An assessment of the efficiency and effectiveness of compulsory mediation in Malawi

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Abstract

This article analyses the efficiency and effectiveness of mandatory judge-led mediation in Malawi. It discusses whether mandatory judge-led mediation meets the objectives of reducing costs, delay, and case backlog as provided for under the High Court Civil Procedure Rules, 2017. This article also analyses the benefits, challenges, and the parties' satisfaction with mandatory mediation. This study argues that although Malawi's mandatory mediation may resolve disputes expeditiously, reduce case backlog

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and costs, it threatens the parties' right to trial and infringes mediation principles including voluntariness, party self-determination, flexibility, and informality. Further, while the Constitution of Malawi recognises and promotes the use of alternative dispute resolution mechanisms such as mediation to enhance access to justice, Malawi lacks institutions, policies and comprehensive legislation which can sufficiently promote the use of mediation and help to decongest courts in Malawi.

Keywords: Malawi, access to justice, efficiency, effectiveness, judge-led mediation, court decongestion

Introduction

The Constitution of Malawi (1994) guarantees the right to access justice for all persons in Malawi.[1] To meet this objective, the Constitution recognises various dispute resolution mechanisms including alternative dispute resolution (ADR),[2] customary law, and litigation.[3] Ideally, considering the numerous challenges facing the Malawian judiciary, mediation and other ADR techniques should widen the access to justice for many Malawians. These challenges include high litigation costs, inadequate legal aid opportunities,[4] delay in litigation,[5] immense case backlog,[6] insufficient numbers of courts, lack of training for judicial officers, government underfunding, low education levels, and complex court procedures.[7]

To give effect to the constitutional provisions promoting the use of ADR, the judiciary introduced mandatory mediation of all civil cases coming to the commercial and general divisions of the high court.[8] Malawi first implemented judge-led mediation only in the commercial division of the high court in 2007.[9] The objectives of the mandatory mediation include: expeditious dispute resolution, reducing litigation costs and delay, and ensuring fairness and justice to parties.[10] The judiciary further seeks to reduce the courts' case backlog.[11]

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1 Constitution of Malawi (1994) Section 41.

2 Constitution of Malawi (1994) Section 13(l).

3 Constitution of Malawi (1994) Section 10(2).

4 Wilfried Scharf, Chikondi Banda, Ricky Rontsch, Desmond Kaunda, and Rosemary Shapiro, *Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums,* Dullah Omar Institute, 2002, 9.

5 Fidelis Edge Kanyongolo, 'Malawi: Justice sector and the rule of law', Open Society Initiative for Southern Africa, 2006, 28.

6 Kanyongolo, 'Malawi: Justice sector and the rule of law', 28.

7 Scharf and others, 'Access to justice to the poor of Malawi', 13-20.

8 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 1.

9 Commercial Division Mandatory Mediation Rules 2007, Order 1 Rule 3.

10 Courts (High Court) (Civil Procedure) Rules 2017, Order 13 Rule 2(1)(a).

11 Commercial Division Mandatory Mediation Rules 2007, Order 1 Rule 3.

Although the judiciary introduced the mandatory mediation of civil cases, the high court continues to experience delay in the conclusion of cases and heavy case backlog.[12] For example in the 2016-2017 fiscal year, the entire High Court received 5,219 civil cases and concluded only 1,677 cases representing 32 percent of the total cases resolved. The Commercial Division registered 364 cases during the same period and finalised 221 cases representing 60 percent of the resolved cases while the Industrial Relations Court disposed of 997 cases out of 1,415 cases reported thereby resolving 70 percent of the cases.[13] The figures paint a bad picture of the High Court in general. Furthermore, no evidence exists to suggest that Malawi's mandatory mediation has reduced costs for both the litigants and the courts.[14]

This paper seeks to analyse the efficiency and effectiveness of Malawi's mandatory mediation under the 2017 Rules. The paper assesses whether compulsory mediation in Malawi meets its objectives of reducing courts' delay in resolving disputes, costs, and ensuring fairness. Further, the paper analyses the processes, outcomes, settlement rates, satisfaction rates, compliance rates, benefits, and challenges of Malawi's compulsory mediation. To assess these issues, the study carried out in-person interviews between July and September 2021 of direct stakeholders in Malawi's court-ordered mediation, namely, judges, parties, and lawyers. The study picked respondents from the commercial and general divisions of the high court where mediation applies.

This research utilised purposive sampling which enables the researcher to pick respondents who are likely to provide answers to the study objectives.[15] Six judges, nine lawyers, and nine parties were interviewed. Among the parties, four were plaintiffs while five were defendants. The work experience of the judges ranged between one (1) year and twenty-five (25) years while the lawyers ranged between four years

12 Frank Edgar Kapanda, 'A critical evaluation of judicial mediation in Malawi', Unpublished LLM Dissertation, University of Cape Town, 2013, 51.

13 Suzgo Khunga, 'Judges shortage delaying justice', *Nation Online,* 2018.

14 Kapanda, 'A critical evaluation of judicial mediation in Malawi', 24.

15 Olive Mugenda and Abel Gitau Mugenda, *Research methods: Quantitative and qualitative approaches*, African Centre for Technology Studies, 1999, 86.

and twenty-five (25) years. The lawyers practiced law in various fields of law including in commercial matters, personal injury matters, land issues, and chieftaincy matters. The collected data was analysed using qualitative content analysis.[16]

This paper is organised into four sections. First, the paper discusses the concept of mediation, its purported advantages and disadvantages, the principles of mediation, types of mediation, and mandatory mediation. Second, the paper analyses the legal framework of mediation in Malawi. Third, the paper discusses mandatory mediation in the High Court. Under this section, the paper reports the findings from the interviews conducted on judges, lawyers and parties. The last part makes recommendations and serves as a conclusion.

The concept of mediation

Folberg and Taylor define mediation 'as the process by which the participants, together with the assistance of a neutral person[(s)] … isolate dispute issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs'.[17] Leonard Riskin defines mediation as a 'voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement'.[18] The above definitions cover mediation principles including impartiality, voluntariness, and party self-determination but do not mention other mediation principles such as confidentiality, informality, and flexibility. This paper defines mediation as a flexible, informal, confidential, and voluntary dispute resolution mechanism in which an impartial third party helps parties reach a mutual agreement.

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16 Christen Erlingsson and Petra Brysiewicz, 'A hands-on guide to doing content analysis', 7(3) *African Journal of Emergency Medicine* (2017) 93 (stating that a content analysis technique aims at organising data, summarising it and finding themes).

17 Jay Folberg and Alisson Taylor, *Mediation: A comprehensive guide to resolving conflicts without litigation*, Jossey-Bass Publishers, 1984, 7.

18 Leonard L Riskin, 'The special place of mediation in alternative dispute processing', 37(1) *Florida Law Review* (1985) 6.

Principles of mediation

Mediation has specific principles that are different from litigation, which attract its users. The first characteristic of mediation is party self-determination and voluntariness. The elements of party self-determination include the party's freedom to choose mediation,[19] mediators, procedures, and the outcome.[20] Parties should also be free to withdraw from mediation if they so please.[21]

The second principle of mediation is confidentiality. Both the parties and the mediator are prohibited from revealing information they get during mediation sessions. The mediator and parties cannot bring such information during a subsequent litigation or arbitration. For instance, the American Arbitration Association's mediation standards provide that mediators should keep confidential all information relating to mediation and information coming from caucuses with the individual parties unless the parties otherwise agree.[22] In the same line, the EU Directive on Cross Border Mediation, 2008 states that 'mediation is intended to take place in a manner that respects confidentiality'.[23] Similarly, Malawi's High Court Civil Procedure Rules, 2017 provide that matters deliberated in the mediation process shall be confidential.[24]

The principle of confidentiality is important in mediation for various reasons. First, it enables parties to share more about their cases because they do not fear that such information will be used against them in subsequent litigation.[25] Second, it makes parties trust the mediator

[19] John Brand, Felicity Steadman, and Chris Todd, *Commercial mediation: A user's guide to court-referred and voluntary mediation in South Africa,* Juta Law, 2016, 24.

[20] Wahab, 'Court-annexed and judge-led mediation in civil cases', 61.

[21] Model standards of conduct for mediators, adopted by American Arbitration Association, American Bar Association, Association for Conflict Resolution, 2005, Standard 1(A).

[22] Model standards of conduct for mediators, Standard 5(A).

[23] Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, 21 May 2008, Article 7.

[24] Courts (High Court) (Civil Procedure) Rules 2017, Order 13 Rule 7(1).

[25] Ronan Feehily, 'The development of commercial mediation in South Africa in view of the experience in Europe', Unpublished PhD Thesis, University of Cape Town, 2008, 145.

and the process.[26] Third, it protects the reputation of mediators as well as strengthens the impartiality of the mediators.[27] Moreover, parties may choose mediation due to the privacy it provides because they wish to avoid publicity.[28] For instance, business entities may prefer mediation to avoid tarnishing the image of the companies, which may lead to loss of shares or business. However, critics state that the confidentiality of mediation makes mediation unaccountable to the public.[29] The public is not able to assess whether the procedures and outcomes of mediation are just. As such, mediation may not protect weaker members of society.[30] Further, mediation does not generate precedents from which the society can learn; nor does it contribute to the development of law.[31]

The impartiality of mediators is the third principle of mediation. For example, the Model Standards of Conduct provide that 'a mediator shall conduct mediation in an impartial manner'.[32] However, while mediators are always required to be impartial, they may not have to be neutral at all times. This is because mediators have to be 'mindful of the fairness of any outcome; and aware of their professional role in ensuring the duty of care (to the parties)'.[33] Mediators cannot be neutral where they see injustice is likely to happen. For example, the Standards of Practice for Lawyer Mediators in Family Disputes stipulate that a mediator '…should be concerned with fairness…(and) has an obligation to avoid an unreasonable result'.[34]

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26 Law Reform Commission Report, 'Alternative dispute resolution: Mediation and conciliation', November 2010, 101.

27 Laurence Boulle and Alan Rycroft, *Mediation: Principles, process, practice,* Butterworths, 1997, 3.

28 Feehily, 'The development of commercial mediation in South Africa', 33-34.

29 Jacqueline Nolan-Haley, 'Mediation and access to justice in Africa: Perspectives from Ghana', 21(59) *Harvard Negotiation Law Review* (2015) 95.

30 Rodney S Webb, 'Court-annexed ADR- a dissent', 70(2) *North Dakota Law Review* (1994) 232.

31 Deborah Thompson Eisenberg, 'What we know and need to know about court-annexed dispute resolution', 67(2) *South Carolina Law Review* (2016) 246 -247.

32 Model standards of conduct for mediators, Standard II B.

33 Patricia Marshall, 'The partial mediator: Balancing ideology and the reality', 1 *ADR Bulletin of Bond University*, 2010.

34 National Alternative Dispute Resolution Advisory Council (NADRAC), 'Issues of fairness and justice in alternative dispute resolution', Canberra, November 1997, 24.

Similarly, Australian law provides that a mediator should ensure just outcomes and consider public interest in issues.[35] For instance, mediators cannot be neutral in cases of power imbalances where stronger parties attempt to take advantage of weaker parties. In such cases, the mediator may be obligated to assist the weaker party.[36] If mediators strictly remain neutral, the outcome may be unjust.[37]

What should mediators do to ensure justice in mediation? While many people may argue that mediators should not be concerned with substantive justice,[38] almost everyone agrees that mediators must ensure procedural fairness. The mediator can ensure procedural fairness by encouraging parties to have legal representation,[39] giving disputants equal and sufficient time to present their case, allowing the parties to resolve matters, ensuring voluntary mediation, and respecting the parties.[40] There should be 'no threat, compulsion or coercion to enter or stay in the process'.[41]

Fourth, mediation is informal and flexible.[42] Unlike litigation which is laden with evidential and procedural complexities, mediation procedures are simpler. Parties freely speak about their cases and choose for themselves the mediators, rules of procedure, and the outcome.[43] Moreover, disputants have a wide variety of options to resolve their dispute,[44]

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35 Law Reform Commission Report, 'Alternative dispute resolution', 42.

36 Boulle and Rycroft, *Mediation: Principles, process and practice*, 299-300.

37 Hilary Astor, 'Rethinking neutrality: A theory to inform practice - part 1', 11(2) *Australian Dispute Resolution Journal* (2000) 73.

38 Boulle and Rycroft, *Mediation: Principles, process and practice*, 196.

39 Joseph Stulberg, 'Mediation and justice: What standards govern?', 6 *Cardozo Journal of Conflict Resolution* (2005) 244.

40 Stulberg, 'Mediation and justice', 243.

41 NADRAC, 'Issues of fairness and justice in alternative dispute resolution', 21.

42 Office of Democracy and Governance (ODG), *Alternative dispute resolution practitioners guide*, Technical Publication series, 1998, 6.

43 Campell C Hutchinson, 'The case for mandatory mediation', 42(1) *Loyola Law Review* (1996) 85, 89.

44 Kariuki Muigua, 'ADR: The road to justice in Kenya', Paper presented at the Chartered Institute of Arbitrators, Kenya Branch, International Arbitration Conference held on 7 and 8 August 2014 at Sarova Whitesands Hotel, Mombasa, Kenya, 42.

including offering apologies. This enables the disputants to resolve the disputes according to what they need.

Types of mediation

There are three main types of mediation: facilitative, evaluative and transformative. According to Riskin, the facilitative mediator 'assumes that the parties are intelligent, able to work with their counterparts… capable of understanding their situations better than the mediator,' and 'can develop better solutions than any the mediator might create'.[45] Therefore, in a facilitative mediation, there is no element of adjudication on the part of the mediator.[46] The mediator does not give recommendations on how to resolve the case; nor does he or she express opinions to the parties on the strengths and weaknesses of their cases or predict the likely outcomes of such cases at trial.[47] The task of the mediator in facilitative mediation is to observe fair procedures, promote communication between the parties, and clarify issues.[48]

Facilitative mediation has the advantage of empowering disputants by enabling them to take full responsibility for dispute resolution. It promotes party self-determination.[49] However, critics of facilitative mediation argue that settlements delay because there is a lack of evaluation by the mediator.[50] Second, facilitative mediation often leads to no resolution or its outcomes may not meet the standards of justice. Further, they argue that mediators may not sufficiently protect the weaker

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45 Leonard L Riskin, 'Understanding mediator's orientations, strategies, and techniques: A grid for the perplexed', 1(7) *Harvard Negotiation Law Review* (1996) 24.

46 Carrie Menkel-Meadow, 'Lawyer negotiations: Theories and realities - what we learn from mediation', 56 *Modern Law Review* (1993) 367.

47 Murray S Levin, 'The propriety of evaluative mediation: concerns about the nature and quality of an evaluative opinion', 16(2) *Ohio State Journal on Dispute Resolution* (2001) 268.

48 Riskin, 'Understanding mediator's orientations, strategies, and techniques: A grid for the perplexed', 24.

49 Carole J Brown, 'Facilitative mediation: The classic approach retails its appeal', 4(2) *Pepperdine Dispute Resolution Journal* (2004) 283.

50 Levin, 'The propriety of evaluative mediation: Concerns about the nature and quality of an evaluative opinion', 270.

party since the facilitative mediator refrains from saying anything regarding the parties' rights and obligations.[51]

As for evaluative mediation, Leonard Riskin states that the mediator 'assumes that the participants want and need [them] to provide some guidance as to the appropriate grounds for settlement – based on law, industry practice or technology – and that [they are] qualified to give such guidance by virtue of [their] training, experience, and objectivity'.[52] Thus, the evaluative mediator has the task of 'finding facts by properly weighing evidence, judging creditability, allocating the burden of proof, determining and applying relevant law, rules, or customs, and rendering an opinion'.[53]

The evaluative mediator focuses on the rights and obligations of the parties rather than their needs and interests and evaluates the matters according to legal principles of fairness.[54] The evaluative mediator gives the strengths and weaknesses of the disputants' cases, predicts outcomes at litigation,[55] helps the disputants appreciate the advantages and disadvantages of engaging in mediation, and makes recommendations to the parties towards a settlement.[56]

Proponents of evaluative mediation argue that this mediation increases settlement rates, protects party rights more than facilitative mediation,[57] and decreases the possibility of settling for less in mediation.[58] However, critics contend that evaluative mediation breaches self-deter-

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51 Zena Zumeta, 'Styles of mediation: Facilitative, evaluative, and transformative mediation', *Mediate Everything Mediation*, 27 February 2018; Hilary Astor and Christine Chinkin, *Dispute resolution in Australia,* 2nd edition, LexisNexis, 2002, 26.

52 Riskin, 'Understanding mediator's orientations, strategies, and techniques: A grid for the perplexed ', 24.

53 Brown, 'Facilitative mediation', 283.

54 Brown, 'Facilitative mediation', 283.

55 Levin, 'The propriety of evaluative mediation: Concerns about the nature and quality of an evaluative opinion', 270.

56 Zumeta, 'Styles of mediation: Facilitative, evaluative, and transformative mediation'.

57 Kathy Douglas and Becky Batagol, 'The role of lawyers in mediation: Insights from mediators at Victoria's Civil and Administrative Tribunal', 764.

58 Douglas and Batagol, 'The role of lawyers in mediation: Insights from mediators at Victoria's Civil and Administrative Tribunal'.

mination of parties and mediator impartiality, encourages adversarial tendencies of litigation, and risks making parties lose trust in the mediator since a party may think that the mediator favours the party who has a stronger case.[59]

Finally, the transformative model emphasises the social and communicative view of conflicts. Transformative mediation 'is a process of assisting in conflict transformation [by] changing the quality of interaction' so that 'parties can recapture their sense of competence and connection, reverse the negative conflict cycle, re-establish a constructive interaction, and move forward on a positive footing with the mediator's help'.[60]

Bush and Folger argue that where there is a conflict there is a crisis of human interaction. The disputants' hostility towards each other results in negative and destructive interaction between them. In transformative mediation, which is party-driven and party-centred, the mediator helps the disputants understand each other and return to a positive and constructive interaction. The term 'transformative' is used to highlight the change which occurs when the relationship between the disputants changes from a hostile, negative, and destructive interaction to one which is positive and constructive. Such changes in the interaction between the disputants are important regardless of whether or not they lead to any settlement.[61] Critics argue that transformative mediation takes too long to resolve matters, may not lead to any settlement, is contrary to standards of fairness because the mediator does not intervene where injustice is being done, and may not protect weaker parties.[62]

Advantages of mediation

Mediation has advantages. Mediation maintains relationships. While litigation is adversarial because it 'polarises parties, creates ad-

[59] Kimberlee K Kovach and Lela P Love, 'Evaluative mediation is an oxymoron', 14(3) *CPR Institute for Disputer Resolution*, (1996) 31.

[60] Robert A Baruch Bush and Joseph P Folger, *The promise of mediation: The transformative approach to conflict,* 2nd edition, Jossey-Bass, 2004, 9-11.

[61] Bush and Folger, *The promise of mediation: The transformative approach to conflict,* 9-11.

[62] Zumeta, 'Styles of mediation: Facilitative, evaluative, and transformative mediation'.

ditional rifts and strains relationships to a point that future dealings are difficult if not impossible',[63] mediation is not combative. As such, mediation remains a useful tool in disputes where the parties wish to maintain future relationships, for instance, in family, commercial, and employment disputes. For example, countries such as Uruguay, Bolivia, Ukraine, and Thailand have promoted the use of mediation in commercial matters. South Africa encourages resolving labour issues through mediation and arbitration.[64] In England and Wales, marriage disputes concerning property, children, separation, and money are usually resolved through mediation.[65] Other countries that promote using mediation to resolve family matters include the United States (US), Norway, Sweden, Australia, Spain, South Africa and Zimbabwe.[66]

Proponents of mediation also contend that mediation reduces delay, case backlog, and cost.[67] The Malawi High Court Civil Procedure Rules, 2017 have similar objectives.[68] Studies have shown that mediation resolved disputes in the US faster than litigation.[69] One US study compared similar cases resolved through litigation and mediation and found that mediation resolved such matters within seven weeks before the court ever made their judgment on the same issues.[70] However, court-annexed mediation in the US appears to be affected by the same administrative complexities and costs in litigation.[71]

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63 Hutchinson, 'The case for mandatory mediation', 88.

64 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide*, 12.

65 Thomas McFarlane, 'Mediation: The future of dispute resolution in contemporary Scots Family', 3 *Aberdeen Student Law Review* (2012) 52.

66 McFarlane, 'Mediation: The future of dispute resolution', 31, 32, 34.

67 Eisenberg, 'What we know and need to know about court-annexed dispute resolution', 246.

68 Courts (High Court) (Civil Procedure) Rules 2017, Order 13 Rule (2)(1)(a); Commercial Division Mandatory Mediation Rules, 2007, Order 1(3).

69 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide,* 17.

70 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide,* 17 citing Stevens H Clarke, Elizabeth D Ellen, Kelly McCormick, 'Court-ordered civil case mediation in North Carolina: An evaluation of its effects', North Carolina Administrative Office of the Courts, State Justice Institute, Institute of Government, University of North Carolina, 1995.

71 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide*, 17.

Thus, it is not obvious that mediation will always reduce costs and time. There are many factors to consider when analysing these matters. Mediation may reduce time and costs when parties settle the matter. However, if the matter is unsettled, mediation elongates dispute resolution and makes it more expensive because parties will pay for both the mediation and the subsequent litigation. Other factors include whether parties paid costs for any sanctions, whether they paid the mediators, and whether the parties went for the mediation early enough after the dispute arose.

Disadvantages of mediation

Mediation also has disadvantages. For instance, the use of mediation usually focuses on the interests of the parties, and not those of the society as a whole. There are times when advancing individual interests may not benefit societal interests. For instance, resolving a consumer dispute through mediation whereby the owner of a chemist has been selling expired drugs to a customer may protect the reputation of the chemist. However, it is detrimental to the interest of the public because the wrongdoer may continue selling expired drugs to other customers. If such matters went to court, the public would be alerted. A second example is resolving cases of defilement through mediation to protect concerned individuals. The wrongdoer may continue committing such crimes because the public is not aware that they committed those crimes.

Mediation can be a threat to justice and legal rights especially for persons who do not have power, money, and access to legal representatives,[72] as it is difficult for the state to intervene. The presence of ignorance can make the weaker party bargain and settle for less.[73] Further, mediation's confidentiality hinders research and development of law and practice.[74] Mediation has no precedent from which society may

[72] Owen M Fiss, 'Against settlement', 93(6) *Yale Law Journal* (1984) 1076.

[73] Office of Democracy and Governance, *Alternative dispute resolution practitioners guide*, 24.

[74] Eisenberg, 'Court-annexed dispute resolution', 246.

learn something.[75] Due to these challenges of mediation, it is important to use mediation in appropriate cases.

Institutional and legal framework on mediation

Mediation is recognised at the international level as one of the dispute resolution mechanisms. The United Nations Charter prescribes that 'parties to any dispute… shall… seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.[76] However, the clause is not comprehensive enough because it fails to set up institutions at the international level to promote mediation and does not oblige states to set up legal and institutional frameworks on mediation. Further, the Singapore Convention, which seeks to recognise and enforce international commercial agreements,[77] is an important regulatory framework. However, the Convention's scope is too limited since it only deals with commercial matters.

At the national level, the Malawi Constitution recognises and encourages the use of mediation.[78] The main legislation governing court-ordered mediation in Malawi is the Civil Procedure Rules, 2017. The Rules apply to all civil cases in Malawi's High Court. The Rules provide that 'all proceedings (in civil matters) shall first go through mediation'.[79] The application of the Rules is not sufficient to promote the use of mediation and to significantly reduce case backlog in the Malawi courts. The Rules apply only to civil cases in the High Court and have no application in the other courts including the magistrates' courts and industrial relations court. The lack of mediation laws in other courts impedes the use of mediation.

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75 Office of Democracy and Governance, *Alternative dispute resolution practitioners guide*, 16.

76 United Nations Charter, 24 October 1945, 1 UNTS XVI, Article 33.

77 United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), 20 December 2018, UNTS 73/198, Article 1(1).

78 Constitution of Malawi (1994) Section 13 (1).

79 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 1.

The Rules exempt certain matters from mandatory mediation. The exemptions include 'a matter whose trial is expedited by law or practice', where a party applies for summary judgment or judgment on admission, or 'where the court in its discretion, so orders'.[80] However, some of the exemptions require further explanation. For instance, the clause should give examples of cases 'where by law or practice, the trial is expedited'. The other challenge is that the clause on exemptions does not provide any opportunity for parties themselves to avoid mediation when they have good reasons. Moreover, the provisions fail to give guidelines to judges on how to screen cases to determine whether to refer cases to mediation. In response to this, the Rules could provide for exemptions to mediation where there are power imbalances between the disputants, where the judiciary seeks to develop precedent and the law, or where public interest is at stake.

Further, mandatory mediation under the Rules has objectives. The Rules seek to 'reduce costs and delay in litigation' and ensure the 'fair resolution of disputes'.[81] Mandatory mediation also seeks to reduce case backlog in the court.[82] Nevertheless, the objectives under the Rules are not exhaustive. The Rules should include the objective of promoting the peaceful resolution of disputes and the maintenance of relationships. Further, the rules should include the objective of promoting party autonomy in resolving disputes and ensuring creative solutions.

Moreover, the Rules provide that participants to the mediation process include the parties, their lawyers and the mediators.[83] The Rules do not state what should happen if a party is physically unavailable for mediation. The Rules should allow unavailable people to take part in the mediation through video conferencing or phone calls. Furthermore, the Rules provide for the mandatory attendance of parties and their legal representatives in the mediation session.[84] Thus, parties may hire

80 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 1.

81 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule (2)(1).

82 Commercial Division Mandatory Mediation Rules, 2007, Order 1(2)(e) and (f).

83 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 4(1).

84 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 4(1).

lawyers to represent them at mediation. However, the clause fails to explain the role of lawyers at mediation. The clause is also silent on the obligation of the Malawian government to provide legal aid in mediation. In addition, the clause does not provide for the training of lawyers in mediation.

Mediators under the Rules are the judges of the High Court. A judge who handles a case in mediation is not allowed to handle the same case in litigation if the mediation fails to resolve the matter.[85] The Rules provide for the impartiality and independence of judges in conducting mediation.[86] However, the Rules fail to define the impartiality and independence of mediators. The Rules do not provide any guidelines to mediators to ensure impartiality. For example, the Rules fail to mention conflict of interest issues. They do not explain whether a judge should recuse himself or herself where there is a conflict of interest. Moreover, the Rules fail to provide for the training of judges in mediation. The Rules do not set up training and accreditation bodies. Further, they do not give guidelines to the judges for the conduct of mediation; nor do they explicitly provide for styles of mediation.

The Rules prescribe the time for mediation which takes place sevem days after the close of pleadings.[87] Parties are required to submit mediation bundles briefly stating the facts, legal issues, their position and interests.[88] The Rules also require the parties to tender their evidence.[89] The Rules further stipulate that parties to a mediation process should have the authority to settle.[90] The mandatory provisions further provide for sanctions where the parties fail to comply with provisions for mandatory mediation.[91] However, sanctions may tamper with the voluntary

85 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 9(1).

86 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 2(2)(a).

87 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 3(1).

88 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 3(3).

89 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 3(4).

90 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 5(1).

91 For any non-compliance such as failing to attend a mediation session without good cause, the judge may dismiss the claim if the non-complying party is a claimant, or strike out the defence where the non-complying party is the defendant or order a party

nature of mediation. The Rules require the parties and the mediator to sign a mediation settlement which the court considers as its own judgment and enforces it.[92]

The Rules further provide for the principle of confidentiality. The Rules provide that mediation matters are confidential.[93] The confidentiality rule covers communication between the parties, any documents and the judge's records.[94] Mediation matters cannot be used in a subsequent litigation by a judge-mediator or the parties.[95] In the case of *JF Investments Limited v First Merchant Bank Limited,*[96] the court confirmed the confidentiality of the mediation process.[97] However, the Rules do not give guidelines on whether a mediator can share information from caucuses to the other party. Moreover, the Rules do not mention whether third parties, experts or witnesses who may attend the mediation sessions are bound by the confidentiality rule. Malawi may learn from jurisdictions that require participants in mediation to commit to upholding confidentiality by signing a confidentiality agreement.[98]

While the Rules provide for the principle of confidentiality, they fail to provide for other principles of mediation. For instance, the Rules do not explicitly provide for the principle of self-determination of the parties. Under the Rules, a mediator 'shall facilitate communication between or among the parties in order to assist them in reaching a mutually acceptable resolution'.[99] The foregoing statement may imply the

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to pay costs or make any other order the court so finds fit. See Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 6(1).

92 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 8(3).

93 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 7(1).

94 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 7(1) and (2).

95 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 7(b).

96 Commercial Case No 55 of 2010, 19 March 2010 (unreported).

97 See also, *Trust Securities Ltd v Finance Bank of Malawi* (in Liquidation) (HC) Commercial Case No 51 of 2007 (unreported).

98 Edna Sussman, 'A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony', *IBA Legal Practice Division, Mediation Committee Newsletter*, April 2006, 32.

99 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 2(1)(b).

self-determination of parties. Nevertheless, the explicit mention of party self-determination together with its elements would have served better considering that party self-determination is a cardinal feature of mediation. Additionally, the Rules do not mention the informality and flexibility of mediation.

The practical experience of mandatory mediation in Malawi

Owing to the purported advantages of mediation, courts in many jurisdictions introduced mandatory mediation to enable the parties enjoy the benefits of mediation. Those in support of mandatory mediation give the following arguments. First, they contend that compulsory mediation provides opportunities for parties to enjoy the benefits of mediation. When mediation is voluntary, not many people choose it.[100] For instance, a study in England's London County courts discovered that out of 4,500 cases in which parties were free to choose mediation, only 160 chose mediation.[101] However, when England enacted the Civil Procedure Rules in 1977, encouraging mediation and giving sanctions for non-compliance, there was a dramatic increase of 141 percent of the number of commercial disputes referred to mediation.[102] A study found out that voluntary mediation has a lower uptake than compulsory mediation.[103]

Second, supporters of mandatory mediation argue that courts coercing parties into mediation is good since some may not want to initiate mediation for fear of seeming weak.[104] In *Remuneration Planning Corp Pty v Fitton,* the Supreme Court of New South Wales said:

> It has become plain that that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that

[100] Lord Chancellor Department, 'Alternative dispute resolution: A discussion paper', November 1999, Annex B.

[101] Lord Chancellor Department, 'Alternative dispute resolution'.

[102] Lord Chancellor Department, 'Alternative dispute resolution'.

[103] Safer Communities Directorate, 'Mediation in civil justice: International evidence review', *Scottish Government*, 25 June 2019.

[104] Hutchinson, 'The case for mandatory mediation', 88.

> showing willingness to do so may appear as a sign of weakness, yet engage in successful mediation when mediation is ordered.[105]

In such cases, compulsory mediation intervenes to help the parties enter mediation.

Third, commentators argue that mandatory mediation is justified because it helps to bring awareness to people about mediation and its benefits.[106] However, they argue that the courts should implement mandatory mediation only as a short-term measure.[107] When the courts create sufficient mediation awareness among the people, they should abandon mandatory mediation and implement voluntary mediation.[108]

Critics of mandatory mediation argue that mandatory mediation undermines party self-determination which is 'a core value of mediation'.[109] Self-determination includes the parties' freedom to choose mediation and the outcome.[110] When courts implement mandatory mediation, they undermine party autonomy and one questions whether the process deserves to be called mediation. Trina Grillo contends that self-determination of parties is 'fundamentally altered when mediation is imposed rather than sought or offered'.[111] Similarly, Richard Ingleby is of the opinion that 'mediation loses its defining characteristics if the parties do not enter of their own volition or if the process is institutionalised'.[112]

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105 (2001) NSWSC 1208 (14 December 2001) para 3.

106 Frank Sander, William Allen and Debra Hensler, 'Judicial misuse of ADR? A debate', 27 *University of Toledo Law Review* (1996) 885, 886.

107 Sander, Allen and Hensler, 'Judicial misuse of ADR? A debate', 886.

108 Dorcas Quek, 'Mandatory mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation programme', 11(2) *Cardozo Journal of Conflict Resolution* (2010) 484; Sander, Allen and Hensler, 'Judicial misuse of ADR?', 886.

109 Mary Anne Noone and Lola Akin Ojelabi, 'Ethical challenges for mediators around the globe: An Australian perspective', 45 *Washington University Journal of Law and Policy* (2014) 165.

110 Brand, Steadman and Todd, *Commercial mediation,* 24.

111 Trina Grillo, 'The mediation alternative: Process dangers for women', 100 *Yale Law Journal* (1991) 1581.

112 Richard Ingleby, 'Court-sponsored mediation: The case against mandatory participation', 56(3) *Modern Law Review* (1993) 443.

Colleen Kotyk stresses that '[t]he very premise of mediation is its voluntary nature, which in theory makes the parties more willing to reach an agreement. When a court or statute mandates mediation, however, a cornerstone of its foundation is removed, causing serious structural flaws'.[113] Others argue that coercion into mediation infringes the parties' rights to trial.[114]

Furthermore, critics argue that it is not necessary to implement mandatory mediation because it does not produce many settlements as compared to voluntary mediation. Studies indicate that mandatory mediation has less settlements than voluntary mediation. For example, voluntary mediation in Birmingham (UK) in the years between 1999 and 2004 had a 60% settlement rate while in Exeter where the judge referred cases to mediation against the will of the parties, the settlement rate was only 30%.[115] Similarly, research carried out in New York showed that mandatory mediation produced much fewer settlements than voluntary mediation.[116]

Mandatory mediation's low settlement rate may be a result of the 'undue pressure' that the judge exerts on the parties to mediate,[117] or the threat of sanctions for non-compliance.[118] Such pressure has the potential of making the disputants less frank in mediation.[119] Mediation's success depends on the willingness of the parties to enter the mediation process, negotiate and compromise.[120] Commentators argue that mediation's voluntariness is what leads to more settlements and warrants the

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113 Colleen N Kotyk, 'Tearing down the house: Weakening the foundation of divorce mediation brick by brick', 6 *William and Mary Bill of Rights Journal* (1997) 309.

114 *Halsey v Milton Keynes Gen NHS Trust*, CA 11 May 2004, para 9.

115 Wahad, 'Court-annexed and judge-led mediation in civil cases', 73.

116 Sally Engle Merry, 'The myth and practice in the mediation process' in Martin Wright and Burt Galaway (eds) *Mediation and criminal justice: Victim, offenders and community,* Sage Publications, 1989, 244.

117 Quek, 'Mandatory mediation: An oxymoron?', 486-487.

118 Farhan Ahmad, 'Is mandatory mediation the future?', *The Barrister Group*, 26 September 2024.

119 Quek, 'Mandatory mediation: An oxymoron?', 487.

120 Michael P Carbone, 'Mediation strategies: A lawyer's guide to successful negotiation', *Mediate: Everything Mediation.com*, 9 August 2019.

disputants' satisfaction with the process. When parties are forced into mediation, they may not cooperate because mediation depends on their good will to participate. Moreover, when the parties are forced into mediation, they may not comply with the settlements ensuing from such agreements.[121]

Reasons for introducing compulsory mediation in Malawi

Owing to the purported advantages of mediation, courts in many jurisdictions introduced mandatory mediation to enable the parties enjoy the benefits of mediation. Those in support of mandatory mediation give the following arguments. First, they contend that compulsory mediation provides opportunities for parties to enjoy the benefits of mediation. When mediation is voluntary, not many people choose it.[122] For instance, a study in England's London County courts discovered that out of 4,500 cases in which parties were free to choose mediation, only 160 chose mediation.[123] However, when England enacted the Civil Procedure Rules in 1977, encouraging mediation and giving sanctions for non-compliance, there was a dramatic increase of 141 percent of the number of commercial disputes referred to mediation.[124] A study found out that voluntary mediation has a lower uptake than compulsory mediation.[125]

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121 Timothy Hedeen, 'Coercion and self-determination in court-connected mediation: All mediations are voluntary, but some are more voluntary than others', 26(3) *The Justice System Journal,* (2005) 281.

122 Lord Chancellor Department, 'Alternative dispute resolution: A discussion paper', November 1999, Annex B.

123 Lord Chancellor Department, 'Alternative dispute resolution: A discussion paper'.

124 Lord Chancellor Department, 'Alternative dispute resolution: A discussion paper'.

125 Safer Communities Directorate, 'Mediation in civil justice: International evidence review', *Scottish Government*, 25 June 2019.

126 Hutchinson, 'The case for mandatory mediation', 88.

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In such cases, compulsory mediation intervenes to help the parties enter mediation.

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127 (2001) NSWSC 1208 (14 December 2001) para 3.

128 Dorcas Quek, 'Mandatory mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation programme', 11(2) *Cardozo Journal of Conflict Resolution* (2010) 484.

129 Mary Anne Noone and Lola Akin Ojelabi, 'Ethical challenges for mediators around the globe: An Australian perspective', 45 *Washington University Journal of Law and Policy* (2014) 165.

130 Brand, Steadman and Todd, *Commercial mediation,* 24.

131 Trina Grillo, 'The mediation alternative: Process dangers for women', 100 *Yale Law Journal* (1991) 1581.

132 Richard Ingleby, 'Court-sponsored mediation: The case against mandatory participation', 56(3) *Modern Law Review* (1993) 443.

Colleen Kotyk stresses that '[t]he very premise of mediation is its voluntary nature, which in theory makes the parties more willing to reach an agreement. When a court or statute mandates mediation, however, a cornerstone of its foundation is removed, causing serious structural flaws'.[133] Others argue that coercion into mediation infringes the parties' rights to trial.[134]

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133 Colleen N Kotyk, 'Tearing down the house: Weakening the foundation of divorce mediation brick by brick', 6 *William and Mary Bill of Rights Journal* (1997) 309.

134 *Halsey v Milton Keynes Gen NHS Trust*, CA 11 May 2004, para 9.

135 Wahad, 'Court-annexed and judge-led mediation in civil cases', 73.

136 Sally Engle Merry, 'The myth and practice in the mediation process' in Martin Wright and Burt Galaway (eds) *Mediation and criminal justice: Victim, offenders and community,* Sage Publications, 1989, 244.

137 Quek, 'Mandatory mediation: An oxymoron?', 486-487.

138 Farhan Ahmad, 'Is mandatory mediation the future?', *The Barrister Group*, 26 September 2024.

139 Quek, 'Mandatory mediation: An oxymoron?', 487.

140 Michael P Carbone, 'Mediation strategies: A lawyer's guide to successful negotiation', *Mediate Everything Mediation*, 9 August 2019.

disputants' satisfaction with the process. When parties are forced into mediation, they may not cooperate because mediation depends on their good will to participate. Moreover, when the parties are forced into mediation, they may not comply with the settlements ensuing from such agreements.[141]

The main reason why Malawi introduced compulsory mediation was to reduce the case backlog in the courts of Malawi.[142] Five out of the six judges[143] and seven out of the nine lawyers[144] interviewed explained that the Malawi judiciary implemented mandatory mediation to reduce the backlog of cases. For example, one judge said compulsory mediation commenced in the Malawi courts 'to reduce unnecessary workload of the courts'[145]. Similarly, one lawyer said that Malawi introduced mandatory mediation because 'the courts were flooded with cases'.[146]

Respondents explained that the case backlog increased in Malawi due to the advent of multi-party democracy in 1994 as more Malawians became aware of their rights and sued to enforce their rights.[147] They also attributed the increase of case backlog to the insufficient numbers of judges.[148] Further, about half of the judges and lawyers mentioned that Malawi introduced mandatory mediation to reduce delay in the courts[149] and save costs.[150] Some judges and lawyers explained that Ma-

141 Timothy Hedeen, 'Coercion and self-determination in court-connected mediation: All mediations are voluntary, but some are more voluntary than others', 26(3) *The Justice System Journal,* (2005) 281.

142 Interview responses from participant 1, participant 4, participant 5, participant 6, participant 7, participant 8, participant 9, participant 10, participant 11, participant 13, participant 14, and participant 15.

143 Interview responses from participant 10, participant 11, participant 13, participant 14, and participant 15.

144 Interview responses from participant 1, participant 4, participant 5, participant 6, participant 7, participant 8, and participant 9.

145 Interview response from participant 14.

146 Interview response from participant 1.

147 Interview response from participant 5.

148 Interview responses from participant 7 participant 4, and participant 8.

149 Interview responses from participant 2, participant 3, participant 4, participant 6, participant 10, participant 11, participant 12 and participant 15.

150 Interview response from participant 2, participant 3, participant 4, participant 10, participant 11, participant 12, and participant 15.

lawi introduced mandatory mediation because when mediation was voluntary the uptake was too low.[151]

The findings show that the main goal for introducing mandatory mediation in Malawi was to reduce the case backlog, not necessarily to promote the use of mediation due to its features including flexibility, informality, and party self-determination in resolving disputes. Further, while some of the reasons given by the lawyers and judges for implementing compulsory mediation are contained in the Rules as objectives, others are not.

The objective of the Rules is to ensure that 'the parties shall strive to reduce costs and delay in litigation, and facilitate the early and fair resolution of disputes'.[152] This provision fails to mention other benefits of mediation such as encouraging the peaceful resolution of disputes, reconciliation and the maintenance of relationships as provided for in the Malawi Constitution.[153] This article recommends that the 2017 Civil Procedure Rules should include these other benefits of mediation and mediation features. The inclusion of other benefits of mediation can help lawyers and judges appreciate and promote the use of mediation as a dispute resolution mechanism.

Court-connected mediation vis-a-vis judge-led mediation

Parties, lawyers, and judges made a comparison between court-connected mediation and judge-led mediation. The majority of the parties (six out of eight parties) preferred judge-led and compulsory mediation to court-connected or private mediation.[154] First, the parties found judge-led mediation more serious than court-connected or private mediation.[155] They found the authority of the judge important.[156] They bemoaned the

151 Interview response from participant 1, participant 10, and participant 13.

152 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 2(1)(a).

153 Constitution of Malawi (1994) Section 13(1).

154 Interview responses from participant 16, participant 17, participant 20, participant 21, participant 22, and participant 23.

155 Interview responses from participant 16 and participant 17.

156 Interview responses from participant 16 and participant 20.

lack of commitment of mediators in Malawi's court-connected mediation programme.[157] More often than not, mediators in court-connected mediation failed to turn up for mediation sessions.[158] Second, parties found judges more professional, respectful and impartial than private mediators.[159] Third, parties preferred judge-led mediation because the settlement is binding and enforced by the court as a court judgement while in private mediation, the settlement is not binding.[160]

Similarly, eight out of nine lawyers and all the six judges preferred judge-led mediation to court-connected or private mediation.[161] They explained that Malawi once implemented court-connected mediation in the High Court's general division and magistrates' courts from 2004 to 2016.[162] However, the judiciary abandoned the programme because it was not working.[163] They also explained that Malawi implemented judge-led mediation in the commercial division between 2007 and 2016.[164] This fared better than court-connected mediation of the general division. In court-connected mediation, parties had the freedom to choose mediators from a list of mediators maintained by the chief justice. [165]

Lawyers and judges explained that mandatory mediation of the general division and magistrates' courts faced many challenges. First, court-connected mediation produced fewer settlements than judge-led mediation.[166] Second, court-connected mediators were not trained and

157 Interview responses from participant 16 and participant 17.

158 Interview responses from participant 16 and participant 17.

159 Interview responses from participant 16, participant 20, participant 21 and participant 22.

160 Interview response from participant 16.

161 Interview responses from participants 1-15. Only participant 5 preferred court-connected mediation and private mediation to judge-led mediation. He stated that what is needed in Malawi is to improve the conduct of private and court-connected mediation so that these mediations become serious.

162 Kapanda, 'A critical evaluation of judicial mediation in Malawi'; Interview with Participants 1-15.

163 Interviews with participants 1-15.

164 Commercial Division Mandatory Mediation Rules, 2007, Order 1(5).

165 Interviews with participants 1-15.

166 Interview responses from participant 4, participant 11 and participant 12.

accredited and lacked competence to conduct mediation since Malawi has no accreditation body. Moreover, there were no ethical standards for mediators.[167] Third, although the chief justice was supposed to maintain a list of mediators from various professions, majority of the mediators were lawyers. This defeated the whole idea of having expert mediators handle specific matters. [168]

Fourth, participants took court-connected mediation casually.[169] Sometimes disputants selected mediators who were their friends thereby making the process casual.[170] Law firms would send clerks or secretaries to represent clients instead of lawyers.[171] At times, the parties themselves never attended the mediation.[172] Moreover, court-connected mediation usually failed to end within the ninety-day period stipulated within the law.[173] Without seriously engaging in the mediation, the mediators would issue certificates indicating that mediation had failed.[174]

Fifth, money was the main incentive for lawyer-mediators in court-connected mediation. By contrast, the judge as a mediator has no interest in mediation fees since parties do not pay the judge any fees. The Malawi government pays the judge the same salary regardless of whether the judge does mediation or not.[175]

Sixth, the mediator's lack of power to sanction parties for non-compliance was another challenge.[176] Where disputants failed to attend mediation sessions, the innocent parties had the right to request mediators to issue a certificate to show that a party had not complied with

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167 Interview responses from participant 4, participant 5, participant 7 and participant 8.

168 Interview responses from participant 1, participant 4 and participant 6.

169 Interview responses from participant 1, participant 4, participant 5, participant 6, participant 7, participant 12, participant 14 and participant 15.

170 Interview responses from participant 5 and participant 6.

171 Interview response from participant 6.

172 Interview response from participant 11.

173 Interview response from participant 1.

174 Interview response from participant 5.

175 Interview responses from participant 4, participant 9, participant 11, participant 13 and participant 15.

176 Interview responses from participant 12 and participant 15.

mediation. Innocent parties would submit to the court the certificate of non-compliance so that the court could issue sanctions but this was a long process. The lawyer-mediator lacked powers to act instantly when non-compliance occurred. By contrast, in judge-led mediation, the judge-mediators have power to sanction the defaulting party as soon as non-compliance happens.[177]

Further, the majority of judges and lawyers preferred compulsory mediation to voluntary mediation.[178] Respondents explained that when mediation is voluntary, very few people choose to go for it.[179] Sometimes parties may want higher compensation from litigation.[180] Respondents gave the example of what is currently happening in the magistrates' courts where mediation is voluntary and due to this, mediation is not practised anymore in those courts.[181] However, a few judges and lawyers acknowledged that implementing court-connected mediation would be ideal for Malawi if the country put in place mediation infrastructure. This is because court-connected mediation is consistent with mediation principles such as parties' self-determination, informality, and flexibility.[182] Similarly, a few parties preferred court-connected mediation because it would allow them to choose mediators who would be readily available to conduct the mediation as compared to a judge who may be too busy.

While the majority of the parties, lawyers and judges preferred judge-led mediation in Malawi, the practice of judges mediating cases attracts controversy. Critics of mediation bring up the following critiques of mediation. They contend that it is not the duty of judges to mediate but to decide cases as per rules of evidence, relevant law, and

177 Interview response from participant 6.

178 Interview responses from participant 1, participant 2, participant 3, participant 4, participant 5, participant 6, participant 10, participant 11, participant 12, participant 13, participant 14, and participant 15.

179 Interview responses from participant 1, participant 10, participant 12 and participant 13.

180 Interview responses from participant 2 and participant 3.

181 Interview response from participant 1.

182 Interview responses from participant 7, participant 8 and participant 9.

the available facts.[183] Moreover, allowing judge-led mediation would be departing from the adversarial Malawian legal system to a civil law system. Since judicial authority does not include mediating cases, it is inappropriate for the judge to engage in the mediation of cases coming to court.[184] Commenting on this matter, the District Court of Appeal of Florida said, 'Mediation should be left to the mediators and judging to the judges'.[185]

Second, judges are not trained to be mediators. Trying to train judges would drain state resources.[186] Third, giving the work of mediating cases to judges adds to the judge's workload. Mediation cases consume the judge's time supposed to be used for litigation, therefore, mediating cases deprives litigation of having sufficient judges. That is why it is better for the court to leave mediation to private providers so that it has sufficient time to concentrate on litigation, which is the court's main mandate.[187] Fourth, owing to their evaluative qualities and the desire to reduce case backlog, judges may be tempted to coerce parties to settle in certain ways, which destroys the parties' self-determination in deciding cases.[188]

Fifth, the court is a public justice system while mediation is a private justice system. The judiciary operates using tax-payers' money and its operations must be accountable and transparent to the public. When the judge engages in mediation, the public is not able to follow and assess their actions because of the confidentiality of mediation. No one assesses whether these mediation processes lead to just outcomes. Hence, judges should not engage in such private dispute resolution whose transparency is questionable. Judges should be transparent and accountable for their decisions.[189]

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183 Marilyn Warren, 'Should judges be mediators?', Supreme and Federal Court Judges' Conference Canberra, 27 January 2010, 5.

184 NADRAC, 'Issues of fairness and justice in alternative dispute resolution', 21.

185 *Evans v State*, 603 So 2d 15, 17 (Fla Dist Ct App 1992).

186 NADRAC, 'Issues of fairness and justice in alternative dispute resolution', 21.

187 Warren, 'Should judges be mediators?', 17.

188 Peter Robinson, 'Adding judicial mediation to the debate about judges attempting to settle cases assigned to them for trial', 2(1) *Journal of Dispute Resolution* (2006) 353.

189 Warren, 'Should judges be mediators?', 17.

Supporters of judicial mediation argue that judge-mediators help increase settlements in mediation because of the judges' evaluative qualities.[190] Where parties may not have legal representation, the judge-mediator can tell the parties the legal implications of their cases.[191] Others support the use of judges as mediators in the courts because 'mediation provides an opportunity to expand and develop the judicial role of judges to the mutual benefit of the judges and the community'.[192] The authors in this article believe that the foregoing arguments are worth considering when implementing judge-led mediation in Malawi. In light of the above, this article recommends that the Malawi judiciary takes measures to promote mediation principles including the self-determination of parties, flexibility, and informality.

Right to trial and compulsory mediation

Parties, lawyers and judges deliberated on whether mandatory mediation is consistent with the rights of the parties to trial and litigation as provided for in the Constitution.[193] All interviewees stated that mandatory mediation complies with the right of the disputants to litigation because judges do not force parties to settle the dispute during mediation. Where parties fail to settle, the judge terminates the mediation and parties proceed to trial.[194] Some interviewees perceived mediation as part of court procedures which parties ought to respect.[195] The respondents all noted that parties generally comply with the requirement for mediation as part of court procedures.[196]

190 Warren, 'Should judges be mediators?', 17.

191 Leonard L Riskin, 'Toward new standards for the neutral lawyer in mediation', 26 *Arizona Law Review* (1984) 330.

192 James Alfini and Gerald S Clay, 'Should lawyer-mediators be prohibited from providing legal advice or evaluations?', *Dispute Resolution Magazine* (1994) 148.

193 Constitution of Malawi (1994) Section 41(2) and 42.

194 Interview responses from participants 1-23.

195 Interview responses from participant 1, participant 5, participant 9, participant 11, participant 13 and participant 18.

196 Interview response from participant 11.

While asserting that mandatory mediation in Malawi complies with the parties' right to litigation, a few judges admitted that sanctions imposed by judge-mediators threaten the right of the parties to litigation.[197] These judges contended that sanctions are necessary to regulate party behaviour.[198] However, some of the sanctions under the Courts' Rules were draconian, including the sanction of judges dismissing claims or striking out defences from the parties.[199] All respondents acknowledged that judges have been imposing sanctions to defaulting parties.[200] Some judges and lawyers were of the view that judges should apply sanctions as the last resort.[201] Others argued that judges ought to arrange other sessions for the mediation as opposed to rushing to give sanctions.[202]

The imposition of sanctions in mediation is always a controversial matter. Sanctions are deemed to contravene the voluntariness of mediation, especially when they are excessive. Some commentators argue that heavy sanctions for non-compliance result to coercion in mediation because parties may go for the mediation because they fear those sanctions.[203] Others contend that excessive sanctions violate the right of the parties to trial.[204] Under Malawi's Court Rules, the powers of a judge to strike out defences or dismiss claims in mediation are excessive sanctions that violate the disputant's right to litigation and infringe mediation's voluntariness. Judges should not have such powers in mediation.

Under the Rules, the judge is empowered to order the payment of costs to parties for non-compliance,[205] but the clause fails to give guidelines to help the judges determine the amount of the costs, which gives

197 Interview responses from participant 12 and participant 13.

198 Interview responses from participant 1, participant 12 and participant 13.

199 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 6(1); participant 12; participant 13.

200 Interview responses from participants 1-23.

201 Interview responses from participant 10 and participant 13.

202 Interview responses from participant 10 and participant 13.

203 Quek, 'Mandatory mediation: An oxymoron?', 490.

204 William P Lynch, 'Problems with court-annexed mandatory arbitration: Illustrations for the New Mexico experience', 32(2) *New Mexico Law Review* (2002) 181.

205 Courts (High Court) (Civil Procedure) Rules, 2017, Order 13 Rule 6(1)(b).

too much discretion to the judge and may result in too much variation in practice. Some judges can abuse the clause by imposing heavy costs to a defaulting party while others may impose very minimal costs.

This article recommends amending the clause to specify the kind of costs to be paid by a defaulting party. For example, in some jurisdictions, a defaulting party may pay the lawyer's fees or the mediation costs incurred for the mediation that failed to take place because of the absence of that party.[206] The objective of such monetary sanctions is to compensate the innocent party and discourage future non-compliance.[207]

Judges and lawyers in this research argued that what is important for the parties is for the dispute to be resolved.[208] Nevertheless, commentators argue that dispute resolution through litigation is different from mediation because the two processes offer different kinds of justice. Litigation accords parties with justice 'based on objective legal norms' while mediation offers 'individualised justice based on subjective standards'.[209] At trial, a judge resolves disputes while in mediation, disputants themselves make decisions that resolve the dispute. When the court coerces parties to go for mediation, the law is no longer central in resolving the matter and the judge is no longer the person to make judgments.[210] Therefore, if parties desire justice offered through the trial process, courts must respect the choice of the parties to use litigation as much as possible. Similarly, where parties desire justice provided by

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206 *Dvorak v Shibata,* 123 FRD 608, 610 (D Neb 1988).

207 Quek, 'Mandatory mediation: An oxymoron?', 496.

208 Interview responses from Participant 4 who stated that mandatory mediation promotes the settlement of disputes through the courts. He further stated that settlement of disputes through the courts should not be understood to mean the passing of judgement at trial. He noted that the important factor is the resolution of the issue, therefore, it does not matter whether the resolution is through settlement or judgment; Participant 6 stated that mandatory mediation promotes the right of the parties to trial. Additionally, participant 6 sated that mandatory mediation promotes the use of ADR and enhances access to justice. Participant 7 stated that mandatory mediation assists Malawians enjoy the right to trial since it helps reduce the case backlog, which gives more people access to the courts.

209 Jacqueline Nolan-Haley, 'Court mediation and the search for justice through law', 74 *Washington University Law Quarterly* (1996) 51.

210 Nolan-Haley, 'Court mediation and the search for justice through law', 63-64.

mediation, courts should encourage the parties. Each dispute resolution mechanism has its own benefits and challenges and it is up to the clients to choose the mechanism they please.

The efficiency and effectiveness of compulsory mediation in Malawi

Lawyers and judges analysed whether Malawi's mandatory mediation meets its objectives of resolving disputes expeditiously, reducing costs and the backlog of cases. Although Malawi has not evaluated the impact of the mandatory mediation to get the right figures on this,[211] the general answer was that there is minimal impact of mandatory mediation because the High Court still experiences delay and case backlog.[212] However, mandatory mediation is preventing the situation from worsening. Respondents stated that were it not for mandatory mediation, the case backlog and delay would have been worse.[213]

First, with regards to cost reduction, nearly all the parties, judges, and lawyers stated that mandatory mediation in Malawi is meeting this objective. Eight of the nine lawyers[214] and five of the six judges[215] stated that Malawi's mandatory mediation meets the objective of reducing costs. Further, six out of the nine parties said mediation saves on costs.[216] The judges and lawyers explained that if parties reach a mediation agreement, the lawyers do less work and research and use less money for paper work, therefore, the lawyer's fees are reduced and the parties spend less money.[217] Similarly, the courts spend less on paper work if

211 Interview responses from participant 10, participant 13 and participant 15.

212 Interview responses from participant 4, participant 9 and participant 13.

213 Interview response from participant 4.

214 Interview responses from participant 1, participant 2, participant 3, participant 4, participant 6, participant 7, participant 8 and participant 9. Only participant 5 was unsure of whether mediation reduced costs.

215 Interview responses from participant 10, participant 11, participant 12, participant 14, and participant 15. Only participant 13 said that mediation did not meet the objective of reducing costs.

216 Interview responses from participant 16, participant 17, participant 18, participant 19, participant 20, participant 22 and participant 23. Only participant 21 was unsure of whether mediation reduced costs.

217 Interview responses from participant 6 and participant 10.

the matter is settled at mediation.[218] Further, when a matter is settled at mediation, the courts do not tax the costs.[219]

Some cases settled through mediation have high settlement rates. The matters that have high settlement rates are personal injury and commercial matters.[220] Respondents explained that personal injury matters are easily settled because it is easy to find the liable party.[221] Moreover, parties depend on their insurance covers to pay compensation.[222] A good number of commercial matters are also resolved in mediation because some parties want to preserve their business relationships.[223] Further, producing evidence in commercial matters is easier since parties can produce receipts to show payments.[224]

Second, on whether mediation is helping to resolve disputes expeditiously in the courts, lawyers and judges had different views. While nearly all judges (five of the six judges) stated that Malawi's mandatory mediation resolves disputes fast,[225] only four out of nine lawyers had the same sentiments.[226] Both the judges and lawyers agreed that mediation sessions take a short time to conclude – sometimes from 30 minutes to 3 hours or at least within a day for most cases.[227] However, the majority of the lawyers (seven out of nine) stated that some judges take too long to allocate mediation dates, which prolongs the time mediation takes to

218 Interview responses from participant 10.

219 Interview response from participant 4.

220 Interview responses from participant 4, participant 6, participant 7, participant 8, participant 9, participant 10, participant 11, participant 12 and participant 14.

221 Interview responses from participant 10 and participant 14.

222 Interview response from participant 14.

223 Interview response from participant 9.

224 Interview response from participant 1.

225 Interview responses from participant 10, participant 11, participant 12, participant 14 and participant 15. Only participant 13 did not believe that mandatory mediation helped reduce delay in the courts.

226 Interview responses from participant 3, participant 4, participant 7 and participant 8 showed that mandatory mediation reduced delay in the courts of Malawi. Those who said that mandatory mediation did not help reduce delay in the courts include participant 1, participant 4, participant 5, participant 6 and participant 9.

227 Interview response from participant 11.

resolve the dispute.[228] While a few lawyers thought some judges failed to allocate mediation dates on time for good reasons (including the fact that judges in Malawi are few and, therefore, very busy),[229] the majority of lawyers were of the view that some judges are indolent.[230]

Third, lawyers and judges were divided in opinion as to whether compulsory mediation reduces case backlog in Malawi. Most judges (five out of the six judges) said mediation reduces the case backlog.[231] Half of the lawyers were in agreement with this assertion, while the other half disagreed.[232] Those who said mediation reduces the backlog argued that there is a high settlement rate in some cases, which logically means that mediation reduces case backlog.[233] They contended that, generally, the cases that are settled are more than those that are not settled.[234] Further, some of these lawyers argued that if Malawi courts still have backlog, it is because more people are suing.[235] Despite all of this, one thing that the lawyers and judges agreed on was that the overall impact of mandatory mediation is not seen because delay and case backlog continue to rise in the High Court.[236] This means there must be other factors to consider to ensure that mediation produces good results.[237]

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228 Interview responses from participant 1, participant 2, participant 3, participant 4, participant 5, participant 6 and participant 9.

229 Interview response from participant 7.

230 Interview responses from participant 2, participant 3, participant 5 and participant 6.

231 Interview responses from participant 10, participant 11, participant 12, participant 14 and participant 15. Only participant 13 stated that mandatory mediation did not reduce the case backlog.

232 Those who said mandatory mediation did not reduce the case backlog include participant 1, participant 4, participant 5 and participant 9. Those who said mandatory mediation reduced case backlog include participant 2, participant 3, participant 6, participant 7 and participant 8.

233 Interview responses from participant 6, participant 7, participant 8, participant 9, participant 10, participant 11, participant 12 and participant 14.

234 Interview responses from participant 6, participant 7, participant 8, participant 9, participant 10, participant 11, participant 12 and participant 14.

235 Interview response from participant 4.

236 Interview responses from participant 4, participant 9 and participant 13.

237 Interview response from participant 13.

Respondent's interview response to the observance of the principles of mediation in relation to mandatory mediation

The respondents mentioned other benefits of mediation including the fact that it empowers parties themselves to make decisions to resolve the dispute.[238] However, some lawyers and judges acknowledged the impossibility of fully realising mediation principles in mandatory mediation.[239] For example, commentators argue that the self-determination of parties includes the free choice of disputants to opt for mediation.[240] Malawi does not meet this requirement since the Malawi judiciary coerces parties to go for mediation.[241] Moreover, self-determination includes the liberty of disputants to select mediators, mediation procedures, venues, and outcomes.[242] Every party should also be free to withdraw from mediation if he or she pleases to do so.[243] Respondents explained that in Malawi's mandatory mediation, disputants have no liberty to choose the judge as their mediator since the court allocates the judges to mediate cases.[244] They also explained that parties do not also have the freedom to choose the venue since the mediation occurs within court premises (in conference rooms, judges' chambers or other offices) and the judge decides which room to use for the mediation.[245]

Since mediation takes place within court premises and conducted by a judge, some parties may think that they are doing litigation.[246] This article recommends that Malawi courts should allow judges to conduct mediation outside the court premises in venues the parties request.

238 Interview responses from participant 5, participant 6, participant 7, participant 11 and participant 15.

239 Interview responses from participant 6, participant 7, participant 8, participant 9 and participant 14.

240 Brand, Steadman and Todd, *Commercial mediation,* 24; Participants 1-15.

241 Interview responses from Participants 1-23. All respondents acknowledged that they were forced to go for mediation in the courts.

242 Wahad, 'Court-annexed and judge-led mediation in civil cases', 61.

243 Model standards of conduct for mediators 2005, Standard 1(A).

244 Interview responses from participant 1, participant 5, participant 6, participant 8, participant 10, participant 11 and participant 14.

245 Interview responses from participant 6 and participant 9.

246 Interview responses from participant 1, participant 7 and participant 9.

However, the venue should not be too far from court premises to avoid transport expenses. Further, respondents stated that the parties do not have a lot of say on the date and time of the mediation since judges allocate this according to their schedules.[247] Furthermore, the authors of this article observe that the Rules have no clause giving the parties the possibility to withdraw from the mediation. All these factors diminish party autonomy, flexibility, and informality of mediation as an ADR process.

Factors leading to settlements in mandatory mediation

Respondents stated that what contributes to settlements is the parties' willingness to settle, the judges' competence and the skills of the lawyer. The lawyers and judges acknowledged that some clients are difficult, stubborn, see no value of talking to the other party, and want litigation.[248] The parties mentioned the following as contributing factors to reaching settlements: the acceptance of liability by one party, that party's readiness to pay compensation or any monies involved, and the parties' willingness to compromise.[249] The lawyers and judges also explained that the amount of money involved also matters; parties are reluctant to settle if huge sums of money are involved but are ready to settle if small amounts of money are at stake.[250]

Moreover, settlements of disputes in mediation also depend on the value the parties attach to the dispute's subject matter or its complexity.[251] For instance, most land, chieftaincy, defamation, and custody matters are unresolved at mediation because they are complex and the people attach so much value to them.[252] Further, mediation fails or succeeds depending on the amount of compensation the claimant demands. If the plaintiff is demanding too much compensation, the chances of the

247 Interview responses from participant 6 and participant 9.

248 Interview responses from participant 4, participant 5, participant 8, participant 9, participant 11 and participant 13.

249 Interview response from participant 21.

250 Interview response from participant 8.

251 Interview responses from participant 1, participant 5.

252 Interview responses from participant 1, participant 10 and participant 12.

mediation failing are high.[253] Mediation may also fail if one party sees that they have a much stronger case than the other party hence a higher chance of winning the case in litigation.[254] Defendants may also be opposed to settling the matter in order to buy time so that they can look for money to pay later in litigation since litigation takes long.[255] Some defendants might have invested their money and want to earn interest before they can compensate the other party. [256]

In addition, the lawyers and judges stated that the competence of the lawyer and judge led to the failure or success of the mediation process.[257] The judges and lawyers acknowledged that most judges in Malawi have not been trained in mediation.[258] While some judges are good at conducting mediation despite the lack of training, there are a few judges who conduct mediation poorly.[259] For instance, there are some judges who terminate the mediation too quickly without helping the parties deliberate sufficiently.[260]

Further, lawyers make the mediation fail or succeed depending on the advice they give to the clients.[261] Most lawyers in Malawi did not receive formal education in mediation in the law school and have less appreciation for mediation.[262] Due to the non-appreciation of mediation, some lawyers advise the parties not to settle because they believe that

253 Interview response from participant 6.

254 Interview responses from participant 2, participant 3, participant 4, participant 6 and participant 8.

255 Interview response from participant 5.

256 Interview response from participant 6.

257 Interview responses from participant 4, participant 5, participant 6, participant 8, participant 9, participant 12 and participant 13.

258 Interview responses from participant 4, participant 5, participant 8, participant 9, participant 12, participant 13 and participant 15.

259 Interview responses from participant 2, participant 3, participant 4, participant 5, participant 6, participant 9 and participant 13.

260 Interview responses from participant 2, participant 3, participant 5, participant 6, participant 9 and participant 13.

261 Interview responses from participant 4 and participant 5.

262 Interview responses from participant 4, participant 5, participant 7, participant 8, participant 11 and participant 13.

the parties have a good case and would win at trial.[263] Other lawyers advise their parties not to settle so that the parties can get more compensation at trial and the lawyers can get more legal fees or show off their litigation skills.[264]

Satisfaction with mediation settlements

The study asked the parties, lawyers, and judges about their satisfaction with mediation settlements. Nearly all the judges and lawyers were of the opinion that parties are satisfied with mediation settlements.[265] The judges and lawyers stated that parties are satisfied with mediation settlements since the parties themselves are the ones who make decisions in mediation.[266] They discuss in an open way and come to a consensus about the outcome.[267] The lawyer and judge-mediators do not force the parties to settle. Where a party does not feel comfortable with the suggested outcomes, they can refuse the suggestions and the mediator terminates the mediation so that the parties proceed to litigation. Therefore, if a party accepts a particular agreement, the assumption is that they are happy with it.[268]

The judges and lawyers explained that the parties must be satisfied with mediation agreements because the lawyers and judges guide them during the mediation. The lawyers explain to the clients the legal implications of their cases, the concept, and procedures of mediation at the court, and the reasonable compensation they can accept. Therefore, the parties should be satisfied with the decisions they make since they

263 Interview responses from participant 2, participant 3, participant 4, participant 6 and participant 8.

264 Interview responses from participant 4, participant 5, participant 7, participant 8, participant 10 and participant 11.

265 Interview responses from participant 4, participant 5, participant 6, participant 7, participant 9, participant 11, participant 12, participant, 13, participant 14 and participant 15.

266 Interview responses from participant 5, participant 6, participant 7, participant 11 and participant 15.

267 Interview responses from participant 2, participant 3, participant 5 and participant 13.

268 Interview responses from participant 6 and participant 13.

do not make them out of ignorance.[269] The judges and lawyers also stated that the parties must be satisfied with mediation because mediation helps them resolve the dispute quickly and attain a win-win remedy.[270] Moreover, parties must be satisfied since mediation helps them reach a settlement that meets their interests and needs.[271] For example, mediation gives parties the opportunity to apologise hence maintaining relationships.[272] The judges and lawyers further stated that they were satisfied with mediation outcomes for the same reasons above.[273]

Similarly, the majority of the parties (six out of the nine parties) said that they were content with the mediation settlements.[274] Those who were satisfied with mediation settlements stated that mediation is faster and cheaper than litigation.[275] They also stated that Mediation simple and allows the parties to make the decisions themselves,[276]while at the same time preserving relationships.[277] Some parties articulated that their satisfaction with mediation settlements is derived from adequate compensation by the defendant.[278] However, a few parties were not satisfied with mediation due to the delayed payment of compensation,[279] payment in instalments[280] and insufficient compensation.[281] Secondly, mediation led to arriving at compromised solutions.[282] For example, one party stated that she wanted to evict her tenant from her house but she failed to do so and ended up allowing the tenant to stay

[269] Interview responses from participant 4, participant 6, participant 9, participant 13 and participant 14.

[270] Interview responses from participant 11, participant 12 and participant 14.

[271] Interview response from participant 11.

[272] Interview response from participant 11.

[273] Interview responses from participant 5, participant 7 and participant 11.

[274] Interview responses from participant 16 and participant 17.

[275] Interview responses from participant 16 and participant 17.

[276] Interview response from participant 17.

[277] Interview response from participant 18.

[278] Interview responses from participant 18 and participant 23.

[279] Interview responses from participant 20 and participant 21.

[280] Interview response from participant 21.

[281] Interview responses from participant 18 and participant 23.

[282] Interview response from participant 19.

in the premises for one more year. She would have preferred litigation because she would have expelled that tenant from her premises.[283]

Challenges facing mandatory mediation

The lawyers and judges acknowledged that mandatory mediation in Malawi faces many challenges. First, the judges and lawyers stated that the Malawi judiciary lacks other mediation or ADR programmes to compliment the mandatory mediation programme in the High Court.[284] The application of mandatory mediation falls short of promoting the use of mediation countrywide because mandatory mediation is not used in the other courts. Apart from the Industrial Relations Court which encourages resolving labour disputes through arbitration,[285] there are no other ADR programmes in the other courts of Malawi. Malawi courts may learn from other countries that promote the use of many ADR programmes to widen access to justice. United States courts, for instance, promote the use of various dispute resolution mechanisms such as mediation, arbitration, early neutral evaluation, summary jury trials, and mini-trials.[286]

Second, Malawi lacks institutions and comprehensive legislation to promote the use of mediation and other ADR programmes. The country does not have mediation or any ADR accreditation committees and mediation or ADR centres. Additionally, Malawi has no parent statute on mediation. Further, the mandatory mediation programme of the High Court has no guidelines for the conduct of mediation and there is no ethical code for mediators and lawyers in the country. The lack of institutions and legislation on mediation and ADR hampers the growth of the use of mediation and other ADR mechanisms in the country.

Third, the respondents stated that the Malawi Judiciary has not monitored and evaluated mandatory mediation since the Rules came

283 Interview response from participant 19.

284 Interview responses from participants 1-15.

285 Malawi Labour Relations Act, 1996, Section 44(3).

286 Ettie Ward, 'Mandatory court-annexed alternative dispute resolution in the United States Federal Courts: Panacea or pandemic?', 81(77) *St John's Law Review* (2007) 84.

into effect.[287] Other challenges include the Malawi judiciary's lack of reporting on mediation and poor record keeping on mediation at the court registry since files at the registry are in a mess. Additionally, the Malawi judiciary has not digitised records.[288]

Fourth, only a few judges in Malawi received training in mediation through the assistance of international organisations including the World Bank.[289] Owing to the lack of training in mediation, the respondents stated that some judges were not good at mediation.[290] For example, the respondents explained how some of the judges at the General Division of the High Court terminate mediation without giving the parties the chance to try mediation.[291] Other judges take too long to allocate mediation dates, which may indicate their lack of appreciation for mediation.[292] Others schedule too many mediation exercises within the same morning, for example, 10-15 mediation exercises, and rush through the mediation without getting to the root causes of the matters.[293] Other judges enter judgements on liability the moment one of the parties is not present without making efforts to find that party.[294]

The lack of training for lawyers in mediation also poses a great challenge to the success of a mediation process.[295] Due to the lack of training, some lawyers do not appreciate mediation.[296] As a result, the respondents explained that the Law Society of Malawi and the Law Commission of Malawi do very little in promoting the use of mediation in Malawi, the enactment of mediation laws or the establishment of rel-

287 Interview responses from participant 10, participant 13 and participant 15.

288 Interview response from participant 13.

289 Interview responses from participant 4 and participant 7.

290 Interview responses from participant 2, participant 3 and participant 4.

291 Interview responses from participant 2, participant 3, participant 4, participant 5 and participant 6.

292 Interview responses from participant 1, participant 2, participant 3, participant 4, participant 5, participant 6 and participant 9.

293 Interview responses from participant 6.

294 Interview responses from participant 2 and participant 3.

295 Interview responses from participants 1-15.

296 Interview responses from participant 1, participant 8 and participant 9.

evant institutions.[297] Most lawyers do not encourage their clients to try mediation before proceeding to institute a lawsuit.[298]

Fifth, other sectoral actors have put minimal effort in promoting the use of mediation. Mediation programmes locally ran by the chiefs in the villages go unsupported. Additionally, governments and non-governmental organisations are not implementing any mediation programmes in the rural areas to promote access to justice to the local people through mediation. Companies and religious institutions in Malawi are also not committed to promoting the use of mediation.

Therefore, Malawi can borrow a leaf from United States' mediation practice. Private organisations in the US make great use of mediation. For example, professional bodies such as the American Bar Association (ABA), the American Arbitration Association (AAA), and the Association for Conflict Resolution (ACR) have been involved in promulgating ethical codes of conduct for mediators. In 1994, the ABA and AAA promulgated the Model Standards of Conduct for Mediators and revised them in 2005. Many US companies have signed the Conflict Resolution ADR pledge to use alternative dispute resolution mechanisms such as mediation.[299]

The Judicial Arbitration and Mediation Services (JAMS), the largest private organisation providing ADR services in the United States and other jurisdictions, has wide reach. JAMS has trained and specialised arbitrators, mediators, and early neutral evaluators, most of whom are retired judges, or skilled lawyers who offer services on any civil matter.[300] Christians, Muslims, and Jews maintain religious courts that use arbi-

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297 Interview responses from participant 1, participant 5, participant 7, participant 8 and participant 9.

298 Interview responses from participant 1.

299 For instance, the CPR website states that over 4000 corporations have signed its ADR pledge. International Institute for Conflict Prevention and Resolution, 'About CPR: History'.

300 Lucas Rozdeiczer and Alejandro Alvarez, de la Campa, 'Alternative dispute resolution manual: Implementing commercial mediation', Small and Medium Enterprise Department, World Bank Group, November 2006, 100.

tration, and mediation centres to resolve family matters.[301] Local communities also apply informal justice systems including mediation and consensus building to resolve land, environmental, budget, and cultural disputes.[302]

Moreover, some states in the United States require certification of mediators which makes mediation a profession and increases public confidence in mediation.[303] Individual lawyers and retired judges now offer mediation services and their names are now found in telephone directories in the United States. The mediators make adverts in legal newspapers and magazines. Law firms also advertise the kind of services they offer in mediation. The curriculum in law schools also includes dispute resolution courses such as mediation. Additionally, there are also mediation training programmes for lawyers.[304]

The respondent parties also mentioned other challenges facing Malawi's mandatory mediation. They noted the imbalance between parties in mediation due to illiteracy.[305] The parties explained that the literacy levels of the parties affect the reasoning and understanding of mediation proceedings.[306] Uneducated parties, for instance, are likely to settle for less because of their ignorance. Furthermore, illiteracy creates a communication problem.[307]

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301 Carrie Menkel-Meadow, 'Regulation of dispute resolution in the United States of America: From the formal to informal to the "semi-formal"', Georgetown University Law Centre, 2013, 440.

302 A Camacho, 'Mustering the missing voices: A collaborative model for fostering equality, community involvement and adaptive planning in land use decisions, instalment two', 24 *Stanford Environmental Law Journal* (2005) 274.

303 Online Master of Legal Studies, 'Court-certified mediator qualification: Requirements by state', May 2021.

304 Jay Folberg, 'Development of mediation practice in the United States', 17 *Iuris Dictio* (2015) 38.

305 Interview response from participant 16.

306 Interview response from participant 16.

307 Interview response from participant 16.

Recommendations

Considering the above challenges, this article makes the following recommendations to improve mediation practice in Malawi: first, the Malawi Parliament should enact a statute on mediation called the Mediation Act to strengthen the legal framework on mediation. Additionally, the 2017 Rules need amendment to expand the scope of mandatory mediation to include civil matters in the magistrates' courts and Industrial Relations Court. Second, Malawi needs to set up mediation and ADR institutions.

The Chief Justice of Malawi should also establish a Mediation Accreditation Committee whose duty will be to train, accredit mediators and formulate mediator ethical codes. The Ministry of Justice and Constitutional Affairs should establish a supreme ADR body that will oversee the implementation of all ADR programmes in Malawi. The supervisory ADR body should push for the establishment of ADR institutions as well as for the strengthening ADR centres and the ADR legal framework.

Third, there should be training of lawyers, judges, and magistrates in mediation. All judges and magistrates should be trained and accredited as mediators by taking refresher courses on mediation. Any new judges and magistrates ought to be trained in mediation before taking up their jobs. The Chief Justice of Malawi should spearhead the training of judges and magistrates while the Law Society of Malawi should spearhead the training of lawyers. Mediation should also be taught as an independent and compulsory course to all law students in Malawi. Furthermore, lawyers and judges should abide by ethical codes in mediation.

Fourth, the Malawi government should create public awareness of mediation. Creating awareness on mediation programmes and infrastructure may be done through radios, television, newspapers, magazines, and social media. Fifth, there should be monitoring and evaluation of mandatory mediation in Malawi to determine whether it meets its objectives. Finally, this paper recommends that the Malawi government increases funding for mediation programmes in each fiscal year.

Conclusion

Although there is no remarkable impact of mandatory mediation in reducing delay and case backlog in Malawi's High Court, the Malawi judiciary ought to consider the aforementioned challenges and recommendations to ensure its mediation programme significantly achieves its objectives. However, mandatory mediation prevents the situation from worsening by reducing costs even though mediation fails to achieve the settlement of some cases which end up going to trial.