined in the constitution for the appointment and disciplining of erring chief judges or judges is equally unacceptable. Seniority is part and parcel of the legal profession. To just appoint a chief judge from any position without recourse to seniority arrangement is an invitation to anarchy in the system, just as we are now witnessing in Rivers State. Television Continental (TVC), "Similar incidence reported for Osun State" (14 February 2024), online: TVC News <https://www.tvcnews.tv>, reported by Rafiu Hammed (correspondent). The closure started on 22 November 2023. It began with the purported suspension of the state Chief Judge, Adepele Ojo, by the State Government followed by the industrial action embarked upon by the Judiciary Staff Union over their welfare.

⁶²⁰ J P Sofiri, "Election Wars in Nigeria: The Case of Rivers State" (2020) 7:9 Academic J Current Research 1.

the Judiciary. It is essential to maintain rigorous oversight to safeguard judicial independence in this context.⁶²¹

The elevation of Hon. Justice Ayo Salami (now retired) from the presidency of the Nigerian Court of Appeal to the Supreme Court of Nigeria in 2011 serves as a noteworthy example. This promotion sparked controversy, as Justice Salami alleged that it was a retaliatory move due to his refusal to sway the decisions of the Governorship Election Petition Tribunals in favor of the ruling party People's Democratic Party (PDP).⁶²² As a result, the National Judicial Council (NJC) recommended his compulsory retirement in the same year. In May 2012, the National Judicial Council reversed its decision and recommended his immediate reinstatement but was disregarded by the Federal Government of Nigeria. Justice Salami later retired in 2013.⁶²³

Another notable incident involves President Muhammadu Buhari's (the immediate past executive president of Nigeria) sudden suspension of the former Chief Justice of Nigeria, Honourable Justice Walter Onnoghen in 2019,⁶²⁴ and the subsequent swearing-in of Justice Mohammed Tanko as the Acting CJN and later confirmation as the CJN.⁶²⁵ Onnoghen later retired. These actions were widely seen as a direct affront to the autonomy and sanctity of the Judiciary in Nigeria.

⁶²¹ Sylvester Udemzue, "Legitimate Confines of Powers of the National Judicial Council in Appointment of Substantive Chief Judges for States in Nigeria: Gombe State as a Case Study" (2021) SSRN Scholarly Paper ID 3889087, online: <https://papers.ssrn.com/abstract=3889087>

⁶²² "Ayo Salami" (last edited 30 November 2024), online: *Wikipedia* https://en.wikipedia.org/wiki/Ayo_Salami

⁶²³ *Ibid*

⁶²⁴ Walter Samuel Nkanu Onnoghen, GCON, "Walter Onnoghen" in *Wikipedia* (last edited 30 November 2024), online: https://en.wikipedia.org/wiki/Walter_Onnoghen.

⁶²⁵ *Ibid*. The jurist was appointed acting CJN on 25 January 2019. After over six months in an acting capacity, Justice Ibrahim Tanko Muhammad was sworn in as the substantive 18th Chief Justice of Nigeria (CJN) by President Muhammadu Buhari on 24 July 2019 at the Presidential Villa, Abuja.

Let me round off the discussion on executive interference in Judicial arm with the high-level constitutional infringement case in Kogi State Nigeria for a decade. This was succinctly put by the former Chairman of the National Human Rights Commission of Nigeria (“the NHRC”) below.

In early April 2008, the Kogi State House of Assembly, in defiance of a state High Court ruling, passed a resolution urging the State Governor to remove the incumbent Chief Judge, Umaru Eri. Acting on this resolution, then-acting governor Clarence Olafemi announced Eri’s dismissal on April 2, 2008, appointing Judge Sam Ota as his replacement. Umaru Eri contended that his termination was retaliation for refusing to facilitate bribery negotiations with the election petition tribunal on behalf of the governor involved in a disputed election. Subsequently, on May 16, 2008, High Court Judge Alaba Ajileye ruled to overturn the dismissal, reinstating Eri. A decade later, on June 18, 2019, Ajileye presided over a case that reminiscently echoed the issues from his earlier ruling. The 2019 claimant was another Chief Judge of Kogi State, Nasir Ajanah, accompanied by his Chief Registrar, Yahya Adamu. The defendants included the Kogi State House of Assembly, its Speaker, and the serving Governor, Yahaya Bello. In November 2018, under the directive of Governor Yahaya Bello, the state's secretary wrote to Chief Judge Ajanah requesting the payroll of judicial staff for the ongoing civil service pay parade, despite the governor being a defendant in the judicial proceedings before Ajanah. The Chief Registrar's response clarified the judiciary's status as a co-equal, self-accounting branch of government overseen by the State Judicial Service Commission. In response to perceived misconduct, Governor Bello escalated his actions by formally requesting Walter Onnoghen, the then Chief Justice of Nigeria and Chair of the National Judicial Council (NJC), to investigate the Chief Judge and mandate his suspension while appointing an Acting Chief Judge. Subsequently, Gov. Bello marginalized Chief Judge Ajanah, prohibiting him from attending official state events. On May 21, 2020, when Ajanah attended the swearing-in ceremony for the new Grand Khadi of Kogi State, he was informed by the Chief Security Officer that the governor had ordered his exclusion from such functions. During the COVID-19 pandemic, Ajanah was effectively rendered *persona non grata* in Kogi State, leading to his internal displacement in Abuja, where his living conditions were precarious. Tragically, while in hiding, Ajanah contracted COVID-19 and succumbed to the illness in isolation in Gwagwalada, Federal Capital Territory, on June 28, 2020.⁶²⁶

The examples provided demonstrate that unwarranted interference by the executive branch with the autonomy and independence of the Judiciary can destabilize the justice system, impede growth and development, deprive it of funds, and dismiss dedicated judicial officers who seek to promote collaborative law through mediation, thereby improving the timeline for case resolution. In Nigeria, financial security and judiciary institutional independence are lacking. The executive branch continues to control the necessary funding, which ideally should be allocated as

⁶²⁶ Chidi Anslem Odinkalu, "Yahaya Bello and a complicit judiciary" (April 2024), online: TheCable <www.thecable.ng/yahaya-bello-and-a-complicit-judiciary/>[1].

a first-line charge from the Federation Account through an annual appropriation bill, providing the Judiciary with the resources it needs.

The Nigeria Supreme Court Mediation Centre, established in 2016, has yet to mediate any cases successfully.⁶²⁷ These challenges stem from financial constraints and a lack of institutional independence. Former Chief Justice Walter Onnoghen was a proponent of mediation, pledging to enhance the viability of the Supreme Court Mediation Centre and advocating for non-adversarial dispute resolution among states and judges.⁶²⁸ The President Buhari-led executive purportedly suspended Onnoghen.⁶²⁹ According to Onnoghen,

Judges are encouraged to promote Alternative Dispute Resolution (ADR) mechanisms in cases that are less contentious, as this plays a significant role in alleviating congestion in our courts. It is essential to recognize that the implementation of ADR methods in the courtroom is also a component of the quarterly performance evaluations for Judges.⁶³⁰

The approval of the Executive on judiciary policies limits their independence. Some policies formulated by the judiciary for effective justice delivery must be approved by the president or governor, who heads the executive branch, before they can be implemented. For example, establishing the Multi-Door Court by the Ondo State Judiciary and the Abuja Judiciary required President and Governor approval. While new program within the judiciary either requires new law or amendment and funding needs other arms of government to agree, as this may be true of Canadian jurisdiction, Nigeria situation is dire and mostly arbitrary. The same

⁶²⁷ Kehinde Aina *supra* note 616 at 27 and 40. Also, Kehinde Aina *supra* note 33 at 13 and 14

⁶²⁸ Emilia Onyema & Monalisa Odibo, "How Alternative Dispute Resolution Made a Comeback in Nigeria's Courts" (2017) African Research Institute Counterpoints at 4.

⁶²⁹ Jude Odigbo & Ernest Udalla, "Politics of Regime Survival in Nigeria's Fourth Republic (1999–2019)" in *Anonymous Power* (Singapore: Palgrave Macmillan, 2022) 419.

⁶³⁰ Walter Samuel Nkanu Onnoghen, *Keynote Address Delivered By The Honourable, The Chief Justice Of Nigeria And Chairman Board Of Governors, National Judicial Institute*, (30 May 2018) (Opening Ceremony of the 2018 National Seminar on Construction Law for Judges) (Aloysius Katsina-Alu Seminar Hall, National Judicial Institute).

applies to all expenses for overheads. This means that the judiciary must seek approval from the executive branch whenever funding is needed. This is not the case in advanced democracy like Canada. The power of approval allows the Executive to assess the impact of such policies on their branch of government and decide whether to approve them. This enables the Executive to interfere with the independence of the judiciary in Nigeria.

Unfortunately, too, even when the enabling law or practice direction recommends that ADR Judges be appointed to supervise court-connected mediation in those jurisdictions, the executive does not allow the Chief Judge to have final say in such appointments. Sometimes, they end up appointing a judge who is adverse to mediation or lacks proper administrative training to manage such ventures. Lacking financial autonomy makes it difficult for the Multi-Door Courthouses in Nigeria to flourish. They lack requisite resources to meet their overheads. This also include paucity of funds for online mediation to meet the needs of those who may not be available in-person to attend mediation sessions.

Also, the Multi-Door Courthouses in both High Court in Abuja and the one in Ondo State has only one centre each at the Capital city; in the municipality of Abuja and Akure. Lack of funds did not allow them establish offices manned by well-trained personnel in ADR and mediation in each county. Abuja has six counties while Ondo State has eighteen counties. Hence, if a matter is referred for mediation or a party wishes to walk-in, they must go to the main and only one centre in Abuja or Akure. This means that, most judges in other counties where Multi-Door Courthouse does not have branches may choose to go through the trial and not refer cases suitable for mediation because there are structure or staff to assist.

The Nigerian Constitution seems to have provisions that looks likes as though they guarantee judicial autonomy. Let us consider few of such provisions and how that same is defeated by further, constitutional provisions.

(1) The State social order is founded on ideals of Freedom, Equality and Justice; (2) The independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.⁶³¹

(2e) The judicial powers vested in accordance with the foregoing provisions of this section – shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;⁶³²

The Nigerian Constitution plays a crucial role in ensuring and upholding the autonomy, fairness, and integrity of the courts of law. Section 17(1) (2e) above falls within the fundamental objectives and directive principles of state policy which provide a solid foundation for the legal system. It is important to note that the independence of the judiciary, as outlined in Chapter II of the Constitution, is non-justiciable and cannot be enforced according to section 6(6)(c) of the same Constitution. In the case of *A.G. Ondo State v. A.G. Federation*,⁶³³ the Supreme Court ruled that while the Fundamental Objectives and Directive Principles of State Policy are non-justiciable and cannot be enforced through legal means, blatant disregard of these principles would be considered a failure of a state organs.

On the budgetary allocation for the Judiciary, there is incongruency in the Constitution which allows the executives to plan the budget of the Judiciary and determine what they think.

⁶³¹ CFRN, 1999, s. 17(1)

⁶³² *Ibid* s. 6(6)(c)

⁶³³ *Attorney-General of Ondo State v. Attorney-General of the Federation* (2002) 9 NWLR (Pt. 772) 222

This may make unscrupulous President or Governor to starve the judiciary which they think are not doing their biddings. At the Federal Level, the Constitution provides that,

81(3) The amount standing to the credit of the – (a) Independent National Electoral Commission, (b) National Assembly, and (c) Judiciary, in the Consolidated Revenue Fund of the Federation shall be paid directly to the said bodies respectively; in the case of the Judiciary, such amount shall be paid to the National Judicial Council for disbursement to the heads of the courts established for the Federation and the States under section 6 of this Constitution.⁶³⁴

Also, for the for State government,

121(3) Any amount standing to the credit of – (a) a State House of Assembly of a State in the Consolidated Revenue Fund of the State shall be paid directly into the account of the Assembly; and (b) the Judiciary of a State in the Consolidated Revenue Fund of the State shall be paid directly to the heads of the courts concerned those sums for the purposes specified therein.⁶³⁵

Following on from the above Constitutional provisions, in February 2013, a prominent Senior Advocate of Nigeria (SAN)⁶³⁶, Olisa Agbakoba, initiated legal action against the Attorney General of the Federation, the National Judicial Council, and the National Assembly, driven by his unwavering commitment to ensuring the financial autonomy of the judiciary. Central to his legal challenge was the longstanding practice by the President and governors of appropriating the judiciary's budget through appropriation bills, rather than treating it as a first-line charge to be paid directly to the judiciary. Agbakoba contended that this method contravened the amended provisions of the 1999 Constitution of the Federal Republic of Nigeria.⁶³⁷

⁶³⁴ *Ibid* s. 81(3)

⁶³⁵ CFRN, 1999, s. 121(3)

⁶³⁶ A Senior Advocate of Nigeria (SAN) is an equivalent to Queen Counsel (QC)

⁶³⁷ CFRN, 1999, s 81(3) and 121(3). These sections establish financial autonomy for both Federal and State Judiciaries. This autonomy mandates that funds allocated to the judiciary from the Consolidated Revenue Fund must be paid directly to the heads of courts, thereby ensuring independence from executive control. Key Legal Cases: Judiciary Staff Union of Nigeria vs National Judicial Council & Governors of the 36 States (Suit No: FHC/ABJ/CS/667/13); Olisa Agbakoba vs Federal Government, the NJC & National Assembly (Suit No: FHC/ABJ/CS/63/2013); and Olisa Agbakoba vs Attorney General, Ekiti State & 2 Others (Suit No: NAD/56/2013) These cases have reinforced the judiciary's right to financial independence, emphasizing that any funds designated for judicial use must bypass the executive branch to prevent undue influence and ensure functional autonomy

On the 22nd of May 2020, President Muhammadu Buhari signed Executive Order 10, a significant move to ensure the financial autonomy of the legislature and judiciary at the state level in Nigeria.⁶³⁸ This executive order grants the accountant general of the Federation the authority to deduct funds due to the state legislature and judiciary from the state's monthly allocation at the source. The President's Executive Order was later quashed by the Supreme Court of Nigeria on the grounds that it is unconstitutional.⁶³⁹ Before this executive order, the Ado Ekiti branch of the Nigerian Bar Association (NBA) emphasized the importance of all 36 state governors complying with the provisions of the 1999 constitution regarding the critical issue of complete autonomy.

Critics of President Buhari's leadership have pointed to several events that highlight significant challenges within the judicial system. They have underscored the controversy surrounding the introduction of a new naira note, along with subsequent Supreme Court decisions that the President altered.⁶⁴⁰ Additionally, they noted the removal of Chief Justice of

The courts have consistently upheld these provisions, arguing that financial dependence on the executive undermines judicial independence and can lead to a constitutional crisis. This constitutional framework aims to protect the judiciary from external pressures, thereby allowing it to operate without fear or favor in its adjudicative functions.

⁶³⁸ Federal Ministry of Information and National Orientation. "President Buhari Signs Executive Order on Financial Autonomy of State Legislature, Judiciary" (22 May 2020), online: Federal Ministry of Information and National Orientation <https://fmino.gov.ng/president-buhari-signs-executive-order-on-financial-autonomy-of-state-legislature-judiciary/>.

⁶³⁹ Ikechukwu Nnochiri, S'Court voids Buhari's Executive Order 10, declares it illegal" (25 February 2022), online: Vanguard <www.vanguardngr.com/2022/02/scourt-voids-buharis-executive-order-10-declares-it-illegal/>. See also, Raymond Nkannebe, "The Unconstitutionality of Muhammadu Buhari's Executive Order 10" (28 August 2020), online: *Legalpedia* <https://legalpediaonline.com/unconstitutionality-of-muhammadu-buharis-executive-order-10/>.

⁶⁴⁰ M Ozekhome. (2023, February 17). Naira notes: Why Buhari can't overrule Supreme Court order. *Vanguard*. <https://www.vanguardngr.com/2023/02/naira-notes-why-buhari-cant-overrule-supreme-court-order-ozekhome/>. The statement partly reads, "Buhari, in his broadcast on Thursday, February 16, 2023, unilaterally varied the apex court's extant order of maintenance of status quo, by directing the CBN Governor to the effect that 'the old N200 banknotes be released back into circulation...to circulate as legal tender with the new N200, N500 and N1000 bank notes for 60 days...' "The President then issued a dicta, more in the form of a military Decree, that, 'in line with section 20 (3) of the CBN Act, 2007, all existing old N1000 and N500 notes remain redeemable at the

Nigeria Onnoghen, which occurred without adherence to proper procedures,⁶⁴¹ and the unprecedented protests by Supreme Court Justices, driven by their concerns over poor executive governance and insufficient funding.⁶⁴² It is argued that granting greater autonomy to the judiciary might have mitigated such issues.

The establishment of a strong mediation practice within the court system often becomes a secondary priority when the judiciary is facing financial constraints. Many states in Nigeria, including the capital city of Abuja, have only recently set up Multi-Door Courthouses or Mediation Centers in reaction to urgent needs, rather than as a result of a thoughtful, proactive strategy. These Mediation Centers require better funding, as the primary court processes and administration are experiencing financial strain.

As a result, the aspiration to implement functional court-connected mediation, complete with well-trained judicial officers, dispute-resolution officers, and neutrals, and the introduction of an online mediation platform to reach a wider audience and raise awareness about the mediation process, remains unattainable due to the judiciary's lack of funding priority. In terms of institutional autonomy, the head of the court can only make decisions for the courts after

CBN and designated prints'. "This order is a clear violation of and disobedience to the existing order of the apex court which had already maintained the status quo ante bellum of all parties involved in the Naira re-design dispute.

⁶⁴¹ Odigbo, *supra* note 629

⁶⁴² Nigeria's Supreme Court Engulfed in Welfare Complaints Row" (21 June 2022), online: Al Jazeera <https://www.aljazeera.com/news/2022/6/21/nigerias-supreme-court-engulfed-in-welfare-complaints-row>. In the leaked memo, 14 Justices out of the existing 16 complained about several welfare and logistical issues including a lack of research assistants and inadequate accommodation. Available at <https://www.aljazeera.com/news/2022/6/21/nigerias-supreme-court-engulfed-in-welfare-complaints-row>

consulting the executive branch for potential financing of initiatives, including appointing judges to new roles such as ADR Judge appointments. Fortunately, this is not the case in Canada.

The Constitution Act of 1867 makes provisions for the independence of the judiciary.⁶⁴³ It states the procedures for the appointment of judges,⁶⁴⁴ security of tenure⁶⁴⁵ and the remuneration of judges including salaries and allowances.⁶⁴⁶ The staffing of the superior courts (including judicial salaries) is to also be the responsibilities of Parliament⁶⁴⁷ while the Parliament of Canada also takes charge of making provisions for the funding of the general court of appeal (the Supreme Court of Canada).⁶⁴⁸ The combinations of these provisions reveals that that the Canadian judiciary is well funded when compared to the Nigerian Courts.

The place of the Canadian parliament and the executive in relations to the Canadian courts is only to the extent of maintaining checks and balances. They do not intermeddle with the administration of the courts including their financial autonomy as it is the case in Nigeria. While it may not have been expressly stated that the courts or judiciary in Canada is independence, deductions from the constitutional provisions reveal that, it is, especially its institution and finances being derived as the first line charge from the Consolidated Revenue Fund at both Federal and the provinces.

⁶⁴³ *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 96-101*

⁶⁴⁴ *Constitution Act, 1982, Ibid s. 96*

⁶⁴⁵ *Constitution Act, 1982, Ibid s. 99*

⁶⁴⁶ *Constitution Act, 1982, Ibid s. 100*

⁶⁴⁷ *Ibid*

⁶⁴⁸ *Constitution Act, 1982, s. 101*

The table below shows a five-year budgetary allocation to the judiciary in Nigeria and Canada.

Year	Nigeria (billion naira= USD)	Canada \$= USD
2024	342bn ⁶⁴⁹ = 213,750,000	759,167,979 ⁶⁵⁰ = 527,199,985
2023	150bn ⁶⁵¹ = 182,926,829	880,650,875 ⁶⁵² = 652,333,981
2022	120bn ⁶⁵³ = 146,341,463	850,054,715 ⁶⁵⁴ = 639,138,883
2021	110bn ⁶⁵⁵ = 266,343,825	810,582,934 ⁶⁵⁶ = 643,319,788

⁶⁴⁹ Lawyard, "FG Increases 2024 Judiciary Budget From N165bn to N342bn" (2 January 2024), online:

Lawyard <https://www.lawyard.org/news/fg-increases-2024-judiciary-budget-from-n165bn-to-n342bn/>

⁶⁵⁰ Office of the Commissioner for Federal Judicial Affairs Canada, "Departmental Results Report 2022-2023" (last modified 2 October 2024), online: Office of the Commissioner for Federal Judicial Affairs

Canada_ - <https://www.fja.gc.ca/publications/dpr-rmr/2022-2023/drr-rrm-eng.html?pedisable=true>.

⁶⁵¹ Onozure Dania, "How far can judiciary's N150bn budget go?" (17 November 2022), online: Punch Newspapers <https://punchng.com/how-far-can-judiciarys-n150bn-budget-go/>.

⁶⁵² Department of Justice Canada, "2. 2023-2024 Main Estimates" (2 October 2024), online: Government of Canada <https://www.justice.gc.ca/eng/trans/bm-mb/other-autre/estimates24-budget24/estimates-budget.html>.

⁶⁵³ BudgIT, "2022 Proposed Budget Analysis" (December 2021), online (pdf): BudgIT <https://yourbudgit.com/wp-content/uploads/2021/12/2022-PROPOSED-BUDGET-ANALYSIS.pdf>.

⁶⁵⁴ Department of Justice Canada, "2. 2023-2024 Main Estimates" (last modified 24 August 2023), online: Government of Canada <https://www.justice.gc.ca/eng/trans/bm-mb/other-autre/estimates24-budget24/estimates-budget.html>, Department of Justice Canada, "2. 2023-2024 Main Estimates" (last modified 27 September 2023), online: Government of Canada <https://www.justice.gc.ca/eng/trans/bm-mb/other-autre/estimates24-budget24/estimates-budget.html>. and <https://www.fja.gc.ca/publications/dpr-rmr/2022-2023/drr-rrm-eng.html?pedisable=true>

⁶⁵⁵ BudgIT, "2021 Budget Analysis (Proposed)" (December 2020), online (pdf): BudgIT <https://yourbudgit.com/wp-content/uploads/2020/12/2021-Budget-Analysis-Proposed.pdf>.

⁶⁵⁶ Canada, Department of Justice, "2. 2023-2024 Main Estimates" (last modified 2 October 2024), online: Government of Canada <https://www.justice.gc.ca/eng/trans/bm-mb/other-autre/estimates24-budget24/estimates-budget.html>. and Canada, Office of the Commissioner for Federal Judicial Affairs,

2020	110bn ⁶⁵⁷ = 279,187,817	757,946,457 ⁶⁵⁸ = 565,631,684
Total(USD)	1,088,549,934	3,027,624,321

NB: For the exchange rate of Nigeria's naira to USD, I used the following rates: 1600 in 2024, 820 for both 2023 and 2022, 413 in 2021, and 394 in

2020. As for the Canadian CAD to USD, I referenced rates of 1.44 in 2024, 1.35 in 2023, 1.33 in 2022, 1.26 in 2021, and 1.34 in 2020

As of August 2024, Nigeria's population is 233,207,982,⁶⁵⁹ while Canada's population is 39,784,527.⁶⁶⁰ Nigeria's population is five times that of Canada's. Despite this, Canada, with its smaller population, has more provisions for its courts compared to Nigeria. The Nigerian judiciary's funding disparity is primarily influenced by the exchange rate, which impacts the availability of funds. In 2020, although the budget in Naira was the lowest, it ranked the highest when converted to US dollars. The government often emphasizes the record-high budgetary provisions in Naira for the current year, 2024, without considering its value in dollars.

The need for more funds for the Nigerian judiciary poses challenges in making adequate provisions for Multi-Door Courthouses, which are integral to court-connected mediation in Nigeria. To address this, the judiciary must prioritize training for neutrals to ensure they possess

"Departmental Results Report 2022-2023" (2023), online: Office of the Commissioner for Federal Judicial Affairs <https://www.fja.gc.ca/publications/dpr-rmr/2022-2023/drr-rrm-eng.html?pedisable=true>.

⁶⁵⁷ YourBudget, "2020 Approved Budget Analysis" (2020), online (pdf): YourBudget <https://yourbudget.com/wp-content/uploads/2020/01/2020-Approved-Budget-Analysis.pdf>

⁶⁵⁸ Canada, Treasury Board of Canada Secretariat, "2020–21 Estimates" (last modified 3 March 2020), online: Government of Canada <https://www.canada.ca/en/treasury-board-secretariat/services/planned-government-spending/government-expenditure-plan-main-estimates/2020-21-estimates.html>. and Office of the Commissioner for Federal Judicial Affairs Canada, "Departmental Results Report 2022-2023" (last modified 2 October 2024), online: Office of the Commissioner for Federal Judicial Affairs Canada <https://www.fja.gc.ca/publications/dpr-rmr/2022-2023/drr-rrm-eng.html?pedisable=true>.

⁶⁵⁹ Worldometers, "Nigeria Population (Live)" (2024), online: Worldometers <https://www.worldometers.info/world-population/nigeria-population/>. See also United Nations Population Fund. "Nigeria - Overview." World Population Dashboard. Accessed December 1, 2024. <https://www.unfpa.org/data/world-population/NG> which put the current population at 229.2 million.

⁶⁶⁰ Worldometers, "Canada Population (Live)" (2024), online: Worldometers <https://www.worldometers.info/world-population/canada-population/>.

the necessary skills. Moreover, judiciary staff, dispute resolution officers, and the panel of neutrals need to know which tools to utilize to meet the needs of the involved parties.

This low budgetary provisions for the Judiciary are ubiquitous in Nigeria. The governors of each state have not allowed the judiciary under them to thrive. The tool they deploy is poor funding. And because the Judiciary does not have autonomy, it makes it hard for it to get funding directly from the consolidated revenue fund account. Below is the table for Ondo state judiciary (ODSJ) budget for five years.

Year	ODSJ Nigeria (billion naira= \$)	Mediation Program / MDC
2020	5,771,623,828.56 ⁶⁶¹ =14,648,791.44	10,500,000= 26,649.75
2021	4,677,131,078.76 ⁶⁶² =11,352,259.90	9,262,500= 22,481.80
2022	4,799,132,370.76 ⁶⁶³ = 5, 852,600.45	19,000,000 = 23,170.73
2023	9,113,151,113.28 ⁶⁶⁴ =11,113,598.92	23,000,000 = 28,048.78
2024	14,480,102,269.77 ⁶⁶⁵ = 9,050,063	72,000,000 = 45,000

⁶⁶¹ Ondo State of Nigeria. (2020). Overall Summary 2020. Administration of Justice: Online: https://www.ondobudget.org/year_budget/year_2020/overall%20summary%20page%20-%20Copy.pdf

⁶⁶² Ondo State, Nigeria. *Ondo State Approved Budget, 2021* (2021) at 136. Online: https://budgetpedia.ng/wpfd_file/2021-ondo-state-approved-budget/

⁶⁶³ Ondo State Government, "2022 Budget Overall Summary" in *Ondo State 2022 Budget* (Ondo State, Nigeria: Ondo State Government, 2022) at 27, online: Ondo State Government https://www.ondobudget.org/year_budget/year_2022/all%20summaries.pdf

⁶⁶⁴ Ondo State Government, "Ondo State 2023 Approved Budget" (2023) at 394, online: Ondo State Budget https://www.ondobudget.org/year_budget/year_2023/Final%20Ondo%20State%20FY%202023%20Budget%20-%20Publication%20Version.pdf.

⁶⁶⁵ Government of Ondo State, "2024 Budget Performance Report" (2024), online: Ondo State Budget Office https://ondobudget.org/materials/2024_ONDO_STATE_SECOND_QUARTER_BPR

In Ontario, the funding available for the courts is mind-blowing when compared to what was provided in Nigeria taking Abuja and Ondo into consideration. Just as was the case while computing the budgetary provisions for Ondo in which I picked the total figures that went into the Administration of justice and pined out the paltry provisions available for mediation, I will be picking the total sum allocation for Ontario in the same manner owing to the difficulty of identifying which one was spent on mediation. Insomuch the mediation is a court-connected, and the mediation built along the trial process, it is believed the budgetary allocation for the court will impliedly impact the mediation program.

Year	Ontario Justice Ministry CAD=USD	0.1819% for mediation (in USD)
2020	1,849,911,201 ⁶⁶⁶ =1,380,530,747	2,484,855
2021	1,816,009,564 ⁶⁶⁷ =1,441,277,432	2,594,299
2022	1,834,566,314 ⁶⁶⁸ =1,379,373,168	2,482,872
2023	1,919,160,714 ⁶⁶⁹ =1,421,600,529	2,558,881
2024	Not available	

⁶⁶⁶ Ontario, Ministry of the Attorney General, "Published Plans and Annual Reports 2023–2024: Ministry of the Attorney General" (2023), online: Government of Ontario <https://www.ontario.ca/page/published-plans-and-annual-reports-2023-2024-ministry-attorney-general>.

⁶⁶⁷ *ibid*

⁶⁶⁸ *ibid*

⁶⁶⁹ *ibid*

It is obvious that there is much more funding for the Ontario mediation program when compared to Abuja and Ondo.⁶⁷⁰ Nigeria has much work to do to match up the commitment and deliberate effort of the Ontario government to promote justice through mediation. The commitment here can be founded on the consciously ensuring judiciary is autonomous and ensuring they have unimpeded funds to executes its functions. This includes building capacity for the Mandatory Mediation Program through training and infrastructure and maintaining an effective roster of mediators/neutrals.⁶⁷¹

ii). Paucity of Legal Research in Mediation

Any activity geared towards the attainment of new discovery or knowledge can be describe as research.⁶⁷² Ekokoi Solomon, while citing Vibhute and Anynalem, describe legal research as the step-by-step inquiries towards “the state of the law”, with a primary purpose of advancing the law.⁶⁷³ A comprehensive understanding of legal matters, particularly the implementation of mediation and its reception among stakeholders such as lawyers and judges, is a result of thorough education and awareness. This education should encompass the development of lawyers from the beginning of their training, ongoing professional development for lawyers and judges in mediation, financial support for legal professionals in academia to

⁶⁷⁰ The assumption was if Ontario made the same percentage Ondo provided for mediation, using the 2020 as the base period by dividing 26,649.75 its total budget of 14,648,791.44, that would give us 0.0018 (0.1819%).

⁶⁷¹ According to the office of the Attorney General report of 2022-2023, in Ontario in 2022, 257 courts were upgraded with video suite technology. The percentage of eligible client transactions using electronic service channels stood at 87.6% and 76% in 2021 and 2022, respectively, while the rate of clients satisfied with services received was 79.7% and 92.5% for 2021 and 2022, respectively. If we look at the justice system, and the Mandatory mediation program is considered a vital tool in the Justice spectrum, it can be said that the OMMP also share part of the above feat within the justice system.

⁶⁷² FO Izobo, "Legal Research as an Instrument For Sustainable Development" (2019) Intl J Advanced Academic Research 36

⁶⁷³ Ekokoi Solomon, "Towards Effective Legal Writing in Nigeria" (2017) J Commonwealth L & Legal Educ 65 at 66

conduct research aimed at enhancing mediation practices, access to valuable reports and resources through both online and physical libraries, access to conference materials on dispute resolution and mediation, and regular and current reviews of legal instruments, statutes, and legislation to help improve knowledge and practical application of mediation.

Since the reintroduction of mediation into the Nigerian justice system in the early 2000s, particularly following the establishment of the Lagos State Multi-Door Courthouse in 2002, there has been considerable confusion among stakeholders regarding the concept of mediation. Many legal professionals, including lawyers, judges, and policymakers, initially equated alternative dispute resolution (ADR) with arbitration. Having been accustomed to practicing arbitration for years, they found it to be quite like litigation, apart from the autonomy it offered to parties and its private nature. This led some to describe arbitration as a form of private trial. The lack of awareness of mediation as a dispute resolution process among lawyers can be attributed to the fact that it was not covered during their time in law school. In fact, it was never part of the law school curriculum for more than four decades of its establishment.

Consequently, when mediation was discussed, many individuals in the legal profession in Nigeria initially associated it with arbitration. In fact, law school students and some lawyers, upon hearing about mediation for the first time, mispronounced it as "meditation." In the words of Kehinde Aina:-

In the early 1990s, I was a rookie with Aina Blankson. Thrown in the middle of this \$950 Million high profile litigation at the Federal High Court, nothing consumed the partners beyond securing an interim order of injunction to lift an imminent threat to the Canadian vessel within Nigerian waters. Walking out of the courtroom basking in the euphoria of the injunction just secured, nothing prepared me for the outburst that followed "...who cares about the injunction and the strength of our case that vessel must sail immediately as delivery deadlines must be met...." the Canadian representative exploded on the telephone. After his tirade and vituperation, we explained the legal

steps intended and likely timelines. Truthfully, I doubt if he was listening as suddenly, he said, "...Tell you what, call the lawyers while I call the Banks. Please suggest mediation and have us go into mediation immediately...". Truthfully, that was Greek to us all. Not one of us knew what mediation was as a legal parlance and no one we consulted provided much assistance as most people confused mediation and arbitration as being the same. As it was impossible to "google it" at the time, the ignorance was as surreal as it was instructive. I went back into my law school notes but nothing was found until Harry Blankson brought me a book called "Getting to Yes", which turned out to be the best Law School ever attended... The combined effect of the mediation success and exposure which "Getting to Yes" brought about were three-fold: first, Aina Blankson established an Alternative Dispute Resolution department and purchased all the books, working paper series and tapes then available at the Harvard Program on Negotiation. Second, the partners of the Firm resolved to champion the cause of ADR in Nigeria by ensuring that their experience and exposure came to the consciousness of judges, lawyers and most especially the Nigerian Law School. And the third most important decision of all was to ensure that the first court connected ADR Centre in Africa (The Lagos Multi-Door Courthouse) was established.⁶⁷⁴

The *Rule of Professional Conduct for Lawyers* (RPC) 2007 mandated that lawyers must inform their clients about alternative-dispute resolution (ADR) options before initiating or continuing litigation. While some stakeholders questioned this requirement, the provision was enforced with severe consequences for non-compliance.⁶⁷⁵ Many saw this as conflicting with the traditional role of lawyers as advocates in open court, trained to skillfully present their cases and challenge opposing evidence. Embracing ADR and mediation was often viewed as a sign of weakness and lack of diligence. This perception might have been avoided if ADR and mediation had been integrated into the legal education curriculum from the outset, rather than introduced after lawyers had already begun practicing.

From the establishment of the Nigerian law school in 1962 to the introduction of RPC in the Professional Ethics of the Law School curriculum in 2007, there was little emphasis on mediation and ADR in legal education. This highlights the historical lack of emphasis on mediation and ADR in legal education in Nigeria. Despite efforts by some faculties of law and universities in

⁶⁷⁴ Kehinde Aina Blankson, *supra* note 616 at 5

⁶⁷⁵ It has now been re-enacted as RPC 2023, with the enforcement provision now in Rule 74(1) as against 55(1) in the previous Rule

Nigeria to introduce courses in peace and conflict studies or alternative dispute resolution, there has been little change.⁶⁷⁶ While ADR topics have been included in most courses at the Nigerian Law School, there has been no practical training opportunity. The three-month externship program primarily focuses on litigation skills for lawyers, with minimal emphasis on ADR and mediation.

There are very few published books on mediation by Nigerian authors, and those that exist are not readily available in law and public libraries. Mediation practitioners mostly rely on books from foreign authors, such as "Getting to Yes." The current mediation and alternative dispute resolution curriculum at the Nigerian Law School and the available resources need to cover the different mediation styles adequately are not sufficient. Unlike American literature, most books in Nigeria rarely discuss mediation styles. This has resulted in a lack of awareness among practitioners regarding the various approaches to conducting mediation and addressing parties' needs.

While many believe that mediation is primarily facilitative, there is a lack of knowledge about evaluative, narrative, and transformative mediation approaches. Those who are familiar with these approaches may have acquired foreign advanced education in the West. There is need for more literature reflecting the national nuances and the Nigerian type of mediation. The limited discussion of mediation styles in Nigerian literature has led to a one-size-fits-all mediation

⁶⁷⁶ The National Open University of Nigeria was the first to put together learning material in ADR as one of the courses in its Faculty of Law in 2011. National Open University of Nigeria, "LAW 517: Alternative Dispute Resolution I" (2011), online: National Open University of Nigeria <https://nou.edu.ng/coursewarecontent/LAW%20517.pdf>.

approach among practitioners-facilitative mediation! This was evidenced by the reliance on American literature for guidance in Part 4 of this thesis.

In comparison to Nigeria, the Canadian jurisdiction has demonstrated more progress in advancing mediation through focused research, comprehensive training, and effective support for frontline dispute resolution professionals, particularly lawyers and, subsequently, judges.

According to Trevor C.W Farrow,

In Canadian common law schools, there are diverse approaches to dispute resolution. The Canadian Bar Association (CBA) Survey has acknowledged this diversity. Over the last three decades, the legal academy has undergone significant changes, with a notable emphasis on the teaching and research of dispute resolution, indicating its growing significance. For instance, 1976, American law schools did not have a subject category for ADR or mediation. However, by 1992, more than 94 percent of these schools were offering dispute resolution courses, and this trend has continued to grow. Since 1999, there has been a geometrical increase in interest in dispute resolution, particularly in its teaching. A 2002 American commentary showed that more than 500 law professors spot themselves as teaching ADR. Similarly, in Canada, there has been a significant upswing in the teaching of dispute resolution, as highlighted in the "CBA Survey," indicating improved interest and emphasis on ADR across all law schools.⁶⁷⁷

The Nigerian legal System significantly lacks in mediation knowledge and practical skills compared to Canada's legal system. In 2002, approximately 500 law professors in Canada were actively involved in teaching Alternative Dispute Resolution ADR, while no university in Nigeria could make a similar claim. In 1992, more than 94 percent of Canada's law faculties offered ADR courses, whereas in Nigeria, the only recognized form of ADR at the time was arbitration, which closely resembles litigation. Kehinde Aina, one of the pioneer mediators in Nigeria, and the founder of the first court-connected mediation/ADR in Africa, provided testimony confirming this.⁶⁷⁸

⁶⁷⁷ Trevor CW Farrow, "Dispute Resolution, Access to Civil Justice and Legal Education" (2005) 42:3 Alta L Rev 741 at 754-755

⁶⁷⁸ Kehinde Aina Blankson, *supra* note 674

Farrow categorized lawyer training into three distinct areas: universities and institutes closely integrated with law faculty courses, integrated-pervasive ADR approaches, and traditional course-based ADR programs. In Ontario, the University of Ottawa offers ADR courses in first year and upper-year law programs, initially introducing them to property law and the law of contract. The specific courses offered at the Faculty of Law, later extended to the College of Medicine, include Alternative Dispute Resolution Processes, ADR Practicum, Mediation Theory and Practice, Mediation Involving Families, Advanced Business Law, Interviewing, Counseling and Negotiation, Labour Law II, and Family Conflicts Resolution. Farrow unequivocally classified these courses under the integrated-pervasive approach to ADR. ADR courses at the University of Saskatchewan also unambiguously fall within this category.⁶⁷⁹

The University of Windsor Faculty of Law's ADR initiatives are designed to provide students with practical experience. They offer several ADR-related courses, such as Access to Justice: Dispute Resolution, Labour Arbitration, The Lawyering Process: Interviewing, Counseling and Negotiation, and The Mediation Clinic. Additionally, the university provides community mediation services through its University of Windsor Mediation Service (UWMS) for legal disputes before and after a lawsuit is initiated and for non-legal disputes. Law students administer these services, gaining valuable hands-on experience. Moreover, the university runs the Osler Hoskin

⁶⁷⁹ *Ibid.* Farrow, in 2005 reported that Saskatchewan University had established a comprehensive dispute resolution program for its students, which is integrated into the core curriculum of first-year courses. This program, influenced by the approach developed at the University of Missouri-Columbia School of Law, is known as the "Dispute Resolution Program." In addition to the first-year program, Saskatchewan offers various upper-year elective courses focusing on dispute resolution. These courses cover topics such as Alternative Dispute Resolution, Mediation (including a clinical component), Labour Law, Labour Arbitration, Multi-Party Institutional Conflict Resolution, an Intense Dispute Resolution Course with an "Independent Clinical Experience" that currently emphasizes mediation or restorative justice, and Conflict Resolution Theory (offered periodically). For more information, the current position can be found at <https://law.usask.ca/students/jd-students/dispute-resolution.php> and <https://www.adrsaskatchewan.ca/>.

Harcourt Internships in Law Program, which was established in 1999. Lastly, the University of Windsor is working on establishing the Dispute Resolution Institute of North America (DRINA).⁶⁸⁰

The University of Western Ontario (UWO) (now Western University) provides a diverse array of approximately eight dispute resolution-related courses, which cover a wide range of topics, including civil procedure, evidence and advocacy, and more. Specifically, UWO offers courses such as Labour Arbitration Competition, Dispute Settlement, Negotiation and Mediation, and Arbitration Law and Procedure in Alternative Dispute Resolution. Moreover, UWO hosts the Dispute Resolution Centre, a prominent ADR-related clinical program. This program is a not-for-profit organization operated by law students under the supervision of the faculty, and it offers valuable mediation services to residents.⁶⁸¹

Catherine Morris succinctly puts the growth of Mediation and ADR within the training of lawyers from Canadian law schools thus:

The field of dispute resolution in Canada is strongly characterized by its close integration of theory, practice, and policy. Legal scholars have played a pivotal role in the mediation movement, often transitioning into practitioners and policymakers, and vice versa, which has significantly shaped the legal education system. For example, scholars at the University of Windsor Law School in Ontario were instrumental in establishing the Windsor Essex Mediation Centre in the early 1980s, one of Canada's pioneering community mediation centers. Similarly, academics from the University of Victoria (UVic) Faculty of Law were involved in developing the Victoria Dispute Resolution Centre (DRC) in 1986, originally designed as a practicum opportunity for UVic law students taking a course in dispute resolution. In 1989, UVic legal scholars championed an interdisciplinary approach as they established the UVic Institute for Dispute Resolution (UVic IDR). Canadian law schools continue to operate mediation clinics and conduct public education, such as the University of British Columbia Faculty of Law's student-run Core Conflict Resolution Clinic in Vancouver and the Osgoode Mediation Centre at Osgoode Hall Law School in Toronto. By the late 1990s, most Canadian law schools offered at least one course in dispute resolution. Currently, courses in negotiation, mediation, and ADR are standard and are often taught by practitioners. Some law schools offer many elective courses in dispute resolution, and Canadian law students are actively involved in

⁶⁸⁰ This was based on farrow's report as of 2005. Recently in 2021, the University did organise ADR Mediation Competition. University of Windsor, Faculty of Law, "ADR Mediation Competition" (8 March 2021), online: University of Windsor <https://www.uwindsor.ca/law/2519/adr-mediation-competition>

⁶⁸¹ *Ibid* at 765.

mediation and negotiation mootings. The University of Ottawa provides a Dispute Resolution and Professional Responsibility designation for students who complete a specific set of courses. Additionally, there are graduate law programs in dispute resolution at Osgoode Hall Law School at York University in Toronto since 1995 and Université de Sherbrooke in Quebec since 1999.⁶⁸²

The growth of mediation practice in Canada can be attributed to the active involvement of academics in nurturing and developing it within both the classroom and real-world settings. This is why Canadian-trained lawyers are more inclined to use mediation to assist their clients, as opposed to Nigeria-trained lawyers who are primarily trained for litigation and have less exposure to alternative dispute resolution (ADR) or mediation during their six years of legal training. While there is still progress to be made in Canada, especially in the area of ensuring that the OMMP extends to all cities in the province as against just three cities currently, evidence suggests that they are more than two decades ahead of Nigeria in mediation practices and research.

Although there has been an increase in the number of scholars and universities in Nigeria now offering ADR, there is no clinical opportunity for law students to practice, especially in the faculties of law and law school. The same applies to those who take mediation during the Family Law Course. There are valuable lessons that can be learned from Ontario, Canada, and the Canadian justice system to improve mediation practices in Nigeria through proper funding and increased research.

iii). Procedural Frameworks for Court-Connected Mediation

In Nigeria, the procedural framework for court-connected mediation does not integrate mediation into the trial process unlike it is done in Canada. Parties in Nigeria are typically

⁶⁸² Catherine Morris, "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws" in Fan Yang & Guiguo Wang, eds, *Mediation in Asia-Pacific: A Practical Guide to Mediation and Its Impact on Legal Systems* (New York: Wolters Kluwer Law & Business; Hong Kong: CCH Hong Kong, 2013) at paras 3.18-3.19

expected to have mediation included in their contractual agreement or opt for it after a dispute arises, or if a judge or magistrate refers the matter for mediation.⁶⁸³ Mediation is not mandatory in Nigeria unless parties are contractually obligated to use it before trial. In Ontario, Canada, civil and estate disputes are required to undergo mediation under the Ontario Mandatory Mediation Program (OMMP) early in the litigation process, allowing parties to avoid pre-trial. In Nigeria, particularly in Abuja and Ondo, parties are expected to engage in pre-trial conference, with the procedure and purpose being, ultimately leading to a court order.

Black's Law Dictionary has defined the term "pre-trial conference" as: "An informal meeting at which opposing attorneys confer, usually, with the judge, to work towards the disposition of the case by discussing matters of evidence and narrowing the issues that will be tried."⁶⁸⁴ In the pre-trial, parties engage in the exchange of pleadings to clarify issues and narrow the focus of the trial, aiming to resolve preliminary issues. This process aids courts in the fair and impartial adjudication of disputes by facilitating document discovery and reducing trial surprises. Despite legal requirements, pre-trial conferences are often attended by counsel as a formality, and even with admissions, settlements are not reached, with admissions only playing a part in the court's final decision ratio. In Ondo, trial may be scheduled without the need for pre-trial.⁶⁸⁵ This is unlike in Ontario Mandatory Mediation Program (OMMP) where mediation is compulsory

⁶⁸³ Abuja Uwais Dispute Resolution Centre, *Mediation Procedure Rules*, 2018, r 2; Ondo State High Court (Civil Procedure) Rules 2019, O 28.

⁶⁸⁴ Bryan A Garner, *supra* note 607, at 1439

⁶⁸⁵ *Ondo State High Court (Civil Procedure) Rules* 2019, O 17(1).

in all civil and estate matters which must happen within 180 days after the first defence is filed with the court.⁶⁸⁶

In both Abuja and Ondo, mediation is not mandatory but optional. One reason why lawyers are not actively involved in mediation practice is that the designation of Senior Advocate of Nigeria (SAN) requires a lawyer to have a litigation record from the court of first instance up to the Supreme Court, with no consideration for successful mediation outcomes.⁶⁸⁷

According to the *Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria*,

(1) Every candidate will be required to provide particulars of contested cases which he considers to be of particular significance to the evaluation of his competence in legal practice and contribution to the development of the law. The candidate shall attach a certified true copy of all the judgments referred to in his application which shall be neatly arranged, indexed and bound. (2) Where cases are reported in a well-known law report, the applicant shall in addition to providing the citation also attach a copy of the reported case. (3) Where the cases are not reported the candidate shall provide certified hard copies of such cases along with his completed application form. (4) All judgments submitted by the candidate must show that the candidate's name is reflected as having conducted the case. (5) An applicant shall provide particulars of cases as follows— (a) 8 judgments of the High Court: provided that in respect of such cases conducted at the High Court, the applicants shall provide certified true copies of complete record of trial proceedings in at least five contested cases from filing stage to Judgment, showing that the applicant as counsel conducted the trial fully. (b) 6 judgments of the Court of Appeal ; and (c) 3 judgments of the Supreme Court : where it is manifest that the applicant himself has conducted the case from the High Court up to the Supreme Court provided that where the applicant submits cases in which he has appeared only at the Supreme Court he will be required to submit 6 judgments of the Supreme Court to qualify. (6) In providing particulars of contested cases, applicants shall provide particulars of recent cases decided within 10 (Ten) years preceding the date of application...⁶⁸⁸

The ambition for every practicing lawyer in Nigeria to achieve the status of a Senior Advocate of Nigeria (SAN) often acts as a restrictive influence, that discourage them to embrace mediation and other forms of Alternative Dispute Resolution. Consequently, parties who breach

⁶⁸⁶ The court has the authority to mandate mediation after 180 days have elapsed since the submission of the initial defense. In cases transferred to Toronto, Ottawa, or Essex County, the court can specify the date for the mediation to occur. Also see Rules of Civil Procedure, *supra* note 419, r 24.1.09(1), <https://canlii.ca/t/56btv>.

⁶⁸⁷ *Guidelines for the Conferment of the Rank of Senior Advocate of Nigeria*, SI 2013/27, s 14

⁶⁸⁸ *Ibid*

precontractual agreements for mediation may frustrate the victim and exploit non-compliance with mediation clauses to delay litigation initiation. In contrast, Ontario closely supervises cases filed to ensure that mediation occurs in all eligible cases.⁶⁸⁹

3. Need for Policy Changes and Recommendations for Nigeria

It has been established that Canada, particularly the Ontario Mandatory Mediation Program, has made significant progress in court-connected mediation. Nigeria can look to this program as a model to enhance its own court-connected mediation system. To achieve this, Nigeria needs to implement proactive policy measures to align with the OMMP. Since the main challenges in Nigeria's court-connected mediation are systemic, implementing the recommended changes will require systemic adjustments and substantial policy directives.

i). Nigeria judiciary must be both financially and institutionally independent.

The Nigerian judiciary lacks a well-defined constitutional provision for autonomy, similar to Canada's. The current provision in the Nigerian Constitution is not being taken seriously, and there should be consequences for its breach, especially on the part of the executive branch. The lack of judicial autonomy has led to poor funding of the justice system and has hindered court-connected mediation in Ondo and Abuja. Inadequate funding has limited the judiciary's ability to raise awareness about the availability of mediation, while the lack of resources for internet connectivity in many parts of Nigeria has posed a challenge for online mediation services.

⁶⁸⁹ *Rules of Civil Procedure*, RRO 1990, Reg 194, r 24.1.09(6), <https://canlii.ca/t/56btv>

Additionally, there is a shortage of properly-trained mediators, particularly those skilled in online mediation, which has restricted the availability and quality of mediation services. Furthermore, the Nigeria judiciary lacks funding for capacity building and can only make minimal financial planning for court-connected mediation. Currently, many courts in Nigeria do not have video suite technology, and many judges still write in longhand. This is in stark contrast to Ontario, where 257 courts were upgraded with video suite technology in the last two years, reflecting a prioritization of access to justice in which the Ontario Ministry of the Attorney General plays a pivotal role.

ii). Integration with Legal Education

The faculties of laws and the Nigerian law school should consider integrating ADR or dispute resolution courses into the curriculum to ensure that future lawyers are knowledgeable about options beyond litigation. Canada has successfully incorporated ADR into the curriculum for law students, and Nigeria could benefit from following suit. This approach would help future lawyers in Nigeria to be trained in mediation techniques and change their attitudes towards ADR.

Currently, many lawyers in Nigeria do not see mediation or ADR as viable means of income generation, which leads to discouragement of out-of-court settlements. This negative attitude towards mediation could impede its growth and acceptance. Addressing this issue proactively by providing comprehensive ADR training to future lawyers, including clinical practice opportunities prior to their call to the Bar, would help cultivate a more favorable view of mediation and facilitate compliance with statutory provisions mandating the adoption of mediation. Integrating ADR with legal education would enhance research and areas of practice among lawyers, as has been

successfully demonstrated in Ontario, Canada. This integration could lead to a natural inclination for lawyers to utilize mediation in all civil cases and approach it enthusiastically with their clients.

iii). Procedural improvement in Nigerian Court-connected mediation.

The incorporation of mediation into the legal proceedings in Nigeria, like the practice in Ontario, Canada, is essential for the advancement of the legal system. Making mediation a mandatory part of the trial process, as seen in Ontario, would prevent stagnation and encourage progress. In Ontario, all parties involved in civil disputes are aware that their case will undergo mediation, resulting in improved outcomes. Achieving this in Nigeria would necessitate significant advocacy efforts by policymakers in the justice administration sector, including enhancements to the existing legal framework for mediation. Litigation alone should not be the sole criterion for conferring the title of Senior Advocate of Nigeria. The inclusion of out-of-court settlements, particularly those achieved through mediation, should be considered as a qualifying factor for this designation.

Rules of courts and practice directions must explicitly stipulate that mediation is mandatory for all civil and estate matters, mirroring the Ontario model. The Nigeria Supreme Court Mediation needs to be operational while the Court of Appeal Mediation Centers needs adequate funding to accommodate more eligible cases for mediation. Appellate matters should be required to undergo mediation before proceeding to hearings. If mediation fails at the trial-court level, providing parties with another opportunity for mediation at the appellate level could prompt them to be more flexible. These initiatives would encourage other chief judges to

prioritize mediation in their judicial divisions, ultimately leading to a more effective and efficient legal system.

4. Conclusion

The study of the challenges faced by mediation practices in Nigeria highlights significant obstacles related to judicial autonomy, procedural frameworks, and the incorporation of mediation into legal education. Limited research and structural deficiencies within the Nigerian mediation system have hindered its effectiveness, growth, and development. The absence of judicial independence has led to financial barriers and executive interference, adversely impacting the judiciary's ability to support and implement mediation practices fully. Despite these challenges, there is potential for growth and improvement by drawing on transferable lessons from the Canadian justice system, particularly from the Ontario Mandatory Mediation Program (OMMP).

Drawing from the Canadian experience, it is evident that incorporating mediation into the legal education curriculum and making it a mandatory component of the trial process can significantly improve the adoption and effectiveness of mediation practices in Nigeria. The Canadian model's focus on early mediation in civil and estate disputes, paired with comprehensive training and support for legal professionals, has proven successful in promoting mediation as a well-considered alternative to litigation. By implementing similar strategies, Nigeria can develop a more robust mediation framework that addresses the current systemic issues and fosters a culture of dispute resolution outside the courtroom.

Ultimately, the success of mediation practices in Nigeria depends on the judiciary's financial and institutional independence, the incorporation of ADR in legal education, and the establishment of clear procedural frameworks. Sufficient funding, appropriate training, and a supportive legal environment are vital for the growth of mediation in Nigeria. By studying the Canadian model and implementing necessary policy reforms, Nigeria can address its current challenges and establish a more effective and efficient mediation system that benefits all stakeholders involved.

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