

## PART XV

### CONSENSUAL DISPUTE RESOLUTION AND ARBITRATION

#### CHAPTER 2

#### CONCILIATION BEYOND THE COURTS – ASPIRATIONS AND LIMITS OF MANDATED AND VOLUNTARY COURT MEDIATION PROGRAMMES FROM A MULTI-JURISDICTIONAL PERSPECTIVE

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## 1 INTRODUCTION

- 1 As judicial systems advance, evolving conceptions of justice are reflected in varying emphasis on the role, place and practice of conciliation beyond civil courts. How such programmes provide opportunities for party-directed reconciliation on the one hand while ensuring access to formal legal channels on the other remains an area of continued enquiry.<sup>1</sup> The question this section seeks to explore is what drives the development of a nation's particular approach to its court mediation system, whether voluntary or mandatory. How important is party choice in the success of court-connected mediation programmes? Given that 'public means available for financing dispute resolution are not unlimited,' a balancing of individual process choices and social efficiency requires careful investigation. Variation among such programmes in diverse societies reflects, to a large extent, distinct approaches to individual and collective responsibility for the financial, social and temporal resources required for resolution. In some jurisdictions, the design of court mediation structures may align with a view of conciliation as the mainstream, normatively preferable, rather than an 'alternative' approach to the resolution of disputes. In others, individual rights, protections, and choices are prioritized, with parties given the option to decide whether to engage in conciliation processes. The first part of this paper explores the motivations behind varying court mediation programme designs, voluntary or mandated, and the relative benefits, challenges and implications of such design choices. Examples of jurisdictions in which mediation has long been considered mainstream are explored to understand continuities in court-connected mediation programmes. This is followed by a discussion of comparative survey findings examining the impact of judicial mediation structure (mandated or voluntary) on perceptions of justice, efficiency and confidence in courts in ten jurisdictions.

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<sup>1</sup> A Cabral, 'Consensual Dispute Resolution' in B Hess, M Woo, L Cadiet, S Men  tre and E Vallines Garc  a (ed), *Comparative Procedural Law and Justice* (pt XV ch 1) <https://www.cplj.org/publications/15-1-consensual-dispute-resolution> accessed 28 October 2024.

## 2 ASPIRATIONS: HUMAN NATURE, MEDIATION AND CIVIL JUSTICE REFORM FROM A MULTI-JURISDICTIONAL PERSPECTIVE

- 2 For centuries, court systems have grappled with the question of how best to address the resolution of conflict – whether through formal restraints or appeals to an individual's higher nature. Émile Durkheim's concept of *homo duplex* asserts that from a sociological viewpoint, human nature is characterised by an oppositional dualism between two states of consciousness: (i) the egoistic individual, of which the body is the foundation and concerned with sensory experience and material desire within the physical universe; versus (ii) a higher plane of conceptual thought and moral activity, arising out of the soul and deriving from collective society.<sup>2</sup>
- 3 These dual natures co-exist.<sup>3</sup> Collective ideals forming the higher part of the *homo duplex* represent a form of external moral force which holds authoritative influence over behaviour.<sup>4</sup> Thus, *homo duplex* describes a dual consciousness of man based upon the intersection and opposition of the self-interested, sensory individual and the intellectual and moral life of collective society.
- 4 In collective-oriented societies, mediation has placed confidence in human capability to transcend a narrow focus on material self-interest through self-reflection and cultivation. Across the globe, many indigenous societies have relied on informal mechanisms of conflict resolution to address community disputes. Mediation has offered a platform for rehabilitation and reconciliation. Among the most ancient applications of this approach in the early fifth century BC China, it was thought that people 'should be positively motivated by *li* (virtue), to do that which they ought' through cultivation rather than merely 'avoid punishment' such that 'there will be no lawsuits'.<sup>5</sup> At the same time, traditional directive forms of mediation have also been misused as a tool for reinforcing social inequalities between youth and elders, between poor and rich, between women and men. Without acknowledging such dangers, directive forms of mediation risk a disconnect with contemporary users.<sup>6</sup>
- 5 More recently, in the twentieth century, emerging debates concerning the purpose of civil justice, as either advancing relational repair or individual rights protection, have long animated socio-legal discourse, beginning with contemporary debates between

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<sup>2</sup> É Durkheim, 'The Dualism of Human Nature and Its Social Conditions' (2005) 11(1) *Durkheimian Studies* 35, 36–38. See also: J S Fish, 'Homo duplex revisited: A defence of Émile Durkheim's theory of the moral self' (2013) 13(3) *Journal of Classical Sociology* 338, 342.

<sup>3</sup> Durkheim (n 2) 38–39.

<sup>4</sup> *Ibid* 42.

<sup>5</sup> Confucius, *The Analects*, para 2.3, 12.13, quoted in L Ross, 'The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong' (1989) 26(1) *Stanford Journal of International Law* 15, 16.

<sup>6</sup> S Ali, 'The Jurisprudence of Responsive Mediation: An Empirical Examination of Chinese People's Mediation in Action' (2013) 45(2) *The Journal of Legal Pluralism and Unofficial Law* 227, DOI:10.1080/07329113.2013.796759.

Owen Fiss and Lon Fuller. Recent work has highlighted the growing inefficiencies of civil litigation in economically advanced countries, while at the same time cautioning judiciaries to ensure that justice is safeguarded in extra-judicial procedures.<sup>7</sup> Building on a growing body of empirical cross-jurisdictional research examining mediation reform and policy,<sup>8</sup> this paper explores comparative findings, examining the association between judicial voluntary and mandatory mediation structure and perceptions of justice, efficiency and confidence in courts.<sup>9</sup> It suggests that variation among such programmes reflects distinct approaches to individual and collective responsibility for the financial, social and temporal resources required for resolution. As many such civil mediation reforms have been underway for more than a decade, it is timely to examine lessons learned in the implementation of such programmes.<sup>10</sup> In doing so, this section highlights positive lessons learned from selected jurisdictions, analyses local circumstances, and distils best practices.

- 6 Several jurisdictions, nationally and regionally, have taken steps to integrate mediation into their dispute settlement regimes.<sup>11</sup> However, an implicitly larger – and somewhat

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<sup>7</sup> See M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law & Society Review* 95; M M Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Russel Sage Foundation 1979); C Albiston, 'The Rule of Law and the Litigation Process: The Paradox of Losing by Winning' (1999) 33(4) *Law & Society Review* 869; H Genn, *Judging Civil Justice* (CUP 2010); A J Cohen, 'Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values' (2009) 78(3) *Fordham Law Review* 1143.

<sup>8</sup> See S Ali, *Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice* (Edward Elgar Publishing 2018). F Steffek and others (ed), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart 2013); M Schonewille and F Schonewille, *The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World* (Eleven International Publishing 2014); D Stienstra and T E Willging, 'Alternatives to Litigation: Do They Have a Place in the Federal District Courts?' (Federal Judicial Center 1995); R L Wissler, 'Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics' (1995) 29(2) *Law & Society Review* 323; C Menkel-Meadow, 'Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the "Semi-formal"' in Steffek and others (ed) (n 8) 419; T Stipanowich, 'The International Evolution of Mediation: A Call for Dialogue and Deliberation' (2015) 46 *Victoria University of Wellington Law Review* 1191; S I Strong, 'Realizing Rationality: An Empirical Assessment of International Commercial Mediation' (2016) 73(4) *Washington and Lee Law Review* 1973; H Genn and others, *Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure* (Ministry of Justice Research Series 1/07, 2007); L B Amsler, J K Martinez and S E Smith, 'Christina Merchant and the State of Dispute System Design' (2015) 33(1) *Conflict Resolution Quarterly* S7; A Kupfer Schneider, 'The Future of Court ADR: Mediation and Beyond: Foreword' (2012) 95(3) *Marquette Law Review* 799; T Sourdin and A Zariski, *The Multi-Tasking Judge: Introduction to Comparative Judicial Dispute Resolution* (Thomson Reuters 2013); D Quek Anderson and J Lee, 'The Global Pound Conference: A Conversation on the Future of Dispute Resolution' (2016) *Asian Journal on Mediation* 70.

<sup>9</sup> Ali (n 8).

<sup>10</sup> Ibid.

<sup>11</sup> See generally, Steffek and others (ed) (n 8); K Macfarlane and M Keet, 'Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Programme' (2005) 42(3) *Alberta Law Review* 677; RL Wissler, 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts' (1997) 33 *Willamette Law Review* 565; A Bruni,

rather overlooked – component to this regulatory transformation has been the concurrent emergence of diverse mediation practices across jurisdictions in terms of the adoption of either voluntary or mandatory (court-directed) mediation approaches for disputants. This section, therefore, surveys the global evolution of mediation across diverse jurisdictions in terms of both its voluntary and mandatory use prior to court proceedings. In this regard, this section not only delves into conceptual debates surrounding voluntary and mandatory mediation requirements but also examines rationales across jurisdictions justifying the adoption of either model.<sup>12</sup> Further, it interrogates the application of these mediation practices in regional and international dispute settlement frameworks alongside contemporary experience.

- 7 In numerous jurisdictions worldwide, civil justice reform has advanced rapidly in recent years since the early days of the ‘multi-door courthouse’.<sup>13</sup> In response to what has been described as ‘a sharp increase in the number, rapidity and complexity of transactions’<sup>14</sup> characterized by ‘cumbersomeness, costliness and legal unpredictability,’<sup>15</sup> reform proposals have been advanced, including the introduction of mediation in civil case administration.<sup>16</sup> Existing scholarship has examined the varying intrinsic and extrinsic rationales motivating courts to introduce mediation programmes,<sup>17</sup> including reduction of caseloads,<sup>18</sup> private and public sector efficiency<sup>19</sup> as well as extrinsic factors including relational,<sup>20</sup> societal<sup>21</sup> and process-based<sup>22</sup> considerations. Examining the impact of such programmes is critical<sup>23</sup>, since ‘with little (...) information about the process or

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‘Mediation in Italy’ (2010) 2 *Revista Forumul Judecatorilor* 96; D Cornes, ‘Mediation Privilege and the EU Mediation Directive: An Opportunity?’ (2008) 74(4) *Arbitration: the Journal of the Chartered Institute of Arbitrators* 395.

<sup>12</sup> Ali (n 8).

<sup>13</sup> See F E A Sander, ‘Varieties of Dispute Processing’ in A Levin and R Wheeler (ed), *The Pound Conference: Perspectives on Justice in the Future* (West Publishing 1979) 65. See also pt XV ch 3 (CPLJ).

<sup>14</sup> Civil Justice Reform, *Interim Report and Consultation Paper* (2001) para 9.

<sup>15</sup> R Kagan, *Adversarial Legalism: The American Way of Law* (Harvard UP 2001) citing D Bok, ‘A Flawed System of Law Practice and Training’ (1983) 33(4) *Journal of Legal Education* 570.

<sup>16</sup> See for example, C J Alkin, ‘The Modern Problem-Solving Court Movement: Taking Stock After 25 Years’ Association of American Law Schools Annual Conference (January 2016); and R Fisher and W Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* (2nd edn, Random House Business Books 1991) 10–11.

<sup>17</sup> D R Hensler, ‘Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System’ (2003) 108(1) *Penn State Law Review* 165.

<sup>18</sup> H Foo Chee, ‘Civil Case Management in Singapore: of Models, Measures and Justice’ 11th ASEAN Law Association General Assembly Conference (Bali, February 2012).

<sup>19</sup> W Maclons, ‘Mandatory Court Based Mediation as an Alternative Dispute Resolution Process in the South African Civil Justice System’ (2014) LLM thesis, University of the Western Cape 85.

<sup>20</sup> Y Shamir, *Alternative Dispute Resolution Approaches and Their Application* (UNESCO 2003) 24.

<sup>21</sup> N Alexander and others, ‘Engineering Peace - Achieving the promise of mediation in the world's most difficult conflicts’ (September 2013) *Mediate.com* [www.mediate.com/articles/engpeace.cfm](http://www.mediate.com/articles/engpeace.cfm) accessed 29 December 2021.

<sup>22</sup> R Zeinemann, ‘The Characterisation of Public Sector Mediator’ (2001) 24(2) *Environs Law* 49, 51–53.

<sup>23</sup> Ali (n 8).

outcomes of dispute resolution, citizens['] abilities to use the justice system effectively to achieve social change...' is limited.<sup>24</sup>

- 8 Significant variations in the implementation of court mediation reforms currently exist. In some jurisdictions, mediation is mandated for particular civil case types, whereas in others, parties are encouraged to engage in voluntary mediation, with cost consequences being attached in some jurisdictions to unreasonable refusal to engage in mediation. At the individual level, such programmes reflect distinct applications of individual rights, suggesting self-determination and party choice in regulatory practice.<sup>25</sup> On the other hand, notions of collective responsibility place importance on reducing the costs of litigation on society as a whole. Avenues toward voluntary or mandatory mediation reflect varying underlying normative conceptions of individual and collective justice. Given that 'public means available for financing dispute resolution are not unlimited,'<sup>26</sup> a balancing of individual process choices and social efficiency requires careful investigation.<sup>27</sup>
- 9 In responding to calls for expanded empirical research exploring the operation<sup>28</sup> and implementation<sup>29</sup> of civil justice reforms, and building on an important foundation of rich scholarship examining the extension<sup>30</sup> and usage<sup>31</sup> of court-mandated mediation, experience of procedural justice,<sup>32</sup> investigation of efficiency claims,<sup>33</sup> impacts on the

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<sup>24</sup> Hensler (n 17).

<sup>25</sup> Steffek and others (ed) (n 8).

<sup>26</sup> Ibid.

<sup>27</sup> Ali (n 8).

<sup>28</sup> See C Tobias, 'Civil Justice Delay and Empirical Data: A Response to Professor Heise' (2000) 51(2) Case Western Reserve Law Review 235; and M Heise, 'Justice Delayed? An Empirical Analysis of Civil Case Disposition Time' (2000) 50(4) Case Western Reserve Law Review 813.

<sup>29</sup> See Stipanowich (n 8).

<sup>30</sup> C Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"' (1991) 19(1) Florida State Law Review 1; J Resnik, 'Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication' (1995) 10(2) Ohio State Journal of Dispute Resolution 211; and E E Deason, 'Procedural Rules for Complementary Systems of Litigation and Mediation - Worldwide' (2005) 80(2) Notre Dame Law Review 553.

<sup>31</sup> See T C W Farrow, 'Civil Justice, Privatization and Democracy' (2011) Social Science Research Network [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1795407](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1795407) accessed 28 November 2011.

<sup>32</sup> J Thibaut and L Walker, 'A Theory of Procedure' (1978) 66(3) California Law Review 541; D Stienstra and others, 'Report to the Judicial Conference Committee on Court Administration and Case Management: A Study of Five Demonstration Programs Established Under the Civil Justice Reform Act of 1990' (1997) Federal Judicial Center.

<sup>33</sup> D R Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR* (RAND Corporation 2000) <https://www.rand.org/pubs/reprints/RP871.html> accessed 29 December 2021; T Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution' (2004) 1(3) Journal of Empirical Legal Studies 843; K Kressel and D G Pruitt, 'Themes in the Mediation of Social Conflict' (1985) 41 Journal of Social Issues 179; J S Kakalik and others, *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (RAND Corporation 1997) [https://www.rand.org/pubs/monograph\\_reports/MR800.html](https://www.rand.org/pubs/monograph_reports/MR800.html) accessed 29 December 2021.



quality and means<sup>34</sup> of access,<sup>35</sup> social justice and minority impacts,<sup>36</sup> settlement outcomes,<sup>37</sup> and cultural factors,<sup>38</sup> this paper presents survey research about the experiences of court mediation practitioners from diverse regions in order to gain insight into the dynamics, strengths and challenges of mandatory and voluntary court mediation programmes.<sup>39</sup> It aims to respond to calls for ‘empirical studies of the effectiveness of’ alternative dispute resolution (ADR), especially outside of North America, including comparative studies within and between mediation programme types, including mandatory and voluntary programmes.<sup>40</sup> In particular, this section contributes to a growing body of empirical scholarship on the experience of civil justice in countries that have implemented mediation reform, including the United Kingdom, Hong Kong, France, the Netherlands, Malaysia, the United States, Australia, Italy, China and India.

- 10 The degree of movement along the voluntary or mandatory mediation spectrum varies from one jurisdiction to another. Such variation exists with respect to the ‘initiation control’<sup>41</sup> of mediation,<sup>42</sup> where approaches range from mandatory assignments for all cases under a particular monetary amount or case type, compelled orders to mediation (characterized in some cases as ‘case settlement’<sup>43</sup>), to more informal party-directed initiation of mediation.<sup>44</sup> The intermediary facilitating judicial mediation sessions varies from judges provided by the courts to private mediators.<sup>45</sup> In addition, parties’ duties concerning engagement in mediation may also differ. Some states use ‘opt-out’ rules, where parties to a particular case type are automatically subjected to mediation unless

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<sup>34</sup> See H Genn, *Paths to Justice* (Hart 1999); and Genn (n 7).

<sup>35</sup> H Genn, ‘What Is Civil Justice For? Reform, ADR, and Access to Justice’ (2013) 24 *Yale Journal of Law & the Humanities* 397.

<sup>36</sup> R Delgado and others, ‘Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution’ (1985) *Wisconsin Law Review* 1359; G LaFree and C Rack, ‘The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases’ (1996) 30(4) *Law & Society Review* 767; and S Press, ‘Court-Connected Mediation and Minorities: Has Any Progress Been Made?’ (2013) *ABA Dispute Resolution Magazine* 36.

<sup>37</sup> J M Brett, Z I Barsness and S B Goldberg, ‘The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers’ (1996) 12(3) *Negotiation Journal* 259; M Galanter and M Cahill, ‘Most Cases Settle: Judicial Promotion and Regulation of Settlements’ (1994) 46 *Stanford Law Review* 1339.

<sup>38</sup> See Heise (n 28)

<sup>39</sup> Ali (n 8).

<sup>40</sup> L B Bingham and others, ‘Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes’ (2009) 24(2) *Ohio State Journal of Dispute Resolution* 1.

<sup>41</sup> Steffek and others (ed) (n 8).

<sup>42</sup> C Menkel-Meadow, ‘Variations in the Uptake of and Resistance to Mediation Outside of the United States’ in A Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Brill-Nijhoff 2015) 197.

<sup>43</sup> M M Mironi, ‘Mediation v. Case Settlement: The Unsettling Relations Between Court and Mediation - A Case Study’ (2014) 19 *Harvard Negotiation Law Review* 173. The distinction outlined by Mironi between ‘mediation’ and ‘case settlement’ is helpful – noting that mediation is characterized by an interest-based, party-focused process rather than a ‘settlement’-oriented rights-based positional discourse.

<sup>44</sup> Menkel-Meadow (n 42).

<sup>45</sup> *Ibid.*



there is a good reason for opting out,<sup>46</sup> while other programmes use an ‘opt-in’ mechanism by which adverse cost consequences are imposed if parties unreasonably refuse to participate in mediation or behave unreasonably.<sup>47</sup> Existing empirical work examining mandatory and voluntary programme outcomes has found that selection and uptake of diverse programme structures are largely dependent on domestic factors, including the level of cooperation by the Bar,<sup>48</sup> mediation awareness, socio-cultural support, and harmonizing legislation.<sup>49</sup> At the global level, soft law-making bodies, such as the United Nations Commission on International Trade Law (UNCITRAL), have generally left open the question of mediation programme design to be inclusive of both voluntary and mandatory modalities<sup>50</sup>, depending on domestic circumstances.<sup>51</sup>

- 11 For purposes of this section, voluntary mediation jurisdictions are characterized as those requiring formal party agreement prior to commencement,<sup>52</sup> while mandatory mediation jurisdictions are classified, following Sander’s definition, as consisting of both ‘categorical’<sup>53</sup> automatic referral programmes for certain categories of cases<sup>54</sup> and ‘discretionary’ such that judges have authority to order mediation where there is no consent from the parties. In jurisdictions where mixed methods of voluntary and mandatory resolution options co-exist, reference is made to the primary mechanism employed in non-family civil trials. In cases of varying federal and state programmes, reference is made to federal programme features. Despite efforts to achieve accurate groupings, limitations exist in such broad characterizations, and future studies will no doubt further refine such categorizations and improve upon them.<sup>55</sup>

## 2.1 Ongoing Debates Regarding the Place of Mediation in Civil Justice Systems

- 12 Relevant to the question of mandatory and voluntary mediation programme design is the broader question of the process and place of mediation generally within the context of systems of civil justice. As judicial systems advance, evolving conceptions of justice are reflected in varying emphasis on the role, place and practice of mediation in civil courts. Exploring how such programmes can provide opportunities for party-directed reconciliation on the one hand while at the same time ensuring access to formal legal

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<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> See generally, P Taivalkoski and A Pynnä, ‘The Courts and Bar Association as Drivers for Mediation in Finland’ in C Esplugues and L Marquis (ed), *New Developments in Civil and Commercial Mediation* (Springer 2015) 275.

<sup>49</sup> Ibid.

<sup>50</sup> Ali (n 8).

<sup>51</sup> UNGA, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (United Nations 2004) 55 Art 3.

<sup>52</sup> See H Anderson and R Pi, ‘Evaluation of the Early Mediation Pilot Programs’ (2004) Judicial Council of California/Administrative Office of the Courts.

<sup>53</sup> F E A Sander, ‘Another View of Mandatory Mediation’ (2007) 13(2) *Dispute Resolution Magazine* 16.

<sup>54</sup> M Hanks, ‘Perspective on Mandatory Mediation’ (2012) 35(3) *University of New South Wales Law Journal* 929.

<sup>55</sup> Ali (n 8).

channels on the other remains an area of continued enquiry. Beginning in the late 1970s, Lon Fuller and Owen Fiss articulated early insights into the role, forms and limits of adjudication. Fiss argued that the purpose of adjudication is to provide a public forum to enact public values and not a forum for settlement proceedings.<sup>56</sup> Continuing this line of exploration, modern court mediation as a policy approach has not been without criticism. Chief among these arguments, similar to those raised by Fiss, is that such informal processes do not result in the development of public goods, including rules of precedent, advocacy skills, publication of facts and enhanced authority of courts as achieved through adjudication.<sup>57</sup> Accordingly, this view holds that adjudication is a central part of political life because it contributes to the articulation of public values,<sup>58</sup> while at the same time acknowledging that only a small portion of disputes are occasions for structural transformation.<sup>59</sup> Out-of-court mediation has also been challenged<sup>60</sup> based on the view that such processes enlarge social disputes,<sup>61</sup> deformalize justice, diffuse legitimate indignation of parties,<sup>62</sup> are not suitable for high-conflict cases<sup>63</sup>, and pose an increased risk of outcomes coloured by prejudice.<sup>64</sup> Similarly, scholars have suggested that in some cases, absent proper safeguards, women and minority interests may be undermined in the mediation process<sup>65</sup> due to its absence of rules and minimization of fault.<sup>66</sup>

- 13 In response to such criticisms, and consistent with Fuller's observations that alternative processes such as mediation are potentially appropriate in cases where adjudication has reached 'its limits,'<sup>67</sup> while contributing toward the creation of relevant interpersonal norms rather than the conformity to such norms,<sup>68</sup> particularly when parties concerned are locked in a relationship of 'heavy interdependence' such that each is dependent on some form of collaboration with the other.<sup>69</sup> The facilitation of a mediator can speed the discussion, reduce the likelihood of miscalculation and help parties reach an optimal

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<sup>56</sup> See O Fiss, 'Foreword: The Forms of Justice' (1978) 93(1) *Harvard Law Review* 1; and O Fiss, 'Against Settlement' (1984) 93(6) *Yale Law Journal* 1073.

<sup>57</sup> D Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83(7) *Georgetown Law Journal* 2619.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> R Delgado, 'ADR and the Dispossessed: Recent Sections about the Deformalization Movement' (1988) 13 *Law & Social Inquiry* 145.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> O Tjersland, W Gulbrandsen and H Haavind, 'Mandatory Mediation outside the Court: A Process and Effect Study' (2015) 33(1) *Conflict Resolution Quarterly* 19.

<sup>64</sup> *Ibid.*

<sup>65</sup> T Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Journal* 1545.

<sup>66</sup> *Ibid.*

<sup>67</sup> See L L Fuller, 'Forms and Limits of Adjudication' (1978) 92(2) *Harvard Law Review* 353. This occurred, Fuller argued, when adjudication attempted to resolve what he described as 'polycentric'-type disputes (such as when there is no clear issue subject to proofs and contentions).

<sup>68</sup> L L Fuller, 'Mediation – Its Forms and Functions' (1970) 44(2) *Southern California Law Review* 305, 308.

<sup>69</sup> *Ibid* 310–312.

agreement by adjusting the parties' divergent valuations.<sup>70</sup> Modern-day scholars of mediation have put forward justifications for the continued support of 'process pluralism'<sup>71</sup> through court-connected mediation on moral, policy and process-based grounds. In particular, scholars note<sup>72</sup> that settlement can be justified on moral grounds consistent with fundamental values, including participation, empowerment, dignity, respect, empathy, catharsis, privacy, efficiency, quality, equity, access, and justice.<sup>73</sup> Privacy may be useful in some cases, providing greater possibilities for just results, and deeper and richer access to justice<sup>74</sup> and settlements absent consensus should not be enforced.<sup>75</sup> Others have questioned whether justice can be achieved through the court system,<sup>76</sup> and highlight the value of reconciliation of broken relationships through mediation.<sup>77</sup> In addition, participant satisfaction<sup>78</sup> and party self-determination<sup>79</sup> have been cited as important contributions.<sup>80</sup>

- 14 In all cases, as recent research has found,<sup>81</sup> 'innovations intended to reduce costs and delay should not do so at the expense of those qualities of the judicial process that are more important to litigants,'<sup>82</sup> including the realization of justice.<sup>83</sup> Institutions involved in the provision of court mediation services must be mindful of benchmarking success beyond measures of 'settlement' to the actual resolution of issues through an impartial, just and principle-based process.<sup>84</sup> The relative advantages of mediation in a given jurisdiction vary according to the functioning of the underlying national civil litigation system.<sup>85</sup> Success largely depends on the quality and skill of the mediators, institutional support, party education and preparation, and engagement with local needs and conditions.<sup>86</sup>

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<sup>70</sup> Ibid 318.

<sup>71</sup> C Menkel-Meadow, 'Peace and Justice: Notes on the Evolution and Purpose of Legal Process' (2006) 94 Georgetown Law Journal 553.

<sup>72</sup> C Menkel-Meadow, 'Whose Settlement Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)' (1995) 83 Georgetown Law Journal 2663.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> A W McThenia and TL Shaffer, 'For Reconciliation' (1985) 94 Yale Law Journal 1660.

<sup>77</sup> Ibid.

<sup>78</sup> Thibaut and Walker (n 32); J D Rosenberg and H J Folberg, 'Alternative Dispute Resolution: An Empirical Analysis' (1994) 46 Stanford Law Review 1487.

<sup>79</sup> K K Kovach and L P Love, "'Evaluative" Mediation Is an Oxymoron' (1996) 14(3) Alternatives to the High Cost of Litigation 31.

<sup>80</sup> Ibid.

<sup>81</sup> Ali (n 8).

<sup>82</sup> E A Lind and others, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences* (RAND Corporation 1989).

<sup>83</sup> Genn (n 7).

<sup>84</sup> See Genn (n 35); Mironi (n 43).

<sup>85</sup> See pt XV ch 3 (CPLJ).

<sup>86</sup> Ali (n 8).

## 2.2 Conceptual Distinction between Voluntary and Mandatory Mediation

- 15 At a conceptual level, the mediation process ordinarily presupposes the participation of two (or more) consenting parties.<sup>87</sup> The idea and question of consent is, thus, central to mediation.<sup>88</sup> Whether through mandate, robust encouragement or voluntary selection, once parties engage in facilitative mediation, the final outcome rests in the hands of the parties.<sup>89</sup> However, at a broader level, the momentum for the adoption of various mediation practices across jurisdictions is also fuelled by a desire to address certain perennial public policy concerns. For instance, as identified above, many jurisdictions justify their movement towards mediation based on the need to identify innovative ways to reduce case backlog and costs.<sup>90</sup> Mediation is also seen in many countries as a potential platform for the attainment of efficacy in the dispute management process.<sup>91</sup> Finally, some countries adopt mediation practices as a tool for facilitating the realization of their regional integration objectives.<sup>92</sup>
- 16 The inevitable result of this confluence of traditional normative and evolving public policy expectations of the mediation process has been the increasing proliferation of mediation practices integrating varying requirements on the question of consent.<sup>93</sup> This essentially defines the current voluntary and mandatory mediation distinction. Whilst in voluntary mediation the assumption ordinarily is that the parties opt for mediation out of free will and without direct court supervision of the process,<sup>94</sup> mandatory mediation models tend to integrate direct court supervision into the mediation process.<sup>95</sup> This typically includes the integration of supervisory measures, such as those requiring disputants to compulsorily attend or participate in mediation conferences prior to adjudication.<sup>96</sup> In addition, some jurisdictions impose 'good faith' requirements, thereby

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<sup>87</sup> See J M Nolan-Haley, 'Consent in Mediation' (2007) 14 *Dispute Resolution Magazine* 4.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> N M Alexander, *Global Trends in Mediation* (Kluwer Law International 2006) 259–77; R F Peckham, 'Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution' (1984) *Rutgers Law Review* 253.

<sup>91</sup> See, for instance, M F Radford, 'Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters' (2000) 1 *Pepperdine Dispute Resolution Law Journal* 241; J Folberg, *Resolving Disputes: Theory, Practice, and Law* (Aspen Law and Business 2005) 226–240.

<sup>92</sup> J M Nolan-Haley, 'Mediation: The "New Arbitration"' (2012) 17(62) *Harvard Negotiation Law Review* 61, 70–72; F De Paolis, 'Italy Responds to the Eu Mediation Directive and Confronts Court Backlog: The New Civil Court Mandatory Mediation Law' (2011) 4(1) *New York Dispute Resolution Lawyer* 44; J M Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation' (2011) 37(4) *North Carolina Journal of International Law and Commercial Regulation* 981.

<sup>93</sup> Ali (n 8).

<sup>94</sup> See generally, G Smith, 'Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not' (1998) 36(4) *Osgoode Hall Law Journal* 847, 847; J M Nolan-Haley, 'Mediation: The Best and Worst of Times' (2014) 16 *Cardozo Journal of Conflict Resolution* 731, 737–738.

<sup>95</sup> Hanks (n 54); D T Saposnek, 'Clarifying Perspectives on Mandatory Mediation' (1992) 30(4) *Family Court Review* 490.

<sup>96</sup> D S Winston, 'Participation Standards in Mandatory Mediation Statutes: You Can Lead a Horse to Water' (1996) 11 *Ohio State Journal on Dispute Resolution* 187.

essentially setting a qualitative bar to courts in assessing disputants' participation in pre-adjudication mediation under mandatory mediation models.<sup>97</sup> This is often achieved through formal reporting obligations on the part of the mediator.<sup>98</sup> Finally, in several instances, courts have been empowered to impose penalties or costs on perceived non-cooperative disputants.<sup>99</sup>

- 17 Despite the above overarching public policy basis for mediation, the eventual selection of either voluntary or mandatory mediation models varies from one jurisdiction to another. At present, there is no particularly discernible global pattern or trend towards the adoption of either mandatory or voluntary mediation models. Instead, diverse national experiences seem to point mostly to the prominent influence of unique domestic factors in a country's eventual adoption of a particular mediation model, whether voluntary or mandatory.<sup>100</sup> For example, Italy's mandatory mediation trial programmes have overcome significant opposition from the Bar, leading to the eventual adoption of a mandatory mediation scheme in the country,<sup>101</sup> while the Australian experience also points to successful mandatory mediation programmes across its diverse states.<sup>102</sup>
- 18 Several reasons have been advanced to explain such patterns. First, in both mandatory and voluntary models, it has been argued that the level of cooperation by the Bar is critical as lawyers are often the most engaged in the dispute settlement process.<sup>103</sup> Therefore, this means that the extent to which lawyers are receptive to and engaged with trial mediation programmes is likely to impact its eventual uptake in a given jurisdiction.<sup>104</sup> Lawyers are, for the most part, the initial point of contact for most participants in the dispute resolution architecture and will most likely have earned a party's trust before mediation is even contemplated. Such unparalleled access plays a significant role in shaping the success of any proposed mediation model. Besides the extent of reception by counsel, the use of either model in a jurisdiction also seems to be significantly influenced by the level of awareness about its existence amongst disputants and, in the case of low-income disputants, the cost implication on them. In this regard,

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<sup>97</sup> Ibid 189–191, 197–198; A Zylstra, 'The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled' (2001) 17 *Journal of the American Academy of Matrimonial Lawyers* 69.

<sup>98</sup> Winston (n 96) 188–190, 197–198.

<sup>99</sup> Ibid 195–196.

<sup>100</sup> See generally, E E Gordon, 'Why Attorneys Support Mandatory Mediation' (1998) 82 *Judicature* 224; Hanks (n 54) 929–932.

<sup>101</sup> See A De Luca, 'Mediation in Italy: Feature and Trends' in C Esplugues and L Marquis (ed), *New Developments in Civil and Commercial Mediation* (Springer 2015) 345; Hanks (n 54) 936–939.

<sup>102</sup> T Sourdin, 'Mediation in Australia: Impacts on Litigation' in N M Alexander (ed), *Global Trends in Mediation* (Kluwer Law International 2006) 37; A S Hart, 'Child-Inclusive Mediation in Cases of Domestic Violence in Australia' (2009) 27(1) *Conflict Resolution Quarterly* 3; Y Zhang, 'Mediation Model Differences between China and Australia and Their Possible Collaboration' (2015) 1(1) *Journal of Interdisciplinary Conflict Science* 46.

<sup>103</sup> Hanks (n 54) 939–942.

<sup>104</sup> Ibid.

empirical evidence suggests that this group of disputants will likely participate in mediation where there is a public subsidy on costs, mostly in the form of free or discounted mediator fees.<sup>105</sup> For example, arguments have been made that the Italian mandatory mediation regime achieved some demonstrated success following collaboration with the Bar.<sup>106</sup> Amendments, including those that were clearly designed to appease the legal fraternity by automatically qualifying all lawyers as mediators and requiring that they inform clients of mediation, undoubtedly put lawyers at the centre of the success of the mediation programme in Italy. In addition, considering that lawyers were also frustrated by prolonged litigation, a mandatory mediation option premised on their substantial involvement benefited from strong buy-in.<sup>107</sup>

- 19 The second factor that influences mediation programme design in a given jurisdiction relates to embedded cultural and societal approaches to dispute settlement.<sup>108</sup> It has been argued in this regard that English society, for example, has a deep and historically entrenched litigation culture informed by adversarial common law dispute settlement approaches.<sup>109</sup> The contention is that this has predisposed most disputants to prefer adjudication over other 'untested' alternatives such as mediation, something that seems to find credence in the generally low mediation uptake in trial programmes in London.<sup>110</sup> This contention, however, may find challenge in the fact that other Anglo-Saxon jurisdictions, like Australia and the United States, with common legal roots have engaged in more direct integration of mediation processes in civil litigation. Similarly, the Danish informal mediation practice has historically been linked with monarchical influence, particularly King Christian V, who made it optional in civil cases '(...) with the aim of encouraging citizens to be less quarrelsome'.<sup>111</sup> A plausible explanation here lies in the fact that these jurisdictions have eventually developed their own legal environments that have significantly departed from the English tradition. Similarly, '*chotei*' (defined as both mediation and conciliation) has had a long tradition in Japan. Since the Tokugawa period, social and philosophical traditions, alongside a small population of lawyers, help account for the emphasis on relatively relational approaches to resolving conflict.<sup>112</sup> In 1922, the Japanese courts first introduced a 'landing and building leases mediation system' in order to address the increasing number of land and building disputes.<sup>113</sup> Other mediation systems were later introduced in 1940 to address various kinds of disputes, including tenant farmer, commercial, labour, family and environmental

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<sup>105</sup> Macfarlane and Keet (n 11) 682.

<sup>106</sup> De Paolis (n 92).

<sup>107</sup> Ibid.

<sup>108</sup> See generally, R R Callister and J A Wall, 'Japanese Community and Organizational Mediation' (1997) 41(2) *Journal of Conflict Resolution* 311.

<sup>109</sup> Hanks (n 54) 939–942.

<sup>110</sup> Nolan-Haley (n 92) 90–91.

<sup>111</sup> Ibid.

<sup>112</sup> K Funken, 'Court-Connected Mediation in Japan and Germany' (2001) University of Queensland School of Law Working Paper No 867 <http://ssrn.com/abstract=293495> accessed 29 December 2021.

<sup>113</sup> A Yasui, 'Alternative Dispute Resolution System in Japan' [http://www.iadcmeetings.mobi/assets/1/7/18.2\\_-\\_Yasui-ADR\\_System\\_in\\_Japan.pdf](http://www.iadcmeetings.mobi/assets/1/7/18.2_-_Yasui-ADR_System_in_Japan.pdf) accessed 12 January 2016.



issues.<sup>114</sup> Such approaches are closely related to the pervasive practice of judicial settlement (*wakai*) that scholars have described as a dominant approach to in-court judicial resolution in Japan.<sup>115</sup> Given the pervasive deference accorded to members of the judiciary, and the frequency with which civil mediation (*'minji chotei'*) and judicial settlement (*wakai*) are encouraged, many regard such processes as integral to the civil litigation system in Japan.<sup>116</sup>

- 20 In sub-Saharan African countries such as Ghana, mediation practices date back to the existence of powerful governance structures<sup>117</sup> built around tribal kingdoms in which tribal chiefs, elders and the queen mother customarily mediated disputes.<sup>118</sup> Such practices have remained in effect in many remote regions.<sup>119</sup> Although the post-colonial order has generally weakened the place of tribal kingdoms in Ghana's political landscape, its cultural influence remains strong.<sup>120</sup> Ghana developed comprehensive mediation legislation in 2010 when the Alternative Dispute Resolution Act was promulgated.<sup>121</sup> As in many other countries, the eventual enactment of this legislation was based on a view of mediation's potential for addressing increasing case backlog and providing for greater party autonomy.<sup>122</sup> The Ghanaian 2010 ADR Act provides only for voluntary mediation and extends this to 'customary arbitration', which is essentially traditional mediation facilitated within tribal Kingdoms as described above.<sup>123</sup> Either of the parties may '(...) at any time before final judgement is given' by the court and also place a referral request for mediation.<sup>124</sup> The mediation standards envisaged under the Act are fairly similar to other global practices in that a party has the right to be represented by counsel, and confidentiality of the proceedings is required.<sup>125</sup> The mediation trend across Africa is largely similar to that of Ghana. For example, in Kenya the use of mediation and 'traditional dispute resolution' mechanisms have been enshrined in the national constitution. The nature of the provision is aspirational in

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<sup>114</sup> Ibid.

<sup>115</sup> E A Feldman, 'No Alternative: Resolving Disputes Japanese Style' in M Bälz and J Zekoll (ed), *Dispute Resolution – Alternatives to Formalization, Formalization of Alternatives* (Brill 2014); Sourdin and Zariski (n 8).

<sup>116</sup> Conversation with Professor Aya Yamada, Professor of Law, Kyoto University, on civil litigation and mediation (Kyoto, Japan 1 October 2022).

<sup>117</sup> J M Nolan-Haley and J K Annor-Ohene, 'Procedural Justice Beyond Borders: Mediation in Ghana' (2014) Harvard Negotiation Law Review Online 1.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> See generally, C C Reindorf, *History of the Gold Coast and Asante* (Ghana University Press 2007); K A Ninsin, *Ghana at 50: Tribe or Nation?* (Weoli Publishing Services 2007).

<sup>121</sup> Alternative Dispute Resolution Act 2010 (Act 798) (Ghana).

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid Sec 64(2).

<sup>125</sup> Ibid Sec 71(1).



character, lending itself toward voluntary mediation practice,<sup>126</sup> while private mediation service providers have multiplied.<sup>127</sup>

- 21 The prevalence of particular dispute types is also an important factor in the prominence of mediation models across jurisdictions, which often expands alongside the growing skill base of mediators. Observers have noted that at the outset, communal disputes, especially those focusing on narrow but inclusive issue areas like environmental protection and landfill reclamation, ought to be preferentially subjected to mediation.<sup>128</sup> In addition, relational and commercial disputes register higher settlement rates than other types of civil disputes.<sup>129</sup> For example, the mediation practice in Canada's Saskatchewan province<sup>130</sup> was designed to be more responsive to disputes with a 'heavy emotional overtone', for which litigation was deemed increasingly inappropriate.<sup>131</sup> The acknowledgment of the prospects of mediation for such cases traces back to the success of a mandatory mediation programme for Saskatchewan farm foreclosures in the 1980s, which enabled creative solutions for farmers facing foreclosure.<sup>132</sup> The scheme was seen to benefit both lenders and farmers, while at the same time creating a pool of capable mediators in the province.<sup>133</sup> Since that time, and building off of both the programme's success and the enhanced skills of domestic mediators, the scheme was extended to criminal cases.<sup>134</sup> The success of the farm programme created a wealth of knowledge and popular support that was crucial in overcoming misconceptions and resistance.<sup>135</sup> Its central aims of social welfare and judicial responsiveness inspired interest-based and transformative mediation practices.<sup>136</sup> Saskatchewan had a small pool of mediators who worked together regularly and shared learning and resources, all of which have contributed to improving the overall quality of the mediation process in the region.<sup>137</sup>

<sup>126</sup> B Brainch, 'The Climate of Arbitration and ADR in Kenya' <http://www.disputeresolutionkenya.org/pdf/The%20Climate%20of%20Arbitration%20and%20ADR%20in%20Kenya.pdf> accessed 19 November 2015.

<sup>127</sup> Strathmore Dispute Resolution Centre, 'Mediation Guidelines' (Strathmore Dispute Resolution Centre).

<sup>128</sup> J B Stulberg, 'The Theory and Practice of Mediation: A Reply to Professor Susskind' (1981) 6 Vermont Law Review 85, 110–113; S Kaufman, 'Mediation in Environmental Disputes' in K W Hipel (ed), *Conflict Resolution Vol. II*, in Encyclopaedia of Life Support Systems (developed under the auspices of UNESCO, Eolss Publishers 2002).

<sup>129</sup> V E Solomon, 'Divorce Mediation: A New Solution to Old Problems' (2015) 16(4) Akron Law Review 5; N Ver Steegh, 'Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence' (2002) 9 William & Mary Journal of Race, Gender, and Social Justice 145; P E Bryan, 'Killing Us Softly: Divorce Mediation and the Politics of Power' (1992) 40(2) Buffalo Law Review 441.

<sup>130</sup> Macfarlane and Keet (n 11) 677.

<sup>131</sup> Ibid 677–679.

<sup>132</sup> Ibid 677.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid; J Nuffield, 'Evaluation of the Adult Victim-Offender Mediation Program Saskatoon Community Mediation Services' (Saskatchewan Department of Justice 1997).

<sup>135</sup> Macfarlane and Keet (n 11).

<sup>136</sup> M Keet, 'The Evolution of Lawyers' Roles in Mandatory Mediation: A Condition of Systemic Transformation' (2005) 68(2) Saskatchewan Law Review 313.

<sup>137</sup> Ibid.

Similarly, the development of mediation in Israel, according to Mironi, can be traced to the resolution of a series of labour disputes in the public healthcare sector.<sup>138</sup> The Prime Minister, in an unprecedented step, asked the parties to enter into mediation,<sup>139</sup> which resulted in innovative settlement terms.<sup>140</sup>

- 22 Beyond the above domestic and cultural factors, rapid technological change has impacted mediation programme design in some jurisdictions.<sup>141</sup> The proliferation of online mediation platforms, or ‘e-mediation’, particularly in North America, is notable in this regard.<sup>142</sup> In Israel, mechanisms of online dispute resolution facilitated through the Mediation Room or the Benoam System are emerging.<sup>143</sup> This has undeniably introduced additional conceptual complexities to the normative understanding of the mediation process itself and, of course, its cardinal characteristics, such as consent that, as argued above, typically constitute the underlying divide between voluntary and mandatory mediation approaches. In the next section, national voluntary and court-directed mandatory mediation programmes are examined with the aim of determining the impact of domestic factors on mediation programme design.<sup>144</sup>

### 2.3 Regional and International Approaches to Voluntary and Mandatory Mediation

- 23 Regionally and internationally, mediation policy has been integrated into disparate instruments with the objective of promoting regional integration. The most prominent instrument in this regard is the EU Mediation Directive, formally referred to as *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters*, which came into effect in 2011.<sup>145</sup> The EU Directive principally focuses on cross-border mediation with respect to civil and commercial disputes, while excluding traditionally domestic and personal subject-

<sup>138</sup> M M Mironi, ‘Experimenting With Alternative Dispute Resolution As A Means For Peaceful Resolution Of Interest Labor Disputes In Public Healthcare—A Case Study’ (2011) 74 *Law and Contemporary Problems* 201.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> See generally, Fuller (n 68); Stulberg (n 128).

<sup>142</sup> See R Birke and L E Teitz, ‘US Mediation in 2001: The Path That Brought America to Uniform Laws and Mediation in Cyberspace’ (2002) 50 *The American Journal of Comparative Law* 181, 206–208; J W Goodman, ‘The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites’ (2003) 2(1) *Duke Law & Technology Review* 1; and M Lang, ‘Cybersettle Secures \$2m for Online Claims Settlement System’ (2011) *Boston Business Journal* <https://www.bizjournals.com/boston/blog/mass-high-tech/2011/06/cybersettle-secures-2m-for-online-claims.html> accessed 29 December 2021. Some online mediation (e-mediation) platforms include [onlinedebtsettlement.com](http://onlinedebtsettlement.com) and [ussettle.com](http://ussettle.com).

<sup>143</sup> O Rabinovich-Einy, ‘Reflecting on ODR: The Israeli Example’ (2008) 430 *CEUR Workshop Proceedings Series* 13.

<sup>144</sup> Ali (n 8).

<sup>145</sup> C Esplugues, ‘Civil and Commercial Mediation in the EU after the Transposition of Directive 2008/52/EC’ in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Vol II. Cross-Border Mediation* (Intersentia 2014) 485.

matter dispute areas.<sup>146</sup> The EU Directive was promulgated with the aim of reducing litigation costs and case backlog<sup>147</sup> as well as enhancing business transactions in the economic block.<sup>148</sup> Importantly, the EU Directive did not expressly provide for either mandatory or voluntary mediation, but a subsequent European Court of Justice (ECJ) decision clarified that its provisions do not restrict member countries from introducing either voluntary or mandatory schemes, provided they did not unreasonably restrict parties' right of access to the courts.<sup>149</sup> As a result, the EU Directive has resulted in a proliferation of many national schemes representing both voluntary and mandatory systems.<sup>150</sup>

- 24 Beyond the EU, other international organizations have increasingly embraced voluntary mediation as a potential option for resolution. The World Trade Organisation (WTO)'s Dispute Settlement Body, for instance, integrates a largely quasi-judicial framework which allows disputing parties' control over the determination of their dispute.<sup>151</sup> This includes provisions for referring cases to pre-adjudication consensus building that has actually resulted in most cases being settled before the adjudication stage.<sup>152</sup> Mediation has now been extended to international human rights matters, both the European and Inter-American Courts of Human Rights, and within hybrid and indigenous courts. In both cases, the approach is largely voluntary in nature.<sup>153</sup> In the European context, at any time during the proceedings, judges may direct a friendly settlement of a matter<sup>154</sup> on the basis of respect for human rights as defined in the European Convention on Human Rights (the European Convention).<sup>155</sup> If a friendly settlement is effected, the court shall strike the case out of its list and hand down a brief statement of facts and of the solution

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<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Hanks (n 54) 932–934.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> See generally, P Michaud, 'Experience from the Bilateral Fisheries Access Agreement, Impact on the Economy and Implications for Seychelles of the Outcome of the Wto Mediation on the Case of Tuna between the Eu and Thailand and the Philippines' (Brussels, April 2003) Seminar on ACP-EU fisheries relations: towards a greater sustainability <https://aquadocs.org/bitstream/handle/1834/194/Experience%20fisheries%20access%20agreement.pdf?sequence=1> accessed 29 December 2021; H T Pham, 'Developing Countries and the WTO: The Need for More Mediation in the DSU' (2004) 9 Harvard Negotiation Law Review 331.

<sup>152</sup> WTO, 'WTO Bodies Involved in the Dispute Settlement Process' [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c3s1p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c3s1p1_e.htm) accessed 29 December 2021.

<sup>153</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) Art 39(1) states that 'at any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement on the basis of respect for human rights'. Therefore, the securing of amiable settlement requires willingness of the parties. Specifically, the European Convention Art 39 §1, cl b. states that after determining the case as admissible, the Chamber then examines the case, and offers parties the option of friendly settlement.

<sup>154</sup> W A Shabas, *The European Convention on Human Rights: A Commentary* (OUP 2015) 1622.

<sup>155</sup> European Convention Art 39(1).

reached.<sup>156</sup> Moreover, it permits friendly settlement negotiations even before the court declares a case as admissible.<sup>157</sup> It codifies a pre-existing practice that friendly settlements are decided through ‘judgments’ instead of ‘decisions’.<sup>158</sup> The enforcement of friendly settlements is also enhanced via the Committee of Ministers’ direct supervision over the execution of ‘judgment’ remedies.<sup>159</sup> Similarly, with regards to the voluntary<sup>160</sup> friendly settlement procedure of the Inter-American Commission on Human Rights (IACHR), the Commission’s Rules were amended in 2009,<sup>161</sup> allowing the Commission to expedite the evaluation of a petition when the State formally expresses its readiness to enter into a friendly settlement procedure.<sup>162</sup>

- 25 At the United Nations level, the UNCITRAL Model Law on International Commercial Conciliation provides support for both mandatory and voluntary mediation.<sup>163</sup> The Model Law was developed with the aim of supporting its increased use both transnationally and domestically.<sup>164</sup> It also aimed at providing greater predictability and certainty in the use of conciliation to foster economy and efficiency in international trade.<sup>165</sup> While the Model Law principally addresses international and commercial cases, the drafters noted that States enacting the Model Law might consider extending it to

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<sup>156</sup> V A Sanchez, ‘Towards a History of ADR: The Dispute Processing Continuum in Anglo-Saxon England and Today’ (1996) 11 Ohio State Journal on Dispute Resolution 1. Also discussed in S Ali, ‘Nudging Civil Justice: Examining Voluntary and Mandatory Court Mediation Experience in Diverse Regions’ (2018) 19(2) Cardozo Journal of Conflict Resolution 269.

<sup>157</sup> ‘Explanatory Report to Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system to the Convention’ CETS No 194 para 92 <https://rm.coe.int/16800d380f> accessed 29 December 2021.

<sup>158</sup> R A Baruch Bush and J P Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (John Wiley & Sons 2004).

<sup>159</sup> Explanatory Report to the CETS 194 (n 158) 94; Council of Europe Recommendation No R (2002) 10 on Mediation in Civil Matters (2002) (Council of Europe) <https://rm.coe.int/16805e1f76> accessed 28 October 2024.

<sup>160</sup> IACHR, ‘Handsection on the Use of the Friendly Settlement Mechanism in the IACHR Petition and Case System’ 5 [www.oas.org/en/iachr/friendly\\_settlements/docs/handsection-fs-en.pdf](http://www.oas.org/en/iachr/friendly_settlements/docs/handsection-fs-en.pdf) (accessed 10 January 2022) states that ‘the friendly settlement procedure is voluntary’, ‘with or without direct involvement of the IACHR’. IACHR, ‘Impact of the Friendly Settlement Procedure Report’ (2013) 1 [www.oas.org/en/iachr/friendly\\_settlements/docs/Report-Friendly-Settlement.pdf](http://www.oas.org/en/iachr/friendly_settlements/docs/Report-Friendly-Settlement.pdf) accessed 29 December 2021 also states that friendly settlement is a ‘voluntary agreement reached by the parties’. But note that the rules of procedure authorize the IACHR to facilitate a friendly settlement at any time during the initial investigation phase. M Webster and S B Burke, ‘Facilitating Friendly Settlements in the Inter-American Human Rights System: A Comparative Analysis with Recommendations’ (2010) Social Science Research Network 23 <http://ssrn.com/abstract=1676603> accessed 29 December 2021.

<sup>161</sup> IACHR, ‘Impact of the Friendly Settlement Procedure Report’ (n 160) 17–18.

<sup>162</sup> Rules of Procedure of the Inter-American Commission on Human Rights 2013 (IACHR) Art 29(2)l.

<sup>163</sup> See generally, E Van Ginkel, ‘The UNCITRAL Model Law on International Commercial Conciliation’ (2004) 21(1) Journal of International Arbitration 1; P Binder and J Sekolec, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell 2005).

<sup>164</sup> UNCITRAL Model Law, commentary, para 8; See also: S Ali, I Bantekas, M Gomez and P Ortolani, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Cambridge University Press 2020).

<sup>165</sup> *Ibid* para 15–16.

domestic commercial disputes and to some non-commercial cases as well.<sup>166</sup> It was drafted with the view that while certain issues, such as the admissibility of evidence in subsequent judicial or arbitral proceedings or the role of the conciliator in subsequent proceedings, could typically be addressed by reference to rules such as the UNCITRAL Conciliation Rules, there were many cases in which no such rules were agreed upon. The conciliation process might thus benefit from the establishment of non-mandatory legislative provisions that would apply when the parties mutually desire to conciliate but have not agreed on a set of conciliation rules.<sup>167</sup>

- 26 The Model Law uses the term 'conciliation' to encompass all procedures, whether initiated through voluntary or mandatory mechanisms, which are assisted by a third person to settle a dispute, such as conciliation, mediation, neutral evaluation or mini-trial.<sup>168</sup> Art 3, for instance, defines mediation as a process where '(...) parties request a third person or persons (...) to assist them in their attempt to reach an amicable settlement of their dispute'.<sup>169</sup> In Art 8, however, the scope of application of the law is expanded to all contexts '(...) irrespective of the basis upon which the conciliation is carried out, including the agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity'.<sup>170</sup>
- 27 From the literature and examples of existing schemes discussed here, we see that domestic factors alongside harmonizing legislation such as the UNCITRAL Model Law have influenced mediation policy at the national level. The examination reveals the embedded involvement of lawyers and, to a large extent, courts, in most of the successful incidences of mediation programmes, whether mandatory or voluntary.<sup>171</sup> In addition, socio-cultural background is an important complimentary factor in the success of either mediation model.<sup>172</sup> The UNCITRAL Model Law, as adopted by the UN General Assembly, has contributed to further harmonization in mediation policy in the international sphere.

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<sup>166</sup> See Model Law on International Commercial Conciliation 2002 (UNCITRAL) Art 1 footnote 1.

<sup>167</sup> *Ibid* para 11.

<sup>168</sup> *Ibid* para 7.

<sup>169</sup> UNGA (n 51) 55 Art 3.

<sup>170</sup> *Ibid* Art 8.

<sup>171</sup> See generally, Taivalkoski and Pynnä (n 48).

<sup>172</sup> Ali (n 8).

- 28 Understanding the underlying intrinsic and extrinsic rationales for introducing court-based mediation in civil justice systems is necessary in considering voluntary and mandatory programme design. Rationales include efficiency, reduction of caseloads, private and public sector cost reductions, as well as extrinsic factors, including relational, societal and process-based considerations. In this regard, understanding some of these rationales is important alongside consideration of how critiques of court-based mediation have influenced the implementation of reforms.
- 29 Scholars have provided important insights into the moral, policy and process-based considerations informing mediation policy design. It has been suggested that<sup>173</sup> settlements can be justified on the basis of values including participation, empowerment, dignity, respect, empathy, catharsis, privacy, efficiency, quality, equity, access, and justice.<sup>174</sup> From this perspective, settlement does not preclude the use or creation of precedent, providing greater possibilities for just results, and deeper and richer access to justice.<sup>175</sup> In addition, settlements absent consensus should not be enforced.<sup>176</sup> In addition to self-determination, scholars have highlighted the value of reconciliation of broken relationships through mediation.<sup>177</sup>
- 30 A range of studies have shed light on the contributions of court-based mediation to the performance of judiciaries in diverse regions.<sup>178</sup> Critiques of court-based mediation likewise raise important considerations for court-mediation design and implementation, which will be examined through the case study and survey research presented in greater detail in the sections that follow.

### 3 CASE STUDY OF MEDIATION AS MAINSTREAM NOT AN 'ALTERNATIVE': DE-FACTO MANDATORY MEDIATION IN THE CHINESE COURTS

- 31 The following section examines a regional case study demonstrating mediation as a 'mainstream' rather than an 'alternative' approach to civil justice. Formalized mediation in China finds its origins in the early Ming dynasty, making it one of the earliest examples of a mainstream approach to civil case disposition. While in recent years, mediation has experienced declines and resurgence in China,<sup>179</sup> nevertheless accounts for a significant percentage of overall civil case disposition.<sup>180</sup> Such trends reinforce and provide nuance to the country's long socio-political history of mediation or *tiao jie* (調解) in its various

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<sup>173</sup> Menkel-Meadow (n 72).

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ali (n 8).

<sup>179</sup> See H Fu and R Cullen, 'From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China' in M Y K Woo and M E Gallagher (ed), *Chinese Justice: Civil Dispute Resolution In Contemporary China* (CUP 2011) 25.

<sup>180</sup> These findings are discussed in Ali (n 8).



configurations.<sup>181</sup> The current mediation regime is governed by the Supreme People's Court (SPC), which periodically issues guidelines and opinions on mediation binding on lower courts. The Civil Procedure Law of the People's Republic of China (Civil Procedure Law) also provides substantive law<sup>182</sup> outlining procedural requirements for mediation. It empowers the courts to initiate the mediation process and to ensure the enforceability of final agreements.<sup>183</sup> The courts are also allowed to invite experts to assist in the mediation process<sup>184</sup> or refer specialized cases to relevant trade bodies.<sup>185</sup> Given the active role of judges in mediating nearly 50% of civil disputes in China, the practice is generally considered to be *de facto* mandatory.<sup>186</sup> It is important to note that a somewhat similar approach is taken by the judiciary in Japan for certain classes of cases (ie. sales, traffic accidents, construction etc). According to M Yoshida, within Japan, 'the barriers between litigation and in-court mediation are low. The two procedures are interchangeable and flexible, depending on the likelihood that the relationships between the parties will continue after the resolution of the case'.<sup>187</sup> She further finds that, 'even in cases where there is no prior mediation and the parties wish litigation, the court may submit the case to in-court mediation if it finds that mediation is more appropriate (Article 20(1) of the Civil Mediation Act)'.<sup>188</sup>

- 32 Early studies of mediation in China examined its unique features, history and place within the civil justice system.<sup>189</sup> In recent years, the dynamics of mediation in the context of its impact on the legal and social order in China<sup>190</sup> has been a rich area of scholarship.<sup>191</sup> Since the 1980s, studies on community and civil mediation in China have

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<sup>181</sup> See generally, L Wang, 'Characteristics of China's Judicial Mediation System' (2009) 17(Supp 1) *Asia Pacific Law Review* 67; S Lubman, 'Mao and Mediation: Politics and Dispute Resolution in Communist China' (1967) 55(5) *California Law Review* 1284.

<sup>182</sup> P C C Huang, 'Court Mediation in China, Past and Present' (2006) 32(3) *Modern China* 275.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> M Tai and D McDonald, 'Judicial Mediation in Mainland China Explained' (2021) Herbert Smith Freehills <https://hsfnotes.com/adr/2012/07/30/judicial-mediation-in-mainland-china-explained/> accessed 29 December 2021.

<sup>186</sup> X He and K H Ng, 'Internal Contradictions of Judicial Mediation in China' (2014) 39(2) *Law & Social Inquiry* 285.

<sup>187</sup> M Yoshida (fellow collaborator on Part XV), 'Mediation in Japan' (2023) not published.

<sup>188</sup> *Ibid.*

<sup>189</sup> See Lubman (n 181); and S Lubman, 'Deng and Dispute Resolution: "Mao and Mediation" Revisited' (1997) 11 *Columbia Journal of Asian Law* 229.

<sup>190</sup> See M Palmer, 'The Revival of Mediation in the People's Republic of China: (1) Extra-Judicial Mediation' in W E Butler (ed), *Yearbook on Socialist Legal Systems* (Transnational Publishers 1988) 219; H Fu, 'Understanding People's Mediation in Post-Mao China' (1992) 6 *Journal of Chinese Law* 211.

<sup>191</sup> M Y Woo, 'Court reform with Chinese characteristics' (2017) 27 *Washington International Law Journal* 241; H Fu and M Palmer (ed), *Mediation in Contemporary China: Continuity and Change* (Wildy, Simmonds and Hill 2017); He and Ng (n 186); and J DeLisle, 'Law and China's Development Model' in P Hsu, Y Wu and S Zhao (ed), *In Search of China's Development Model: Beyond the Beijing Consensus* (Routledge 2011) 147.



proliferated.<sup>192</sup> Most recently, research has provided extensive insight into the transition from governmental emphasis on mediation in the 1950s–1980s period to increased attention on adjudication in the early 2000s, and then back to mediation beginning in 2006.<sup>193</sup> As judges take on the role of mediator, they are confronted by the interplay between state law and local customs.<sup>194</sup> China's recent resurgence in mediation has been viewed as an effort to increase access to courts and reintroduce mediation as a mainstream dispute resolution mechanism.<sup>195</sup>

- 33 In-court mediation in China refers to judicial mediation within the court system. While extensive out-of-court<sup>196</sup> mediation programs<sup>197</sup> exist, in-court mediation is deemed part and parcel of the litigation process.<sup>198</sup> This section examines the nature of judicial mediation in China, relevant laws and policies and their implementation in practice. The wider context of China's achievements in efficiency, confidence and perceptions of justice in the civil justice system will be examined.

### 3.1 Policy and Historical Background

- 34 Judicial mediation in China, while evolving through diverse forms and objectives, has had a long history of finding roots in Confucian notions such as '以和为贵' (harmony is to be prized) and more recently by Chinese government policy objectives.<sup>199</sup> It has long had both cultural and functional origins. Principles such as the importance of cooperation

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<sup>192</sup> See D C Clarke, 'Dispute Resolution in China' (1992) 5 *Journal of Chinese Law* 245; Lubman, 'Deng and Dispute Resolution' (n 189); S G Jiang, *Tiao Jie, Fa Zhi Yu Xian Dai Xing: Zhongguo Tiao Jie Zhi Du Yan Jiu (Mediation, Legality and Modernity: Mediation in China)* (Zhongguo fa zhi chu ban she 2001); X B Xu, 'Mediation in China and the United States: Toward Common Outcome' (2003) JSD thesis, Stanford University; S E Hilmer, *Mediation in the People's Republic of China and Hong Kong (SAR)* (Eleven International 2009).

<sup>193</sup> See Fu and Cullen (n 179); and A Halegua, 'Reforming the People's Mediation System in Urban China' (2008) Social Science Research Network [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1123283](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123283) accessed 29 December 2021.

<sup>194</sup> Ibid; see also R Peerenboom and X He, 'Dispute Resolution in China: Patterns, Causes and Prognosis' (2008) La Trobe Law School Legal Studies Research Paper 9/2008 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1265116](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265116) accessed 29 December 2021; and D Ravenscroft, 'Mediation and Civil Justice Reform' (2008) *Hong Kong Lawyer* <http://law.lexisnexis.com/webcenters/hk/Hong-Kong-Lawyer-/Mediation-and-Civil-Justice-Reform> accessed 28 November 2011.

<sup>195</sup> See V Waye and P Xiong, 'The Relationship between Mediation and Judicial Proceedings in China' (2011) 6(1) *Asian Journal of Comparative Law*, article 2.

<sup>196</sup> Art 111 of the Constitution of the PRC states that, 'People's Mediation Committees are a working committee under grassroots autonomous organizations – Residents Committee, Villagers Committee – whose mission is to mediate civil disputes'.

<sup>197</sup> Art 5 of the People's Mediation Law of the PRC provides that: 'The administrative department of justice under the State Council shall be responsible for guiding the people's mediation work of the whole nation, while the administrative departments of justice of the local people's governments at or above the county level shall be responsible for guiding the people's mediation work within their respective administrative regions. The grassroots people's courts shall provide guidance to the people's mediation commissions in their mediation of disputes among the people'.

<sup>198</sup> Ali (n 8).

<sup>199</sup> Woo (n 191) 242.

and social cohesion<sup>200</sup> existed alongside a general preference for the avoidance of court.<sup>201</sup> While ‘mediation’ has generally been understood as a form of facilitated decision-making,<sup>202</sup> and ‘conciliation’ is a process by which a third party intervenes to offer suggested outcomes,<sup>203</sup> which have often been viewed as distinct, pragmatic overlap may occur based on a careful assessment of party needs.<sup>204</sup> Mediation, in the Chinese context, has long been synonymous with conciliation. Therefore, in the translated versions of the Civil Procedure Law, the chapter for mediation/conciliation (调解)<sup>205</sup> is translated as ‘mediation’ or ‘conciliation’ accordingly by various official agencies.

- 35 The link between our vision of social and moral order and the development of systems of dispute resolution has increasingly been made explicit.<sup>206</sup> Systems of justice are said to stand ‘in close relationship to the ideas, aims, and purposes of society’.<sup>207</sup> Sun Li Bo adds that, ‘differing thought processes have led to differences in the understanding of the concept of justice and the way to put this ideal into practice’.<sup>208</sup>
- 36 In traditional China, justice was seen as the achievement of harmony. According to Sun Li Bo, the concept of justice was ‘based on morality, from which one... brings harmony to a family, and skilfully administers a country’.<sup>209</sup> Harmony, in turn, was the primary objective of decision-making and governance in China. During the period surrounding the Warring States, Confucius saw the Chinese empire plagued by interstate war, rebellion, intrigue and immorality and faced with the challenge of providing sustenance to a significantly large population on a very limited percentage of arable land. According to Phyllis G Chew, ‘the major question of the time was how people could live in peace’.<sup>210</sup>
- 37 Drawing inspiration from traditional texts<sup>211</sup>, Confucius sought to contribute to harmony by promulgating principles of conflict avoidance, compromise, and yielding.<sup>212</sup> These principles became integrated into China’s unique system of dispute prevention and

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<sup>200</sup> D Chow, ‘Development of China’s Legal System will Strengthen its Mediation Programs’ (2002) 3(4) *Cardozo Journal of Conflict Resolution*.

<sup>201</sup> Ali (n 6).

<sup>202</sup> J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Disputes without Litigation* (Jossey-Bass 1984).

<sup>203</sup> D Schwarcz, ‘Regulating Consumer Demand in Insurance Markets’ (2010) 3(1) *Erasmus Law Review* 23.

<sup>204</sup> L Love, ‘Mediation: The Romantic Days Continue’ (197) 38 *South Texas Law Review* 735.

<sup>205</sup> Civil Procedure Law 1991 (People’s Republic of China) Chapter 8.

<sup>206</sup> Ali (n 6).

<sup>207</sup> L M Friedman, *The Legal System, A Social Science Perspective* (New York, Russell Sage Foundation 1975).

<sup>208</sup> L B Sun, ‘Morality, Law and Religion: A Comparison of Three Concepts of Justice’ in C O Lerche (ed), *Towards the Most Great Justice* (The Bahá’í Publishing Trust 1996).

<sup>209</sup> *Ibid.*

<sup>210</sup> P G L Chew, *The Chinese Religion and the Bahá’í Faith* (Oxford, George Ronald 1993)

<sup>211</sup> In addition to Buddhism, see Chew (n 210).

<sup>212</sup> Ali (n 6).

resolution, called 调解, meaning to ‘adjust’ in order to ‘solve’. Based on the assumption that ‘the natural state of society was one of harmony rather than contention’,<sup>213</sup> conflict was seen as an unnatural state of affairs that ‘disrupted the natural harmony which linked individual, group, society, and the entire universe’.<sup>214</sup> Disharmony was considered amenable not through a reliance on positive law, but through the use of heavenly reason, natural law, compromise, and virtue.<sup>215</sup>

- 38 Confucius, ‘the founder of a moral system and a great reformer’<sup>216</sup> and ‘the cause of... advancement and prosperity for the people of China’<sup>217</sup> was born in 510 BC. During his lifetime, given the context of a fragile agricultural reality,<sup>218</sup> social harmony was especially important for the cultivation of life-sustaining crops.
- 39 The principles of harmony gradually became integrated into traditional Chinese governance structures. During that time, the aim of the government was ‘to preserve natural harmony...the source of ethical behaviour’.<sup>219</sup>
- 40 In official opinion, it was undoubtedly more important to keep harmonious and peaceful social relations, than to uphold individual rights and duties. Keeping on good and intimate terms and becoming reconciled was better than making clear distinctions between right and wrong.<sup>220</sup>
- 41 This principle of harmony also became integrated into China’s unique and widely embraced method of decision-making called ‘*tiaojie*’ and was considered superior to adjudication.<sup>221</sup> In practice, *tiaojie* focused on resolving disputes through a network of local peacemakers charged with assisting disputing parties to compromise, yield and finally come to a negotiated resolution. Selected for their qualities of wisdom and trustworthiness, magistrates and rural headmen who served as peacemakers, were trained in Confucian principles. These peacemakers intervened in conflict situations during the course of their normal civic duties through ‘indirect and gentle persuasion’.<sup>222</sup> They encouraged disputing parties to yield, forgive, or compromise for the sake of harmony—even in the face of ‘unreasonable disputants’.

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<sup>213</sup> During this time, the concept of ‘gain’ was understood as the happiness of the majority. See K Lieberthal, *Governing China* (New York, W.W. Norton, 1995) 16.

<sup>214</sup> D Bodde and C Morris, *Law in Imperial China* (University of Pennsylvania Press, 1967) 78.

<sup>215</sup> Ibid.

<sup>216</sup> S Effendi, *Lights of Guidance* (Alpha Editions 2023) 502.

<sup>217</sup> Abdu'l-Baha and S Effendi, ‘Buddha, Krisna, Zoroaster and Related Subjects’ in Bahá'u'lláh, Abdu'l-Bahá and S Effendi (ed), *Compilation of Compilations* (Bahá'í Publications Australia 1991) 15.

<sup>218</sup> H Gao, ‘China’s Judicial System in Ancient Times’ (1984) 12 China Law 14.

<sup>219</sup> Lubman (n 181) 1290.

<sup>220</sup> Ibid. Gao (n 218) 17.

<sup>221</sup> Lubman (n 181) 1290.

<sup>222</sup> During this time, the concept of ‘gain’ was understood as the happiness of the majority. See Lieberthal (n 213) 16.

- 42 During traditional times, it was understood that ‘if one gets into fights with others, one should look into oneself to find the blame. It is better to be wronged than to wrong others...Even if the other party is unbearably unreasonable, one should contemplate the fact that the ancient sages had to endure much more. If one remains tolerant and forgiving, one will be able to curb the other party’s violence’.<sup>223</sup>
- 43 The following case study recorded in Shantung province provides a window into how peacemakers traditionally worked to encourage parties to ‘meet halfway,’ ‘admit their own mistake,’ and eventually ‘share the expenses equally’, regardless of fault.<sup>224</sup>
- 44 First, the invited or self-appointed village leaders come to the involved parties to find out the real issues at stake, and also to collect opinions from other villagers concerning the background of the matter. Then they evaluate the case according to their past experience and propose a solution. In bringing the two parties to accept the proposal, the peacemakers have to go back and forth until the opponents are willing to meet halfway. Then a formal party is held either in the village or in the market town, to which are invited the mediators, the village leaders, clan heads, and the heads of the two disputing families. The main feature of the party is a feast. While it is in progress, the talk may concern anything except the conflict...If the controversy is settled in the form of ‘negotiated peace’, that is, both parties admit their mistakes, the expenses will be equally shared. Thus, the conflict is resolved.<sup>225</sup>
- 45 Though not always achieved in practice, the preference for the harmonious resolution of disputes was reflected in the operation of imperial Chinese institutions and decision-making structures.<sup>226</sup> For centuries, *tiaojie* remained China’s dominant and universally accessible means of decision-making.<sup>227</sup>
- 46 The further development of mediation in China can be largely divided into four eras, including the revolutionary era, the pre-litigation era, the litigation era and the post-litigation era.
- 47 Before the founding of the People’s Republic of China (PRC), Ma Xiwu developed a Trial Mode which combined mediation and arbitration during the Anti-Japanese War. He later assumed office as the presiding Judge of the East Tribunal of the High Court in the Shanxi-Gansu-Ningxia Border Region.<sup>228</sup> His success in resolving numerous complicated

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<sup>223</sup> T Akigoro, *Sofuku no kenkyu* (Tokyo bunko 1960) in P Ebrey, *Chinese Civilization: A Sourcebook* (The Free Press 1993) 604-608.

<sup>224</sup> During this time, the concept of ‘gain’ was understood as the happiness of the majority. See Lieberthal (n 213) 16.

<sup>225</sup> M Yang, *A Chinese Village: Taitou, Shantung Province* (Kegan Paul Trench Trubner 1945) quoted in S Lubman, ‘Mao and Mediation: Politics and Dispute Resolution in Communist China’ (1967) 55(5) *California Law Review* 1284.

<sup>226</sup> Ali (n 6).

<sup>227</sup> Lubman (n 181) 1290.

<sup>228</sup> Wang (n 181) 68.

disputes using his trial method (later known as ‘Ma Xiwu’s Trial Mode’), combining mediation and adjudication, attracted wide public recognition.<sup>229</sup>

- 48 During the post-Mao era, civil disputes were classified as ‘Internal Contradictions Among the People’. Civil mediation was emphasized in solving civil disputes.<sup>230</sup> The policy on adjudicating civil cases was expressed in the slogan, ‘rely upon the masses, make investigations, try cases on the spot, and give priority to mediation’ (‘依靠群众、调查研究、就地办案、调解为主’).<sup>231</sup> The emphasis on the principle of ‘Giving Priority to Mediation’ was maintained through the promulgation of the Civil Procedure Law (for Trial Implementation) in 1982. In this Era, the mediation rate for first-instance civil cases was as high as 75–80%.<sup>232</sup>
- 49 Judicial mediation in China became formalized in 1951 with the Provisional Organic Regulations of the People's Courts of the People's Republic of China (《人民法院暂行组织条例》). Pursuant to Art 12(2) and 12(5), prefecture-level courts were empowered to mediate civil as well as simple criminal cases. This power was reinforced in the first Organic Law of the People’s Court (《人民法院组织法》) enacted in 1954.
- 50 With the passage of over 2000 years since the time of Confucius, and as the realm of interaction expanded from the family and community to the nation and the world, Chinese mediators from Changsha, Beijing, and Shanghai, began to observe that harmony in the absence of equity and justice, could not meet the needs of a rapidly changing society.<sup>233</sup> Many observed that ‘values must change when they don’t fit the current context’,<sup>234</sup> that ‘morals need to work together to order society’,<sup>235</sup> the ‘challenge is to identify and propagate these principles’.<sup>236</sup>
- 51 With the social and economic changes associated with the introduction of China’s Open-Door policy came increasingly diversified relationships and increased mobility and means of communication. These new conditions inspired a search for both a new understanding of order within the community and nation, and also a new means of resolving conflict that reflects these new relationships.<sup>237</sup> Though *tiaojie* has held a long-standing place in the Chinese justice system and has been viewed within China as the

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<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> D Hong (洪冬英), ‘Dangdai Zhongguo Tiaojie Zhidu Bianqian Yanjiu’ (当代中国调解制度变迁研究) (2011) The Study on Changes of Mediation System in Contemporary China (上海人民出版社) 91.

<sup>232</sup> X Feng (冯小光), ‘Tiaojie Zhidu Fazhan Jinchengzhong de Zhengzhi Dongyin’ (调解制度发展进程中的政治动因) (Political Motives in the Process of Mediation System Development)’ (2011) People’s Court Daily (人民法院报) [http://rmfyb.chinacourt.org/paper/html/2011-04/20/content\\_26131.htm?div=-1](http://rmfyb.chinacourt.org/paper/html/2011-04/20/content_26131.htm?div=-1) accessed 29 December 2021.

<sup>233</sup> Ali (n 6).

<sup>234</sup> Shanghai Judge 1997 in Ali (n 6).

<sup>235</sup> Mediator interview 5, 29, and 30 in Ali (n 6).

<sup>236</sup> Shanghai Judge 1997 in Ali (n 6).

<sup>237</sup> Ali (n 6).

‘pearl of the East,’ mediators have explored avenues to balance the principle of social harmony associated with *tiaojie* and rights protection. Increasingly individuals are seeking approaches that ‘satisfy the needs of the individual...while achieving the larger goals of society’.<sup>238</sup>

- 52 In the 1990s, the use of *tiaojie* declined in China, falling from a 90% utilization rate in the early '80s to 60.51% in 1994.<sup>239</sup> In 1979, 30% of civil cases were settled in People's Courts; in 1980, that figure was 45%, and in 1981 it was 55%.<sup>240</sup> According to one study conducted in 1997,<sup>241</sup> peacemakers, judges and Ministry of Justice officials expressed their appreciation of the achievements of *tiaojie* and their desire to build on a process which contributed to the achievement of social harmony. Cognizant that its efficacy was largely due to its foundation on a socially pervasive Confucian ethic, and simultaneously aware of the significant social, economic, and demographic changes, mediators have made greater efforts to reconcile principles of social harmony with principles of equity and justice.<sup>242</sup>
- 53 On the one hand, some mediators among those interviewed in the late 1990s stated that they continued to employ methods emphasizing conciliation. In attempting to resolve a dispute between friends, one mediator commented that he might emphasize their past friendship, and attempt to convince them that they had a ‘long future together as friends’ and that it was ‘best to resolve [the issue] simply and quickly...’<sup>243</sup>
- 54 On the other hand, many mediators expressed a desire for a process of decision-making that went beyond the restoration of harmony through ‘gentle and indirect persuasion,’ to one that resulted in justice and fairness.<sup>244</sup> Many found that reliance on traditional practices such as ‘pasting parties together’ regardless of right and wrong’ has increasingly been called into question by Chinese government officials.<sup>245</sup> Many judges and mediators expressed frustration that reminders of the virtue of reconciliation and yielding in the name of harmony alone sometimes seemed to fall on deaf ears.<sup>246</sup> One

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<sup>238</sup> D I Hitchcock, *Asian Values and the United States: How Much Conflict?* (Center for Strategic and International Studies 1996) 3.

<sup>239</sup> Jiu Y, ‘Ba Er nian renmin *tiaojie* gongzuo gaikuang’ [A survey of People's Mediation Work in 1982] in G Xiang (ed), *Renmin Tiaojie Zai Zhongguo* [People's Mediation in China] (Official Chinese Judiciary Publication 1986).

<sup>240</sup> R H Folsom and J H Minan, *Law in the People's Republic of China: Commentary, Readings and Materials* (Martinus Publishers 1989) 173.

<sup>241</sup> S Maghzi, ‘Approaching the Middle Way: The Relative Decline of Mediation and Rise of Litigation in Contemporary China’ (1998) Stanford University department of International Relations.

<sup>242</sup> Ali (n 6).

<sup>243</sup> Mediator Interview 4 in S F Ali, ‘The Jurisprudence of Responsive Mediation: An Empirical Examination of Chinese People's Mediation in Action. Journal of Legal Pluralism and Unofficial Law’ (2013) 45(2) University of Hong Kong Faculty of Law Research Paper No 2013/023, SSRN: <https://ssrn.com/abstract=2268835>.

<sup>244</sup> Mediator Interview, *ibid*.

<sup>245</sup> T'aiHsing Report, *supra* note 5, at 5-6 in Lubman (n 181) 1307.

<sup>246</sup> Ali (n 6).



Shanghai Intermediate Court judge noted his frustration, ‘sometimes I hear, “Oh, those ideas are too old fashioned!” It becomes difficult for me to persuade them to accept the settlement agreement’’.<sup>247</sup> Interviewees noted that ‘values must change when they don’t fit the current context’,<sup>248</sup> and that ‘morals need to work together to order society’,<sup>249</sup> yet the ‘challenge is to identify and propagate these principles’.<sup>250</sup>

- 55 With the evolution of a national court system in China in the 1990s, the trial became the major mode of civil dispute resolution, with mediation increasingly marginalized. Due to the implementation of public trials and the tendency to emphasize judgment, the role of mediation was greatly weakened.<sup>251</sup> In this era, there was a substantial rise in civil litigation cases from 3.21 million in 1990 to 6.23 million in 1999, amounting to an approximately one-fold increase in less than a decade.<sup>252</sup> This, in turn, triggered an increase in appeals and petitions.<sup>253</sup>
- 56 Woo identifies that following the formalization of legal adjudication processes after the passage of the *Chinese Civil Procedure Code* in 1991 and the application of market principles to the expanding legal services market within the context of judicial reforms throughout the 1990s, significant social disparities emerged in the availability of legal services, and consequently the ability of the most vulnerable litigants to access justice in the face of formalized procedure.<sup>254</sup> In an effort to counter unequal access to justice at the turn of the century, a number of measures were taken both at the national and court levels, including the SPC’s institution of filing fee waivers and mitigation of other litigation costs and efforts to expand legal aid programs.<sup>255</sup>
- 57 The twenty-first century witnessed a resurgence of mediation, with a renewed emphasis on mediation encouraged in Chinese courts.<sup>256</sup> While adjudication still constitutes an important mode of resolution in China, at the same time, the judiciary is placing greater emphasis on mediation while endeavouring to overcome existing challenges, including prolonged mediation, coerced mediation and undue emphasis on the mediation success rates.
- 58 By the mid-2000s, an increasing number of disputes resulted in mounting burdens for the judiciary.<sup>257</sup> Increasing economic inequality, coupled with greater legal and

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<sup>247</sup> Interview: J1 Judge-Intermediate Court: Beijing in Ali (n 243).

<sup>248</sup> Shanghai Judge 1997 in Ali (n 6).

<sup>249</sup> Mediator interview 5, 29, and 30 in Ali (n 243).

<sup>250</sup> Shanghai Judge 1997 in Ali (n 6).

<sup>251</sup> Fu and Palmer (ed) (n 191) 69.

<sup>252</sup> Hong (n 231) 92.

<sup>253</sup> Ibid.

<sup>254</sup> M Y Woo, ‘Bounded Legality: China’s Developmental State and Civil Dispute Resolution’ (2012) 27 *Maryland Journal of International Law* 235, 254.

<sup>255</sup> Ibid.

<sup>256</sup> See Fu and Cullen (n 179).

<sup>257</sup> Ibid 251.



procedural formality absent a commensurate increase in legal representation, resulted in the development of significant grievances among the populace.<sup>258</sup> New national goals promoted a 'harmonious society', aimed at quelling social instability and large-scale class actions.<sup>259</sup> In this context, by 2010, further reforms by the SPC encouraging judges to 'mediate cases that could be mediated, adjudicated cases that should be adjudicated, combining mediation with adjudication, concluding the case and ending the dispute concurrently', the passage of the *People's Mediation Law* and the Chinese government's 'grand mediation (*da tiaojie*, 大調解)' campaign reflected a reversion to the Chinese legal system's emphasis upon mediation, not only as a tool of dispute resolution but as a means of promoting social stability.<sup>260</sup> The government itself embraced an active role in leading mediation and brokering settlement in highly contentious and/or class actions to deter litigation, ranging from the Szechuan earthquake and the Sanlu milk contamination scandal.<sup>261</sup>

- 59 In 2012, *Amendments to the Chinese Civil Procedure Code* similarly prioritized mediation over adjudication as a dispute resolution mechanism, as reflected in specific provisions stipulating that mediation should be the first port of call for appropriate cases, enhancing protections and enforceability of court-mediated agreements, and allowing civil courts to require re-mediation of cases in the event of 'unlawful' agreements.<sup>262</sup> In the same vein, the SPC's *Fourth Judicial Reform Plan (2014-2019)* stipulated 'Diversified Dispute Resolution' as an aim for further pro-mediation court reform, whereby different cases were to be triaged, dependent on the extent of dispute and possibility of settlement.<sup>263</sup>

### 3.2 Mediation as Mainstream: Programme Features

#### 3.2.1 Judicial Mediation Procedures

- 60 At the present time, judges and court staff in China are obliged to consider the suitability of mediation at all stages of the civil litigation life cycle, from filing to appeal to re-trial and enforcement of judgments.<sup>264</sup>

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<sup>258</sup> Ibid 251.

<sup>259</sup> Ibid 252.

<sup>260</sup> Ibid 251.

<sup>261</sup> Such government-department led and bounded mediation for participants of potential class actions was swift, whereby plaintiffs were steered towards settlement processes in preference to formal court process. Conversely, ordinary cases were generally permitted to through the court system. Woo (n 254) 242.

<sup>262</sup> M Wo, 'In Search of Justice: China's Elusive Civil Litigation Reforms' in E Nesossi and others (ed), *Justice: The China Experience* (CUP 2017) 285, 293.

<sup>263</sup> Woo (n 191) 254.

<sup>264</sup> SPC Several Opinions Art 1.

### 3.2.2 Differences between Judicial Mediation and Court-Annexed Mediation

- 61 Unlike in many common law jurisdictions where court-annexed mediation is effectively an ADR mechanism separate from the litigation process, judicial mediation in China has long been an integral part of the litigation process. It does not precede the trial hearing but occurs throughout the litigation process.<sup>265</sup> As a result, courts in China have significant involvement in judicial mediation, with judges typically assuming dual roles – acting both as a mediator and adjudicator in some cases.
- 62 The effects are also distinguishable: in case judicial mediation fails, the evidence and submissions obtained by the judge may have a continuous effect on the contemporaneous adjudication, whereas those attained in court-annexed mediation are usually not discoverable in subsequent litigation.

#### 3.2.2.1 Mediation in Practice

- 63 In practice, observers note the occurrence of compulsion in some cases, contravening the principle of free will.<sup>266</sup> The incidence of coercion reflects a combination of heavy caseloads and the fact that a judge's performance is appraised by reference to their case resolution rate, mediation rate, and rate of appeal.<sup>267</sup> In turn, judges often exert pressure on parties by inducing or coercing them to mediate, in order to achieve higher mediation rates.<sup>268</sup> Due to such political demands for settlements, judicial mediation has emerged as a 'far more adjudicatory, aggressive, and interventionist' process than described in law.<sup>269</sup> This process has been coined as 'mediatory adjudication', reflecting the potential use of heavy-handed measures.<sup>270</sup> This has led to fairness concerns regarding agreements reached by virtue of the lack of genuine consent of the parties, especially as it is often the weaker party that compromises its interest to reach a settlement.<sup>271</sup>
- 64 Within Chinese civil courts, vulnerable litigants appear to prefer informal dispute resolution, yet often lack procedural safeguards.<sup>272</sup> In examining the practice of three Intermediate Courts, Woo notes that outside formal hearings, judges routinely convene informal pre-trial meetings for purposes ranging from the exchange of materials to attempts at dispute resolution, free of formal procedural rules with litigant parties or

<sup>265</sup> L Yin (尹力), 'Ch.6 Fayuan Tiaojie Zhidu (第六章 法院調解制度) (Ch.6 Judicial Mediation System)' in *Zhongguo Tiaojie Jizhi Yanjiu (中國調解機制研究) (The Studies on PRC Mediation System)* (Chinese Judiciary 2009) 109.

<sup>266</sup> Fu and Palmer (ed) (n 191) 71; He and Ng (n 186).

<sup>267</sup> SPC Several Opinions Art 22.

<sup>268</sup> S B Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Stanford UP 1999) 275.

<sup>269</sup> Huang (n 182).

<sup>270</sup> P C C Huang, 'Civil Justice in China: Representation and Practice in Late Qing' (1996) 32(3) *Canadian Journal of History* 148, 498-499.

<sup>271</sup> He and Ng (n 186).

<sup>272</sup> Woo (n 254).

their legal representatives.<sup>273</sup> Woo raises concerns regarding procedural deficiencies, given evidence of judges relying on materials arising from such informal meetings or parties absent from such meetings being denied the opportunity to view or comment on materials prior to the trial proper.<sup>274</sup>

- 65 Once a mediation agreement is reached and a settlement becomes legally binding, it has the following implications for the parties. First, the parties are not allowed to reinstitute the same claim based on identical factual grounds.<sup>275</sup> Second, parties do not have a right of appeal since parties have a 'right of retraction' before the agreement becomes binding.<sup>276</sup> Third, the substantive rights and obligations of the parties become clarified in accordance with the mediation agreement.<sup>277</sup>
- 66 China's court mediation programme accounts for a major share of global court mediation cases. Robust efforts to reform the programme have resulted in some modest gains, not only to the mediation system, but also to the wider experience of civil justice in China. While the flexibility of conciliation allows for a contextualized and 'learning mode of legal intervention,' at the same time, similar to forms of 'responsive law,' the process is at risk of becoming a 'precarious ideal' that lacks precision, potentially displacing legitimate protections of the vulnerable.<sup>278</sup> Between 2011 and 2016, China experienced some modest gains in its rankings<sup>279</sup> in the areas of efficiency, as measured by reduction of delay according to the Global Competitiveness Report 2016–2017,<sup>280</sup> and confidence, as measured by the Rule of Law Index for 'effective enforcement' and 'impartial and effective ADR'<sup>281</sup> and perceptions of the rule of law.<sup>282</sup>

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<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> Yin (n **Fehler! Textmarke nicht definiert.**) 118.

<sup>276</sup> Y Chang and others (ed), 'Dishizhang Renmin Fayuan Tiaojie (第十章 人民法院调解) (Mediation by the People's Court)' in *Zhongguo Tiaojie Zhidu (中国调解制度) (The Mediation System of China)* (Chinese Judiciary 2013) 272.

<sup>277</sup> Yin (n **Fehler! Textmarke nicht definiert.**) 118.

<sup>278</sup> Ali (n 6).

<sup>279</sup> Ali (n 8).

<sup>280</sup> World Economic Forum, *The Global Competitiveness Report 2016–2017* (World Economic Forum 2016) 146–147. China's score for 'no unreasonable delay' in 2011 was in the 0.59 percentile and in 2016 in the 0.76 percentile.

<sup>281</sup> World Justice Project, *Rule of Law Index 2016* (World Justice Project 2016) 60. In 2011 China's scores for 'effective enforcement' was 0.55 and in 2016 it was 0.58; its score for 'impartial and effective ADR' in 2011 was 0.59 and in 2016 was 0.62.

<sup>282</sup> World Bank Group, 'Worldwide Governance Indicators 2015' (World Bank Group 2015) <http://info.worldbank.org/governance/wgi/> accessed 29 December 2021. In 2011 China was in the 0.43 percentile and in 2016 it was in the 0.44 percentile.

#### 4 VOLUNTARY AND MANDATORY MEDIATION IN GLOBAL PRACTICE

- 67 Drawing on the concept of an ‘interpellative and interlocutionary ethics’ in comparative legal studies put forward by Legrand, in which the voice of the studied must be heard,<sup>283</sup> and building on an examination of a country-level case study examining the practice of mediation as ‘mainstream’ rather than an ‘alternative’ form of ADR, this section explores the attitudes and perceptions of practitioners implementing voluntary and mandatory court mediation programmes in five regions in order to provide insights into the dynamics, challenges and lessons learned within and between mediation programme types.<sup>284</sup>
- 68 The principal finding of an 83-person survey is that from the perspective of practitioners, both mandatory and voluntary mediation programmes have been perceived with relatively equal levels of confidence, perceptions of fairness and efficiency.<sup>285</sup> While slight variation exists such that practitioners report higher levels of confidence in mandatory mediation programs (70%) as opposed to voluntary programs (64%), and higher perceptions of efficiency with respect to voluntary programs (77%) as opposed to mandatory programs (68%), both regard voluntary (81%) and mandatory (82%) mediation programs with relatively equal perceptions of fairness.<sup>286</sup> As prior studies have noted, self-reported perceptions are subject to bias, and statements may not always reflect actual practice.<sup>287</sup>
- 69 Mediators shared important insights into the strengths and challenges of existing voluntary and mandatory court mediation programmes.<sup>288</sup> The findings indicate that practitioners working in mandatory court mediation programmes identified several key benefits of such programmes, including normalizing party-driven resolution, improved efficiency and speed through effective case-screening and facilitating relational repair, while practitioners working in voluntary programmes identified key strengths as the development of a well-established and supportive mediation culture, self-determined party engagement, simple procedures, welcoming facilities, high-quality mediators and on-going monitoring and evaluation.<sup>289</sup>
- 70 With respect to programme challenges, mandatory mediation practitioners noted that key challenges included limited party understanding of the mediation process, lawyer conflicts of interest, mediator quality, lack of good faith, inexperience in managing

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<sup>283</sup> P Legrand, ‘The Same and the Different’ in P Legrand and R Munday (ed), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 240, 242.

<sup>284</sup> These findings are discussed in Ali (n 8).

<sup>285</sup> Ibid.

<sup>286</sup> No statistically significant variation exists with respect to such findings.

<sup>287</sup> J A Wall and K Kressel, ‘Research on Mediator Style: A Summary and Some Research Suggestions’ (2012) 5(4) *Negotiation and Conflict Management Research* 403.

<sup>288</sup> Ali (n 8).

<sup>289</sup> Ibid.

power imbalances and resource limitations. Challenges within voluntary court mediation programmes included difficulties associated with encouraging party participation, limited resources, and mediator quality.<sup>290</sup>

- 71 In relation to suggestions for improving the overall court mediation process, mandatory mediation practitioners had a number of useful suggestions for improving the quality of court mediation systems, including enhanced training, public education on the benefits of mediation, funding and organizational resources, mediator incentives, on-going evaluation and greater flexibility in settlement arrangements. Similar suggestions were identified by voluntary mediation programme practitioners, including enhanced mediator training, greater financial resources, increased public education, improved facilities, and more directed encouragement of litigants' attempts at mediation.<sup>291</sup> These findings engage with the recent series of Global Pound Conference (GPC) sessions,<sup>292</sup> suggesting greater consideration may be given to the development of legislation supporting the enforcement of mediated settlements.

#### 4.1 Background and Rationale for Introducing Court Mediation Programmes

- 72 Scholarship has examined the varying rationales motivating courts to introduce mediation programmes.<sup>293</sup> As discussed earlier, existing intrinsic and extrinsic rationales for introducing court-based mediation in civil justice systems include efficiency,<sup>294</sup> reduction of caseloads,<sup>295</sup> private and public sector cost reductions<sup>296</sup> as well as extrinsic factors including relational,<sup>297</sup> societal<sup>298</sup> and process-based<sup>299</sup> considerations.
- 73 Overall, existing scholarship has found that primary importance is focused on 'reduc[ing] costs/time involved in litigation' (efficiency considerations) and secondary importance is placed on 'giv[ing] parties a voice in the outcome' (relational and process-based considerations). For the motivating factors next in level of importance, practitioners in voluntary mediation programmes placed value on improving court access (#3) and improving the quality of outcomes/decisions (#4), while practitioners in mandatory

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<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

<sup>292</sup> For detailed analysis and country breakdowns, see International Mediation Institute, 'GPC Series Data' (International Mediation Institute) <https://imimediation.org/research/gpc/series-data-and-reports/> accessed [1/10/2022].

<sup>293</sup> Hensler (n 17).

<sup>294</sup> M Dakolias, *Court performance around the world: A comparative perspective* (World Bank 1999) 1–3.

<sup>295</sup> Foo Chee (n 18).

<sup>296</sup> Maclons (n 19) 85.

<sup>297</sup> Y Shamir, 'Alternative dispute resolution approaches and their application' (UNESCO 2003) 24.

<sup>298</sup> Alexander and others (n 21).

<sup>299</sup> Zeinemann (n 22) 51–53; N M Alexander and M LeBaron, 'The Alchemy of Mediation: Aesthetic wisdom for a fragmented age' in I MacDuff (ed), *Essays on Mediation: Dealing with Disputes in the 21st Century* (Wolters Kluwer 2016).

programmes placed importance on improving the quality of outcomes/decisions (#3) and improving court access (#4).

## 4.2 Confidence, Fairness and Efficiency in Voluntary and Mandatory Court Mediation

### 4.2.1 Confidence in Court Mediation Programmes

- 74 While prior studies have shown no significant variation in the level of confidence in voluntary or mandatory court mediation programmes, a slightly higher level of confidence among practitioners in mandatory mediation programmes (70%), as opposed to voluntary programs (64%), has been identified.<sup>300</sup> Such programmes benefit from increased exposure, thereby offering parties a chance to observe the possible beneficial results of mediation. Such benefits include an opportunity to tell one's side of the story, participate in the process and help craft the final outcome.<sup>301</sup> This echoes findings from recent studies showing that parties who entered mediation reluctantly nevertheless benefitted from the process<sup>302</sup> regardless of how the mediation was initiated.<sup>303</sup> This also correlates with findings that show higher compliance rates for judgments arrived at through mediation as compared with litigation.<sup>304</sup> Such beneficial perceptions alongside higher compliance rates may explain the relatively higher levels of confidence in mandatory programmes.<sup>305</sup>

### 4.2.2 Fairness in Court Mediation Programmes

- 75 Perceptions of outcome fairness among court mediation practitioners across voluntary and mandatory mediation programmes have been largely uniform.<sup>306</sup> Nearly an identical proportion of practitioners working in voluntary (81%) and mandatory (82%) programmes believed that outcomes arrived at through their court mediation programmes were either very fair or fair.<sup>307</sup> Such identity of response appears to indicate

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<sup>300</sup> Ali (n 8).

<sup>301</sup> R L Wissler, 'Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research' (2002) 17 Ohio State Journal on Dispute Resolution 641, 690.

<sup>302</sup> J Pearson and N Thoennes, 'Divorce Mediation: An Overview of Research Results' (1985) 19 Columbia Journal of Law and Social Problems 451; C McEwen and T Milburn, 'Explaining a Paradox of Mediation' (1993) 9 Negotiation Journal 23.

<sup>303</sup> Sander, 'Another View of Mandatory Mediation' (n 53) 16.

<sup>304</sup> C A McEwen and R J Maiman, 'Mediation in Small Claims Court: Achieving Compliance Through Consent' (1984) 18 Law & Society Review 11; N Vidmar, 'An Assessment of Mediation in a Small Claims Court' (1985) 41 Journal of Social Issues 127.

<sup>305</sup> These findings are discussed in Ali (n 8).

<sup>306</sup> These findings are discussed in Ali (n 8).

<sup>307</sup> Much of the ADR literature uses the terms 'fairness' and 'justice' interchangeably. See for example: O Shapira, 'Conceptions and Perceptions of Fairness in Mediation' (2012) 54 South Texas Law Review 281; J Bercovitch, 'Mediation Success or Failure: A Search for the Elusive Criteria' (2006) 7 Cardozo Journal of Conflict Resolution 289, 291; J M Hyman, 'Swimming in the Deep End: Dealing with Justice in Mediation' (2004) 6 Cardozo Journal of Conflict Resolution 19, 19; and J B Stulberg, 'Mediation and Justice: What Standards Govern?' (2005) 6 Cardozo Journal of Conflict Resolution 213, 215.

that the mechanism by which parties are introduced to court mediation has a limited impact on perceptions of fairness. Perceptions of process fairness,<sup>308</sup> requiring informed<sup>309</sup> participation, non-coercion,<sup>310</sup> absence of undue influence,<sup>311</sup> the opportunity to terminate at any time,<sup>312</sup> absence of bias,<sup>313</sup> impartiality,<sup>314</sup> taking account of power differentials<sup>315</sup> and providing an opportunity for a wide expression of views<sup>316</sup> were not queried. Rather, 'outcome fairness' as traditionally assessed by principles of equity,<sup>317</sup> legality,<sup>318</sup> beneficial impacts on parties,<sup>319</sup> relational improvements,<sup>320</sup> and upholding human dignity,<sup>321</sup> were independent of the mechanism by which parties arrived at mediation – whether voluntarily or through a mandatory process. The identity of perceptions of fairness across mandatory and voluntary mediation programme types appears to support suggestions that, given the 'educative functions' of mandatory programmes, it is worthwhile 'to at least consider some form of dispute settlement procedure before trial'.<sup>322</sup>

#### 4.2.3 Efficiency in Court Mediation Programmes

- 76 Overall, voluntary mediation programmes are viewed as more efficient than mandatory court mediation programmes.<sup>323</sup> When examined from the perspective of a court's

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<sup>308</sup> See generally, Shapira (n 307).

<sup>309</sup> J M Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1999) 74 Notre Dame Law Review 775, 778.

<sup>310</sup> California Rules of Court (USA) Rule 3.857(b) [www.courts.ca.gov/documents/title\\_3.pdf](http://www.courts.ca.gov/documents/title_3.pdf) accessed 29 December 2021.

<sup>311</sup> Eg, Family Mediation Canada, 'Members Code of Professional Conduct' (Family Mediation Canada 2013) [https://www.fmc.ca/wp-content/uploads/2016/10/FMC-Members-Code-of-Conduct\\_0.pdf](https://www.fmc.ca/wp-content/uploads/2016/10/FMC-Members-Code-of-Conduct_0.pdf) accessed 1 October 2022.

<sup>312</sup> Georgia Commission on Dispute Resolution, 'Ethical Standards for Mediators' (Georgia Commission on Dispute Resolution 2012) §IV 30 [www.godr.org/files/APPENDIX%20C,%20CHAP%201,%206-1-2012.pdf](http://www.godr.org/files/APPENDIX%20C,%20CHAP%201,%206-1-2012.pdf) accessed [1/10/2022].

<sup>313</sup> S E Burns, 'Thinking About Fairness & Achieving Balance in Mediation' (2008) 35 Fordham Urban Law Journal 39, 41.

<sup>314</sup> See eg, J Dworkin and W London, 'What Is a Fair Agreement?' (1989) 7(1) Mediation Quarterly 3, 5.

<sup>315</sup> L Boule and M Nesic, *Mediation: Principles, Process, Practice* (LexisNexis UK 2001) 454–455; Grillo (n 65) 1550; Delgado and others (n 36) 1375–1383.

<sup>316</sup> N A Welsh, 'Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?' (2001) 79 Washington University Law Quarterly 787, 817.

<sup>317</sup> See eg, Bercovitch (n 307) 291.

<sup>318</sup> See eg, J W Cooley, 'A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation' (1993) 19 University of Dayton Law review 83, 130.

<sup>319</sup> See eg, J B Stulberg, 'Fairness and Mediation' (1998) 13 Ohio State Journal on Dispute Resolution 909; L Susskind, 'Environmental Mediation and the Accountability Problem' (1981) 6 Vermont Law Review 1, 14–18.

<sup>320</sup> K E Menzel, 'Judging the Fairness of Mediation: A Critical Framework' (1991) 9 Mediation Quarterly 3, 6–16; and J M Hyman and L P Love, 'If Portia Were a Mediator: An Inquiry into Justice in Mediation' (2002) 9 Clinical Law Review 157, 186.

<sup>321</sup> Stulberg (n 319) 215.

<sup>322</sup> C Menkel-Meadow, 'When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals' (1997) 44 UCLA Law Review 1871.

<sup>323</sup> Ali (n 8).



operational costs, voluntary mediation programmes generally place the burden of financing such services on the parties, and therefore overall voluntary mediation costs are lower as compared with mandatory programmes. From the perspective of the user, when mediation is successful, litigation expenses may be reduced. Several studies have identified a reduction in litigation costs when parties are successful in mediating their disputes.<sup>324</sup> However, when mediation is unsuccessful, overall costs of litigation generally go up.<sup>325</sup> In light of the impact of costs on overall efficiency, some mandatory mediation programmes provide an opt-out mechanism for parties in the event that ‘the costs of mediation would be higher than the requested relief (...)’.<sup>326</sup> Original advocates of the multi-door courthouse have also cautioned that requiring that parties pay for court-annexed ADR may contradict the key idea of making a justice system that provides parties with a range of options for dispute resolution.<sup>327</sup> Concerns have also been raised regarding the possibility that mandatory mediation systems, in which users pay for mediation services, may lead to satellite litigation and ‘ultimately increase the costs for litigants and result in general inefficiency within the court system’.<sup>328</sup> For voluntary programmes, it is possible that because the decision regarding whether to proceed with mediation is left to the parties, once a decision is reached, a final agreement may be more likely. It is also important to recognize, as has been described by several mediation scholars, that a narrow focus on efficiency as measured by costs and time, while

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<sup>324</sup> For example, a study conducted by the International Finance Corporation in 2006 found that, in more than 1,000 cases resolved through mediation in Serbia, Bosnia and Herzegovina and Macedonia, direct costs of mediation averaged USD 225, which represented about 50% of the cost of litigation (about USD 470). See I Love, ‘Settling Out of Court: How Effective is Alternative Dispute Resolution?’ in World Bank, ‘Viewpoint: Public Policy for the Private Sector’ (Note No 329, World Bank, October 2011) <https://openknowledge.worldbank.org/handle/10986/11055> accessed 1 October 2022. See also C E Jorquiera and G Dabdoub Alvarez, ‘The Cost of Disputes in Companies and the Use of ADR Methods: Lessons from Nine Latin American Countries’ (Multilateral Investment Fund 2005); J Barkai and G Kassebaum, ‘Hawaii’s Court-Annexed Arbitration Program: Final Evaluation Report’ (1992) Program on Conflict Resolution Working Paper Series 1/1992, accessed 1 October 2022; R G Hann and others, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1) Final Report: The First 23 Months* (Queen’s Printer 2001) Executive Summary and Recommendations [https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1142&context=faculty\\_books](https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1142&context=faculty_books) accessed 1 October 2022.

<sup>325</sup> Genn and others (n 8) (for cases that failed to settle through mediation, expenses were USD 2,000 – USD 4,000 higher); Rosenberg and Folberg (n 78) (similarly, early neutral evaluation processes that did not result in settlement in California courts added about USD 4,000 to the cost of litigation); R L Wissler, ‘The Effectiveness of Court-Connected Dispute Resolution in Civil Cases’ (2004) 22 Conflict Resolution Quarterly 55 (reporting mixed results in cost savings); and R A Posner, ‘The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations’ (1986) 52 University of Chicago Law Review 366 (suggesting that there are no savings in costs).

<sup>326</sup> COLO. REV. STAT. ANN. § 13-22-311 (West 2009).

<sup>327</sup> F E A Sander, ‘Paying for ADR’ (1992) 78 ABA Journal 105.

<sup>328</sup> Quek Anderson (n 8).

important, may nevertheless overlook the more important relational benefits of mediation.<sup>329</sup>

- 77 In addition to court and user costs, mediation programmes impact court and user time. No doubt, mandatory mediation requires an additional time commitment on the part of disputing parties, which in some cases reduces overall disputing time if the mediation is successful.<sup>330</sup> However, when mediation fails to result in a resolution, overall disputing time is extended.<sup>331</sup> Given mixed empirical findings,<sup>332</sup> there is no overall consensus on time savings in mediation.

### 4.3 The Strengths and Challenges of Court Mediation Programmes

- 78 Mediation practitioners have unique insights into what they see has been working well in both mandatory and voluntary mediation programmes as well as existing challenges.
- 79 For practitioners working in mandatory mediation programmes, key areas of achievement include normalizing party-driven resolution, improved efficiency and speed through effective case screening and facilitating relational repair.<sup>333</sup> A key benefit of mandated programmes is the normalization of a process of autonomous party-driven resolution. One practitioner noted that ‘parties now expect that they will mediate – it is now a ‘normal’ part of the legal process’. While ‘self-referral is also encouraged,’ a practitioner added, it helps that we are court mandated. (...) Many have never encountered this process and have no idea what to expect. (...) We draft our own agreements, usually, which I personally feel makes them more neutral and accurate than if a non-professional or more motivated attorney gets a chance to write them.<sup>334</sup>
- 80 Mandatory programmes tend to be ‘effective, [efficient], low cost, [and] fast’. High settlement rates have been achieved in some mandatory programmes in spite of limited resources. One practitioner noted that his mandatory programme has achieved a ‘high success ratio despite lack of facilities, low pay for mediators, and lack of office supplies’.

<sup>329</sup> See for example, L P Love and E Galton, *Stories Mediators Tell* (ABA Book Publishing 2012); C Menkel-Meadow, ‘Alternative and Appropriate Dispute Resolution in Context Formal, Informal, and Semiformal Legal Processes’ in P T Coleman, M Deutsch and E C Marcus (ed), *The Handbook of Conflict Resolution: Theory and Practice* (Wiley 2014) Chapter 50.

<sup>330</sup> See Rosenberg and Folberg (n 78); Barkai and Kassebaum (n 324); Hann and others (n 324); Bingham and others (n 40); and A Alvarez de la Campa, ‘The Private Sector Approach to Commercial ADR: Commercial ADR Mechanisms in Colombia’ (Investment Climate Department, World Bank 2009) <http://www.fias.net/index.cfm> accessed 1 October 2022.

<sup>331</sup> See for example: J S Kakalik and others, *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* (RAND Corporation 1996). However, see also critiques of the study questioning the representativeness of the sample and other design flaws: Stipanowich (n 33).

<sup>332</sup> See also, Genn and others (n 325) (showing no significant impact of mediation on case duration) and Wissler (n 325).

<sup>333</sup> These findings are discussed in Ali (n 8).

<sup>334</sup> Cited in Ali (n 8).

- 81 Mandatory programmes work well when intake officers are vigilant in screening out inappropriate cases, for example, disputes involving domestic violence or PTSD. One practitioner noted the importance of ‘the availability of exemptions for violence (...) so that cases that are inappropriate or urgent come straight to court’. Another practitioner agreed, observing that ‘veteran mediations are compromised by PTSD issues’. In sum, ‘getting certain types of cases to mediation quickly (...) saves a great deal of time and avoids hardening of positions’.<sup>335</sup> Given that mediation is ‘less formal than court’, parties have opportunities to ‘talk together’ to get to the heart of issues and take ownership of resolution options. This is particularly effective when ‘parties make their own plans, rather than having a judge make the decisions’.<sup>336</sup>
- 82 For practitioners in voluntary mediation programmes, key areas of achievement include developing a supportive mediation culture, robust engagement, high-quality mediators and ongoing monitoring and evaluation.
- 83 Past studies have identified challenges facing both mandatory and voluntary programmes.<sup>337</sup>
- 84 In the context of mandatory mediation programmes, challenges often include a lack of good faith on the part of lawyers and parties, limited party understanding of the mediation process, lawyer conflicts of interest, mediator quality, managing power imbalances and resource limitations.
- 85 In addition, generally low settlement rates in mandated programs are often due to a perception of a lack of good faith by lawyers and parties, many of whom see the process as a step toward an ultimate court battle. According to one practitioner, ‘in Indonesia based on a 2014 survey (...) only 4% of cases that [were] submitted to the court were able to reconcile [through] the court mediation program’. This was partly attributable to the lack of ‘good faith of both parties’. One practitioner explained that ‘the problem is that because it is compulsory, parties in dispute aren't putting their ‘heart’ (effort and good faith) [in]to the mediation process. Mediation has a tendency to become just a ‘station’ that must be ‘visited’ on a ‘journey’ and not as a destination (...)’. Another practitioner added that many parties ‘just take it as an obligation in a court process’.<sup>338</sup>
- 86 Mediator quality was cited as a challenge among some practitioners working in mandatory programmes. One noted that the ‘[list] of mediators [and] quality of the mediators’ impeded the success of the programme.

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<sup>335</sup> Ali (n 8).

<sup>336</sup> Ibid.

<sup>337</sup> These findings are discussed in Ali (n 8).

<sup>338</sup> Ali (n 8).

- 87 Effectively managing power imbalances in the context of mandatory mediation also presented unique challenges. Some observed instances in which ‘an attorney representing one party push[ed] an unrepresented party to settle’.
- 88 Voluntary court mediation programmes likewise shared a number of challenges, including encouraging party participation, limited resources, and mediator quality. Among the most frequently cited challenges for practitioners working in voluntary mediation programmes was ‘encouraging party participation’, given the dynamic of party entrenchment once cases enter the court system. One practitioner noted that ‘parties are often more entrenched in [a] conflict due to court proceedings, [and they receive] (...) conflicting advice about mediation from legal representatives who would rather not lose clients’. This view was shared by other practitioners who observed a ‘resistance [on the part] of counsel in embracing the process’.<sup>339</sup>
- 89 Several possibilities have been put forward to improve court mediation programmes,<sup>340</sup> including enhanced training, public education, organizational resources, ongoing evaluation and greater flexibility in settlement arrangements.<sup>341</sup>

## 5 CONCLUDING REMARKS ON HUMAN NATURE, MEDIATION AND CIVIL JUSTICE REFORM FROM A MULTI-JURISDICTIONAL PERSPECTIVE

- 90 This chapter has explored how evolving conceptions of justice are reflected in the varying emphasis on the role, place and practice of conciliation beyond civil courts. What drives the development of a nation’s particular approach to its court mediation system, whether voluntary or mandatory? How important is party choice in the success of court-connected mediation programmes? Variation among such programmes in diverse societies reflects, to a large extent, distinct approaches to individual and collective responsibility for the financial, social and temporal resources required for resolution. In some jurisdictions, the design of court mediation structures may align with a view of conciliation as the mainstream, normatively preferable, rather than an ‘alternative’ approach to the resolution of disputes. This is reflected in social and judicial support for court mediation programmes. In others, individual choice is prioritized, with parties given the option to decide whether to engage in conciliation processes. Voluntary and mandated programmes each come with their own relative benefits, challenges and social and economic cost implications, including distinct impacts on individuals’ perceptions of justice, efficiency and confidence in courts.

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<sup>339</sup> Ibid.

<sup>340</sup> These findings are discussed in Ali (n 8).

<sup>341</sup> These findings are discussed in Ali (n 8).

- 91 Global soft law policy, including Model Laws drafted by the UNCITRAL working group II, has generally left open the question of voluntary or mandatory mediation programme design to reflect domestic circumstances.<sup>342</sup> The scope of application of the law is expanded to all contexts,

(...) irrespective of the basis upon which the conciliation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.<sup>343</sup>

- 92 The provisions in the Model Law governing mediation are designed to accommodate differences in procedure while leaving parties free to carry out the mediation process as deemed appropriate.<sup>344</sup>

- 93 The question of voluntary or mandatory programme design is highly context-dependent, and as such, this section does not purport to offer a unitary conclusion but rather reflects on the achievements of such programmes and what has led to success. The relative advantages and challenges of mediation in a given jurisdiction vary according to the functioning of the underlying national civil litigation system. As noted in an earlier study, 'the differences in the structure and court environments of (...) programs mean that each program (...) is unique: they cannot simply be lumped together and viewed generically'.<sup>345</sup> While the study reports on the programmes' correlation with the same measures, including efficiency, confidence and perceptions of justice, the results must be seen as reflecting the unique conditions of each particular programme, and 'any cross-program comparisons must therefore take into account the impact of programmatic and environmental differences on these results'.<sup>346</sup> Given the primary focus of the study on general civil claims, it must be noted that court referral of family cases to well-trained mediation staff resulting in well-documented benefits to parties is not the focus of the study and, therefore, beyond the scope of interpretation.<sup>347</sup>

- 94 On the whole, whether voluntary or mandatory, it can be suggested that at an early stage, small-scale pilot mediation programmes can provide a useful base of experience to develop culturally specific programmes and train a growing pool of capable mediators. At the mid-stage, as experience is gained, public information programmes can assist with the diffusion and expansion of such programmes in a given region. At an advanced stage, as high-quality mediation services are developed and mediators receive adequate training in avoiding implicit bias, preventing the abuse of power imbalances, and public

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<sup>342</sup> See generally, Van Ginkel (n **Fehler! Textmarke nicht definiert.**); Binder and Sekolec (n **Fehler! Textmarke nicht definiert.**).

<sup>343</sup> UNCITRAL Model Law Art 8.

<sup>344</sup> Ibid para 12.

<sup>345</sup> Anderson and Pi (n 52).

<sup>346</sup> Ibid.

<sup>347</sup> Ali (n 8).

funds are available to support such programmes, then movement towards a more targeted encouragement of mediation in appropriate cases can further enhance options for resolution. In all stages, ongoing learning through joint reflection on challenges and best practices will assist in the advancement of court mediation programmes. Such ongoing learning, coupled with the provision of accessible public information on the mediation process, will contribute to enhanced efficacy. In all cases, as recent research has found, 'innovations intended to reduce costs and delay should not do so at the expense of those qualities of the judicial process that are more important to litigants'.<sup>348</sup> Institutions involved in the provision of court mediation services must be mindful of benchmarking success beyond measures of 'settlement' to the actual resolution of issues through an impartial, just and principle-based process.<sup>349</sup> Success will largely depend on the quality and skill of the mediators, institutional support, party education and preparation, and engagement with local needs and conditions.

- 95 Given the complexity of surrounding civil justice dynamics, much remains to be examined in the realm of conciliation beyond the courts, including the need for more in-depth qualitative studies examining intra-mediation programme variation, and how mediator and participant training<sup>350</sup> contributes to the development of surrounding mediation culture and the advancement of social justice and cohesion. Future studies by a growing number of researchers will no doubt contribute insights to the advancement of such understanding.

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<sup>348</sup> Lind and others (n 82).

<sup>349</sup> See Genn (n 35); Mironi (n 43).

<sup>350</sup> Empirical studies indicate that nearly 30% of court mediators believe that further training is needed to effectively conduct mediations. See S Purcell and J Martinez, 'Mediators in the Field: Experiences Around the Globe' (2014) 20(2) Dispute Resolution Magazine 27.

## ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ACHPR	African Court on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
ALI	American Law Institute
ANCCPC	Argentine National Civil and Commercial Procedural Code (Argentina)
Art	Article/Articles
BGH	Bundesgerichtshof (Federal Court of Justice) [Germany]
BID	Banco Interamericano de Desarrollo (Inter-American Development Bank)
CEPEJ	Conseil de l'Europe Commission européenne pour l'efficacité de la justice (Council of Europe European Commission for the efficiency of justice)
cf	confer (compare)
ch	chapter
CIDH	Corte Interamericana de Derechos Humanos (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
EBRD	European Bank for Reconstruction and Development
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	exempli gratia (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
ibid	ibidem (in the same place)
ICPR	Civil Procedure Regulations (Israel)
ICT	Information and Communication Technologies
ie	id est (that is)
IIDP	Instituto Iberoamericano de Derecho Procesal (Iberoamerican Institute of Procedural Law)



JCCP	Code of Civil Procedure (Japan)
JPY	Japanese Yen
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PD	Practice Direction
PDPACP	Pre-Action Conduct and Protocols
pt	part
RSC Order	Rules of the Supreme Court (UK)
SCC	Supreme Court Canada
Sec	Section/Sections
supp	supplement/supplements
TCCP	Code of Civil Procedure (Turkey)
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	Institut international pour l'unification du droit privé (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
v	versus
vol	volume/volumes
WB	World Bank
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## LEGISLATION

### International/Supranational

European Convention Art 39(1)

Model Law on International Commercial Conciliation 2002 (UNCITRAL) Art 1 footnote 1

Rules of Procedure of the Inter-American Commission on Human Rights 2013 (IACHR) Art 29(2)I

UNCITRAL Model Law Art 8

UNGA, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (United Nations 2004) 55 Art 3

### National

Alternative Dispute Resolution Act 2010 (Act 798) (Ghana)

Civil Procedure Law 1991 (People's Republic of China) Chapter 8

COLO. REV. STAT. ANN. § 13-22-311

Constitution of the PRC Art 111

People's Mediation Law of the PRC Art 5

SPC Several Opinions Art 22

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