ISLAMIC UNIVERSITY IN UGANDA

COMPARATIVE LAW JOURNAL

IUIUCLJ

IUIUCLJ. VOL 6, ISSUE 2, 2019

LEGAL-PICTOGRAPIC ANALYSIS OF THE PRINCIPLES AND PROCEDURES OF MEDIATION UNDER CONVENTIONAL AND ISLAMIC LAW IN NIGERIA

AYINLA LUKMAN ALABI*

Abstract

Mediation is an important ADR mechanism in view of its universal success rate. Its contribution to early dispute resolution is immense taking into consideration its consensual nature particularly when the process is handled by a seasoned and cultured neutral to achieve a negotiated settlement without being unnecessarily overbearing. The role / duty of a mediator is a onerous task that demands the use of the necessary skills armed with a good and sound knowledge of the principle and procedure of mediation for successful outcome / resolution of dispute. This paper thus adopts the graphical / pictorial (descriptive) and doctrinal legal research methods to chronicle the principle and procedure of mediation from the Common Law, Islamic Law and Customary Law perspectives.

Keywords: ADR, Mediation, Islamic Law, Principles & procedures, Nigeria

Introduction

Mediation is a consensual ADR mechanism adopted by parties to resolve their dispute or difference amicably to achieve a mutually acceptable outcome / resolution with the help of a neutral third party known as a mediator, in fact mediation is the ADR technique par excellence. Thus a good mediator that knows what it entails to achieve a mutually acceptable outcome will fortify himself with the nitty-gritty of the mediation process. The fact that we live in a "sue conscious" society with a "sue conscious mindset" is a common place and disturbing. This mindset is a legacy inherited from the right culture. The right culture presupposes the determination of who is right and who is wrong. This has provided a fertile ground for the adversarial system of justice to thrive beyond expectation. This ordinarily involves the determination of whether the court has jurisdiction? Whether the document sought to be tendered in evidence is relevant and admissible? And even whether the right process or procedure is adopted? All these shows the aim of the legal system is to provide for settlement based on evidence and fact without recourse to any other effect or welfare benefits. This is also with the attendant delay, waste of business and precious time, unnecessary cost, acrimony and enmity breeding between the parties and finally only at the end of the processing to achieve a win – lose situation as against a win – win situation that allows for compromise, concession and mutuality**.**

* *Faculty of Law University of Ilorin, Ilorin, Nigeria* Ph.D, (IIUM, Malaysia), LL.M (OAU, Ile-Ife, Nigeria), BL. (Abuja, Nigeria), LL.B. (Combined Hons., UDUS, Nigeria), Associate Professor (Reader) Faculty of Law, University

Adversarial / Litigious Mindset

The picture (imaginary scale of justice) below simply depicts the ordinary requirementof standard of proof which is on balance of probability or preponderance of evidence in the resolution of civil suit at common law.

(Source: https://www.shutterstock.com/search/mediation)

However, to achieve this legal requirement it may take a long period of years to conclude a simply dispute as evidence by plethora of matters that lingered for years before eventually resolved. The situation is so discouraging that some people never wished to attempt to enforce their legal rights through litigation.

The ills of litigation or the adversarial system of justice has no bound as epitomized by the graphic below. It is such that it takes away the moral bases of a relationship. Thus,a matter that may be settled as early as possible by making concession may degenerateto an affront and direct face-off between a minor and an adult. It is such that a minor may even flex muscle with an elderly to settle a score. This is how devastating and damaging the adversarial system may be, indeed it is termed the adversarial hired gun.

(Source: https://www.dreamstime.com/)

This litigious adversarial mindset has led to multiple problems of cost, delay, acrimony, overcrowded docket and court congestion among others. This is not good for the system

as unequivocally stated that: …Our system is too costly, too painful, too destructive, and too inefficient for a truly civilized people." A practical experience is shared in a remark by Justice Allen Linden who submitted that:

As a judge, I have presided over a great many cases and I have seen how people tear themselves apart, wasting their resources, their money and their time, breaking their hearts fighting over things that really need not be fought over.

It is said that "No profound social theory is needed to explain why people are more litigious today than ever before," as Richard Epstein of the University of Chicago putsit. Legal uncertainty "breeds litigation….it's that simple."

Peaceful Resolution of Dispute

Thus, the need to settle dispute in the Pacific and African way becomes imperative. The settlement of dispute in the Pacific and African ways is such that it encompasses the culture of face saving and peaceful resolution of disputes to achieve social equilibrium and harmonious co-existence within the society. However, by necessary implication the contemporary ADR movement becomes relevant.

A critical look at the title of this paper presupposes (3) three major components of mediation, principles and procedures. By necessary implication Mediation is an ADR process / mechanism and as such discussion on ADR is imperative.

An Evaluation of ADR

There are a number of acronyms of the contemporary amicable dispute resolution like ADR (alternative dispute resolution), App. DR (appropriate dispute resolution), DR (dispute resolution), and a host of other names but ADR remains the most widely accepted and recognized term.

The above notwithstanding, ADR is described as a set of mechanisms that the society / parties adopts to settle or resolve disputes without resort to the costly adversarial litigation. Besides, ADR is used to describe methods and procedures that are used to resolve disputes either as an alternative to the established dispute resolution mechanisms or in some cases as supplementary to such mechanism. This description of ADR is apt in the sense that in this contemporary days of the popularization and adoption of ADR mechanism as either an alternative to litigation or as supplement to the courts system which I will describe as the "the marriage of ADR with the Court system" as evident in the Multi-door Courthouse or Court-connected ADR like the Citizen Mediation and Conciliation Centre (CMCC), a situation that is akin to the fusion of the administration of common law and equity.

There are a number of ADR mechanisms like Mediation, Conciliation, Arbitration, Negotiation, Mini-Trial etc. The merits of ADR include the fact that it is quicker, cheaper, cost effective, consensual, control by parties, continued harmonious relationship, minimal technicality, win-win outcome and privacy as against adverse publicity as in litigation. The notable goal of ADR is identified as aiming to "relieve

court congestion, cost and delay", "enhance community involvement in dispute resolution", "facilitate access to justice" and "provide more effective dispute resolution".

The question should be asked, what is mediation? Mediation is the intervention of an acceptable third party (neutral -mediator) who has limited or no authoritative decision making power to assist the parties to voluntarily reach a mutually acceptable settlementof dispute. Mediation has some objects / features generally in the sense that it is a; win-win situation,

Not Right Seeking (not like the Right Culture – to determine who is wrong),Problem solving / consensual / flexible process, Achieve a workable solution / an acceptable outcome, Informal / Less formal in nature to Arbitration and Litigation, Mediator guides parties to reach their own resolution --- Negotiated settlement and, Non-Binding, but the agreement is a contract and the MOU is enforceable.

It is pertinent to look at the legality or otherwise of mediation in Nigeria before discussing the principles of mediation.

The Legal Framework of Mediation

The legality of mediation could be viewed from the apex law of the country which is the *fons et origo* of all laws in Nigeria. Section 19 (d) of the 1999 Constitution provides for the settlement of International dispute by mediation. The Arbitration and Conciliation Act also validates the use of the process although conciliation is mentioned but legal scholars have argued that the two processes may be used interchangeably. In the same vein, the Matrimonial Causes Act, in section 11 encourages reconciliation. The Environmental Impact Assessment Act recognizes the use of mediation in section 33 of the Act. In like manner the various Laws establishing the CMCC and the LMDC also recognizes mediation as one of the permitted ADR process. The various Rules of Court also lend credence to the validity of mediation like the HCCPR (Kwara), HC of FCT Abuja CPR 2004, Ord. 17 R (1) (c) specifically mention mediation. Some Rules also provide for the use of ADR mechanism. A relevant rule here is the Rules of Professional Conduct (RPC) for Legal Practitioners, 2007. Rule 15 (3) (d) provides that a legal practitional shall; …inform his client of the option of ADR mechanisms beforeresorting to or continuing litigation on behalf of his client. However, there are case laws as evidenced by Judicial Precedent in plethora of judicial authorities that are in support of the use of ADR like Owoseni v. Faloye, Aribisala v. ogunyemi and the recent impetus by the court imposing a punitive fine on a counsel for not availing his client the option of a peaceful resolution of dispute as against litigation. Having examined the validity of mediation it is pertinent to look at the basic principles of mediation.

Principles of Mediation

There are a number of principles guiding the conduct of mediation to achieve a successful mediation process. Compliance with these basic principles will make while failure to comply with same will mar the whole process.

CONFIDENTIALITY – This is based on the general principles of fairness, impartiality and good faith. It goes further to include the fact that whatever said, used or written shall not be used in a later proceeding against any of the parties. Therefore Parties mustbe confident that mediator will not reveal that confidential information.

IMPARTIALITY AND NEUTRALITY – Mediator should be impartial and neutral. This includes the need for mediator to avoid derogating and damaging comment during the process. He must avoid value judgment and taking side with any of the parties. It is argued as well that he must avoid suggestion of solution although he may seek solution that suits both parties. Neutrality encompasses dedication and commitment and as well, avoid manners that will create doubt in the mind of the parties.

CONSENT / WILLINGNESS - Mediation as a process is premised on the willingness and voluntary submission of parties or where there is an agreement by the parties to explore the possibility of settlement (mediation). It is important for the mediator to show the parties the advantages so as to take the benefits in mediation. Thus the powerof the parties to withdraw is still potent.

LEGALITY OF PURPOSE – It is very important that the legality of a process is very paramount. This is trite as illegality begets illegality. Thus, the subject matter of the dispute should be capable of settlement and not contrary to existing laws or public policy of Nigeria.

EQUALITY OF PARTIES – The fact that the parties have equal rights is sacrosanct. This strengthens the cardinal principle of natural justice. It is very important and at the same time this should be stressed by the mediator.

MEDIATOR INDEPENDENCE, INTEGRITY AND FAIRNESS – The mediator is independent and not accountable to the parties if settlement is not reached once the ethics of professional conduct is complied with. The mediator may not enjoy immunityif crime or damage is done. Thus, integrity and fairness is highly desirable and unethical manner or dishonesty will only lead to dispute and distrust in mediation process.

MAINTAINING COST AND COST EFFECTIVENESS OF MEDIATION – One of the notable advantages of ADR is minimal cost and the cost effectiveness of ADR. It is therefore important that the mediator make mediation inexpensive. He should as well maintain reasonability of meetings and other cost to avoid unnecessary costs so as to preserve the advantage of mediation.

PRIVACY OF PROCEEDINGS / INFORMALITY - The exclusion of the public is important to protect the private nature of mediation proceedings against unnecessary publicity. This includes the secrets, disclosures and revelations made during the proceedings. Informality presupposes that parties have the right to choose rules of procedures and the process is not ordinarily rule bound.

COMPETENCE – A mediator should be competent professionally and well trained and educated in the art as required by various rules to ensure professionalism. E.g. UNCITRAL Rules on Conciliation.

The above are the major principles of mediation, it is therefore logical to examine the mediation process / procedure.

Mediation Process / Procedure / Stages

There are various stages as hereinafter discussed that encompass the opening stage, joint session, caucuses, joint negotiation and the closing stage.

- MEDIATOR'S OPENING STATEMENT – The mediator introduces everyone, the rules, shows the need for cooperation, reiterates party autonomy, emphasizes voluntariness of process, assures party of his credibility and trustworthiness.
- PARTIES OPENING STATEMENT – A states his side, concerns and effect on him. Way out / idea on resolution. Caveat ---- B not to interrupt. Same process for B.
- JOINT SESSION / DISCUSSION – Mediator facilitates direct communication to narrow down issues to be addressed and resolved. Define issues clearly.
- NEED FOR MEDIATORS CAUCUS IF MORE THAN ONE - optional
- SEPARATE / PRIVATE CAUCUSES – Mediator meets with each party. The meeting otherwise known as caucus. Its purpose includes to discuss the strength and weakness of each case. Discuss issues on settlement. This is an important stage to discover the interest of each party from the disclosures and revelation. The parties make offers, counter-offers, demands and proposals.
- JOINT NEGOTIATION – Sit together and negotiate.
- CLOSING STAGE – Mediation ends. If resolution reached, terms of agreement is put in writing and signatures. If resolution is not reached, mediator review the progress, provide advice on options available ----- Arbitration / Court.

It is argued that the role of a mediator is not limited to facilitative but includes evaluative role. It must be stated that there are other stages / procedures identified by other scholars like Walker J. and Macfarlane J. for family dispute mediation. They are summarized as follow:

- Engagement – introduction, explanation of purpose etc.
- Fact finding and planning agenda – inquiry on family composition, living condition, steps toward divorce or legal advice etc.
- Exploring options and alternatives – ensure alternative to discus and negotiate and reiterate effect of eventual divorce
- Negotiation and decision making – this the substantive stage, facilitate communication and negotiation of acceptable terms
- Clarifying and summarizing agreements – Draft MOU and parties given copies to study or may be modified
- Review – may seek legal advice to review 9he MOU for scrutiny
- Implementation and reviewing agreement – Last stage, it may be recorded as order of court, or a consent award or judgment.

It is pertinent to note that the role of a mediator should not be confused with the role of a judge. This is so because in the duty of a judge – he is faced by attorneys,decides based of fact and settled principles of law and emerges from his chambers without preconceptions to moderate the ferocious and fierce battles of the counselswhile the duty of a mediator requires adequate skills expected of a seasoned mediator. The graphic below epitomizes the skills of mediators. This is necessary in view of the fact that lawyers have picked interest in mediation thus theneed to avoid the usual antics of litigation becomes sacrosanct.

The said usual antics is expressed as: these behaviours include pressing specious arguments, concealing significant information or delaying its disclosure, obscuring weaknesses, misleading parties about projected evidence from percipient or expert witnesses, resisting well-made suggestions, intentionally injecting hostility into the process, remaining rigidly attached to positions not sincerely held, or needlessly protracting the proceedings to wear down the other parties or to increase their cost burdens.

It is not unusual to find two persons as seen below, who are earlier good friends to become poles apart or erstwhile cordial or loving couple / partners becoming enemies to the extent of turning their back at each other. The mediator as a good neutral intermediary will skilfully come between the two parties having submitted their disputeto him and mediate their dispute to achieve a mutually acceptable negotiated agreement by both parties.

(Source:http://www.canstockphoto.com/middle-aged-mother-feeling-helpless-12539470.html)

The necessary outcome of this will result in resolution and restoration of their relationship back to normal.

(Source:https://www.123rf.com/stock photo/mediation.html?mediapopup=12308413)

A good mediator who is impartial and trustworthy will earn the confidence of the parties and build credibility and comfortable relationship with both parties to the extent that two giants of the size or above that of two conflicting elephant will succumb to his facilitative and mediatory role as observed in the picture below.

(Sources: https://www.shutterstock.com/search/mediation)

It is important to state that a mediator should know his role and guiding skills

Role / Skills of a Mediator

- Build credibility and comfortable relationship with both parties
- Educate parties on the process
- Ability to analyse dispute
- Planning the mediation
- Indentify parties interest
- Facilitate parties negotiations
- Help parties to generate proposals
- Draft agreements and developing implementation plan
- Be an active good listener
- Questioning and clarifying skills
- Emotional intelligence and Empathy
- Ability to secure parties commitment to mediation
- Summarizing skills
- Ability to comply with SOFTEN--- Smile, Open, Forward leaning, Touch, Eye contact and Nod.

The soften skill is highly desirable taking into consideration the facilitative role of a mediator. When parties are at loggerhead, the mediator must be able to smile, be open, lean forward and torch them for calm, maintain eye contact with them to show empathy and offer a nod in acknowledgement of their concerns.

(Source: https://www.shutterstock.com/image-vector/angry-adult-men-fiery-conflict-pacemaker-359026538?src=OvMXGG6PgTMjSr24Axp-0w-1-41)

This skill of mediator will always come into play in the discharge of his duty in situations where you have disputing parties who are already spitting fire and have purchased boxing glove for a professional fight as seen in the graphic above and below. Thus, the ability of a good mediator to calm them down and make them see reason why they have to sheathe their sword for peace to reign becomes imperative.

However, it is imperative to discuss mediation from the Islamic law perspective since the discussion is on mediation in Nigeria.

The Use of Sulh (Mediation In Nigeria)

Sulh is reconciliation or mediation. It is compromise of action or to settle a dispute. The authority for the use of sulh in the resolution of dispute is emphasized in …And sulh is the best. Its purpose is to resolve dispute, end hostility or conflict. That is to ensure peace and amity in relationship.

One notable exception is its non-application in *Hudud* cases (Offence against Allah – *Hiraba*, theft, *Zina*, Alcohol etc).

The duty of sulh officer / mediator is relatively a facilitator, who mediates to achieve an amicable result. However the principle of mediation is as stated below.

Principles of Mediation / Fundermental Characteristics Under Islamic Law
It is pertinent to state that the principles under Islamic Law are very much alike with the principle under the conventional ADR mediation. They identified as

- Neutrality and impartiality of mediator
- Voluntariness of the process
- Confidentiality of relationship between mediator and parties
- Procedural flexibility
- Give and take attitude (concession)
- Need for continuous training (fair and just Q49:10)

The Procedure under Islamic Law
The process encompasses the Introduction where the process is introduced and purposeof sulh is highlighted. It is important to recite Surat Fatiha to offer prayer for a successful mediation. There is the need for the Observation of Rules particularly the rules of natural justice and ensure non – interruption.

Next to this is the Main Joint Session, why submission is made by the parties as to the problems and their positions. This is followed by the Private Session. In case the joint session does not work, the need to meet the parties in caucus to avoid a prolong of the sulh session may become imperative.

Finally a Joint Session is held and consequently the process is concluded.

Lessons from Other Jurisdiction
In Malaysia, for example Sulh officers are charged with the responsibility of managing the sulh session. Besides, there is a Sulh working manual to guide the process.However, ethical behavior is also highly desirable and this has led to an ethical code in2002

Traditional Mediation in Nigeria

It must be stated that customary / traditional mediation is well practiced in Nigeria as in India and China. It plays an important role in dispute resolution as practiced by the elders, family heads, chiefs and traditional rulers. This should be strengthen at the grass root level and sustained to co-exist with the modern ADR practice. Although the principle and procedure relevant to the conventional mediation is relevant under traditional mediation but they appear not formalized. This is better appreciated in the various procedures where the elders sit under the trees to resolve dispute between two parties like fighting along the street, foot path, and stream side. The family head sits in the family house to resolve dispute and the resolution is held in the courtyard in Yoruba palaces where the king resolves dispute in appellate capacity. It is therefore important that traditional mediators should also be trained to sustain their valuable role in dispute resolution due to its closeness to the grass root. Traditional ADR mediation should be strengthened to be on the same level or at par with the practice in other jurisdictions.

Conclusion

The graphics are intended to enhance an understanding of the role and the onerous duty of a mediator. It is shown that it is imperative to be acquainted with the dictates of mediation and avoid the ordinary antics of litigation which has given litigation a bad, notorious and sickening name that is no more popular and been discouraged even from its country of origin.

Mediators generally should be trained and ensure continuous training to enhance the quality and success of the mediation process. This will enhance a sound knowledge of the principles and procedures of mediation and at the same time ensure compliance with the ethics of the process as in honesty, fairness, neutrality, transparency, confidentiality and mindfulness under the conventional, Islamic and Traditional mediation.

Above all, mediation / dispute resolution should not be "too rule bound to succeed" but one must ensure a level of flexibility based on a proper understanding of the situations and the cultures to give room for local realities. It is submitted that: "Before one can mediate successfully …he or she must understand the culture, the traditions, the people, the issues and all the sensitivities- a very tall order."

ADR as a dispute resolution and mediation as a process is to enhance peaceful settlement of dispute as against the adversarial and litigious mindset that brings about unhealthy rivalry. Thus, a win-win culture as a paradigm shift in contemporary days gradually moving away from the win-lose culture is a momentum worthy of being sustained. However, further legislations should be made and the old ones be reviewed to enhance and sustain this emerging trend of peaceful settlement culture in Nigeria. The successful entrenchment of this culture is partly dependent on a good mediatory role equipped with the basics of the role and compliance with the ethics of mediation for a successful ADR regime.