

RESEARCH ARTICLE

The Place of Traditional Mediation in Enhancing Access to Justice in Malawi

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Abstract

Despite the fact that traditional mediation is one of the main dispute resolution mechanisms in Malawi, the country's formal legal and institutional frameworks pay little attention to its place in enhancing access to justice. This article analyses the extent to which Malawi's traditional mediation law, practice and institutions promote access to justice. It relies on African mediation theory to argue that the reason why traditional mediation continues to be a favoured dispute resolution mechanism is because of its communitarian nature in its quest to restore harmony in society.

Keywords: access to justice; chieftaincy; dispute resolution; mediation; tradition

Introduction

Traditional mediation is one of the main dispute resolution mechanisms in Malawi. A recent report indicates that the majority of Malawians today depend on informal justice systems, including customary law, for the resolution of disputes, as compared to the formal courts. The most frequently used non-state institutions include *ankhoswe* [family counsellors] and *mafumu* [chiefs and village heads], who use mechanisms such as arbitration, negotiation, mediation and adjudication to resolve disputes.¹

The 1994 Malawi Constitution recognizes traditional mediation; under it, every individual has the right to seek redress for disputes through litigation, alternative dispute resolution (ADR) and customary law.² However, although the Constitution recognizes customary law, including mediation, Malawi lacks a comprehensive legal and institutional framework to promote traditional mediation. This lack of sufficient laws and institutions for traditional mediation may result in “uncertain outcomes, gender inequality, lack of transparency, accountability, [and] human rights abuses”.³ The

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1 OECD “Briefing: Non-state justice and security systems” (May 2004, Department for International Development), available at: <<http://www.oecd.org/dataoecd/6/57/35243076.pdf>> (last accessed 20 September 2021); M Hussein “Intra-state conflict and indigenous-based conflict resolution mechanisms in Malawi: The role of the Public Affairs Committee” (2011) 20/1 *African Security Review* 26.

2 Constitution of Malawi 1994, secs 41, 13(1) and 10(2).

3 D Bagshaw “Mediation in the world today: Opportunities and challenges” (2015) 2/1 *Journal of Mediation and Applied Conflict Analysis* 187 at 196.

absence of institutions results in a lack of monitoring or evaluation of traditional mediation to ensure the quality of justice. The use of customary law mechanisms such as traditional mediation provides alternatives to Malawians to access justice, considering the numerous challenges facing the Malawi judiciary, which include the high cost of litigation, insufficient legal aid, long delays, and a backlog of cases.⁴ Other challenges are the physical inaccessibility of the formal courts, especially in rural areas, underfunding by the Malawian government, insufficient judicial officers, the formal courts' complex procedures, and Malawians' low educational levels.⁵

This article seeks to document and analyse traditional mediation in Malawi to determine the extent to which it enhances access to justice. We discuss traditional mediation conducted by chiefs and village heads in Malawi because these people "are an embodiment of the culture, customs, values and practice of the country, including those related to conflict prevention, resolution and peace building".⁶ The research methodology comprises a combination of a social-legal and a doctrinal methodology. We analyse Malawi's traditional mediation laws and institutions; we also interviewed 11 chiefs and village heads from five Malawian tribes: Lomwe, Sena, Ngoni, Chewa and Yao. The Ngoni and Sena are patrilineal societies while the Lomwe, Yao and Chewa are matrilineal. The study applied purposive sampling, the most important factor in which was to choose both matrilineal and patrilineal tribes in order to have a holistic view. The years of service as chiefs and village heads ranged from one to 20 years, and the ages of the respondents ranged between 30 and 80 years. The study selected interviews as a research tool because they provide in-depth data concerning the subject matter and enable researchers to hear directly from respondents.⁷ Ethical considerations for the conduct of this study involved obtaining a permit letter from the Faculty of Law, University of Nairobi, where the first author is a PhD law student, to go to the field to collect data. We also observed privacy and confidentiality rules in the conduct of the research by ensuring the anonymity of participants. Respondents were also informed at the time of booking and commencing the interviews that the interviews were voluntary. The study required respondents to sign the forms accompanying the interview schedule to show they consented to the interview. Further, respondents consented to have the interviews recorded. Data was analysed using qualitative content analysis.

The article is divided into three main sections. First, we conceptualize mediation in the Malawian context, before analysing mediation in Malawi's formal legal framework. The article then discusses traditional mediation practice and makes recommendations.

Conceptualizing mediation in the Malawian context

Folberg and Taylor define mediation as "a process by which the participants together with the assistance of a neutral person or persons systematically isolate dispute issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs".⁸ However, this definition merely focuses on reaching settlements, not addressing the root causes of

4 S Gloppe and F Kanyongolo *Courts and the Poor of Malawi: Economic Marginalization, Vulnerability, and the Law* (2007, Oxford University Press) at 274; W Scharf et al "Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums" (2002, Department of International Development), available at: <<https://dullahomarainstitute.org.za>> (last accessed 10 April 2026); F Kanyongolo *Malawi: Justice Sector and the Rule of Law* (2006, Open Society Foundation) at 23.

5 F Kapanda "A critical evaluation of judicial mediation in Malawi" (LLM dissertation, University of Cape Town, 2013), available at: <<https://open.uct.ac.za>> (last accessed 10 April 2026); E Kanyongolo "State of the judiciary: Malawi 2003" (2004), available at: <<https://www.ifes.org/publications/state-judiciary-malawi-2003>> (last accessed 20 May 2023); Scharf et al, id.

6 Hussein "Intra-state conflict", above at note 1.

7 OM Mugenda and AG Mugenda *Research Methods: Quantitative and Qualitative Approaches* (2003, ACTS Press) at 84–86; AA Wahad "Court-annexed and judge-led mediation in civil cases: The Malaysian experience" (PhD dissertation, College of Law and Justice, Victoria University of Melbourne, 2013) at 100.

8 J Folberg and A Taylor *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* (1984, Jossey-Bass) at 7.

disputes, and fails to cover the informality and flexibility of mediation.⁹ This article defines mediation as an informal, flexible and voluntary dispute resolution technique whereby an impartial third party helps parties to reach a mutual agreement. The understanding of mediation depends on whether it is traditional or Western mediation; in general, Western mediation emphasizes individualism and autonomy, while African mediation embodies the collective aspect of dispute resolution.¹⁰

African mediation

According to Amanda Boniface, African traditional mediation is communitarian in nature; it is a group mediation involving the disputants, mediators, witnesses and the entire community. The whole community takes part in the resolution of the dispute because Africans believe that a conflict affects both the parties and their communities, so any effort towards peace and reconciliation is the responsibility of the entire community. During African mediation processes, every member of the community is allowed to speak.¹¹ The mediators in traditional mediation are the elders, chiefs or village heads, who have no formal qualification except the good reputation they enjoy in the community. They have the advantage that they understand the community's culture and know the disputants because they are part of that community. African mediators play various roles in mediation, including facilitative and evaluative roles. Thus they can facilitate deliberations, make assessments, suggestions and recommendations, clarify positions, promote communication, summarize deliberations and enforce relevant rules.¹²

The main objective of African mediation is to reduce tensions created by the dispute and to reconcile the parties and the community, not to provide retribution or punishment. It aims at maintaining the parties' and the group's relationships and restoring harmony in the community. African mediation seeks to address the root causes of disputes. Parties are likely to cooperate with mediation agreements since the entire community has the obligation to implement them.¹³

Western mediation

Jacqueline Nolan-Haley identifies three key features of Western mediation: confidentiality, disputants' self-determination and mediators' neutrality. Western mediation empowers the disputants and promotes their autonomy.¹⁴ For example, the Model Standards of Conduct for Mediators in the United States provide that "self-determination is the fundamental principle of mediation requiring parties in mediation to reach a voluntary, un-coerced agreement".¹⁵ In this regard, John Brand et al argue that Western mediation empowers parties to make decisions; the self-determination of parties implies that all involved should freely choose to go to mediation.¹⁶ Self-determination also implies that disputants freely choose mediators, mediation procedures, the venue and time, and the outcomes, and should have the liberty to "withdraw from mediation at any time".¹⁷ Nolan-Haley argues

9 L Boule and A Rycroft *Mediation Principles, Process, Practice* (1997, Butterworths) at 4.

10 A Boniface "African-style mediation and Western-style divorce and family mediation: Reflections for the South African context" (2012) 15 *Potchefstroom Electronic Law Journal* 378.

11 *Ibid.*

12 *Ibid.*

13 *Ibid.*

14 J Nolan-Haley "Mediation and access to justice in Africa: Perspectives from Ghana" (2015) 21 *Harvard Negotiation Law Review* 59.

15 American Arbitration Association "Model standards of conduct for mediators" (1997) 17/2 *Journal of the National Association of Administrative Law Judiciary* 323 at 324.

16 J Brand, F Steadman and C Todd *Commercial Mediation: A User's Guide to Court-Referred and Voluntary Mediation in South Africa* (2016, Juta) at 24.

17 American Arbitration Association "Model standards of conduct for mediators", above at note 15; Wahad "Court-annexed and judge-led mediation", above at note 7 at 61.

that the principle of self-determination matches Western tendencies that emphasize individualism and autonomy but clashes with the communitarian nature of dispute resolution in Africa.¹⁸

Second, Western mediation emphasizes confidentiality.¹⁹ In this regard, the mandatory mediation rules of the High Court of Malawi, which uses Western mediation, provides that matters deliberated in the mediation process shall be confidential.²⁰ Similarly, the US Model Standards provide that unless the parties otherwise agree, mediators shall keep information relating to mediation confidential.²¹ Confidentiality implies that mediators and disputants cannot reveal matters from the mediation to any third party.²² It makes parties trust the mediation process and the mediators, facilitates openness from the parties in telling their stories and maintains future relationships between the parties.²³ However, Nolan-Haley contends that the private nature of Western mediation destroys public accountability. She argues that confidentiality is not a value in African mediation because the participants there are the entire community, which makes mediation transparent and accountable. This accountability safeguards the interests of the parties and of the whole community.²⁴

The neutrality of mediators is another essential feature of Western mediation.²⁵ The US guidelines, for instance, state that “a mediator shall conduct the mediation in an impartial manner”.²⁶ Nolan-Haley observes that US mediators generally practise neutrality by abstaining from expressing their opinion or providing counsel to the disputants. However, while some Western mediation programmes try to observe the neutrality of mediators, there is no consensus that mediators should always be neutral; it depends on the mediation style the mediator adopts, whether facilitative or evaluative. Nolan-Haley contends that neutrality is not a virtue in African traditional mediation because the African mediator plays various roles, depending on circumstances and needs. These roles include facilitating the mediation process, expressing his / her opinions where necessary, giving counsel and making recommendations.²⁷ The foregoing conceptual framework compares traditional mediation in Malawi to Western mediation practices, but it fails to discuss the extent to which traditional mediation enhances access to justice; it mentions the advantages of traditional mediation but does not mention its disadvantages. The literature also does not discuss human rights issues in traditional mediation.

Mediation in Malawi's formal legal framework

At the international level, the UN promotes the use of multiple dispute resolution mechanisms. The UN Charter provides that “parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.²⁸ This clause indicates there is no “exhaustive number of means of settling disputes”;²⁹ it recognizes ADR mechanisms, including mediation, but fails to give details about any dispute resolution mechanism.

The major international legal framework for mediation is the Singapore Convention, which aims at recognizing and enforcing international commercial mediation settlements.³⁰ This Convention

18 Nolan-Haley “Mediation and access to justice”, above at note 14.

19 JK Arthur *Confidentiality and Privilege in Mediation* (2015, Australian Alternative Dispute Resolution Bulletin) at 91.

20 Courts (High Court) (Civil Procedure) Rules 2017, order 13(7)(1).

21 American Arbitration Association “Model standards of conduct for mediators”, above at note 15.

22 Wahad “Court-annexed and judge-led mediation”, above at note 7 at 59.

23 Nolan-Haley “Mediation and access to justice”, above at note 14 at 80.

24 Ibid.

25 Id at 79.

26 American Arbitration Association “Model standards of conduct for mediators”, above at note 15.

27 Nolan-Haley “Mediation and access to justice”, above at note 14 at 79.

28 Charter of the United Nations 1945, art 33.

29 C Djeflal “Mediation in international law: Mapping its specifics for comparison”, available at: <<https://www.researchgate.net/publication/318702266>> (last accessed 10 October 2023).

30 United Nations Convention on International Settlement Agreements Resulting from Mediation 2019, art 1(1).

has resolved the challenges that parties previously went through to enforce international mediation settlements, which in most cases were ignored so that parties resorted to instituting lawsuits.³¹ However, the jurisdiction of the Singapore Convention is limited to promoting the use of mediation between states because it only deals with international commercial matters and leaves out other fields in law, including traditional disputes. Other international mediation laws include the UNCITRAL Model Law on International Commercial Mediation and the International Settlement Agreements Resulting from Mediation of 2018. The former is another example of good progress in mediation; however, it is only a template for drafting mediation laws and does not make any obligation on states.

At the continental and regional levels, the only area where Africa makes some effort to use mediation is in political matters;³² it lacks any law or institutions at these levels in other fields of law. The lack of laws at these higher levels hinders the growth of the use of mediation on the continent, leads to a lack of harmonization in the practice of mediation and may affect the provision of quality mediation services.

In Malawi, the 1994 Constitution recognizes customary law as one of the possible dispute resolution mechanisms and thus recognizes traditional mediation.³³ The Constitution also provides for cultural rights.³⁴ However, the customary laws apply only if they are not repugnant to justice and morality.³⁵ Under the repugnancy clause, customary law is required to be consistent with the provisions of the Malawi Constitution and international law. Section 5 of the Constitution says that “[a]ny Act of Government or any law that is inconsistent with the provision of this Constitution shall, to the extent of such inconsistency, be invalid”. This provision includes traditional mediation laws. Critics argue that repugnancy clauses suppress customary law and give the impression that the Western legal order is superior to customary law.³⁶

The Chief's Act

The Chief's Act of 1967 deals with traditional dispute resolution and governance by the chief or village head. The Act outlines the hierarchy of chieftaincy, which includes, from the highest position to the lowest, the paramount chief, senior chiefs, chiefs, sub-chiefs, the group village head and the village head.³⁷ The language used to refer to some of these positions in the Chief's Act is not gender-sensitive; it mentions “group village headman” or “village headman”, giving the impression that village heads should always be men, not women. There is therefore a need to use inclusive language.

The Chief's Act provides for the appointment of chiefs. Malawian chiefs fall under the executive arm of government, and the Act empowers the president to appoint the paramount chief, senior chief, chief and sub-chief.³⁸ The president shall ensure that the appointees are those “entitled to hold office under customary law” and have “the support of the majority of the people in the area of jurisdiction

31 K Muigua “The Singapore Convention on Mediation on International Settlement Agreements Resulting from Mediation: Challenges and prospects for African states”, available at: <<http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf>> (last accessed 24 May 2023).

32 Protocol Relating to the Establishment of Peace and Security Council of the African Union 2002, art 63. The AU established the Peace and Security Council in 2004 with the objective of promoting peace and security in Africa. It is empowered to use mediation as one of the dispute resolution mechanisms.

33 Constitution of Malawi, sec 200.

34 Id, sec 26.

35 A Dias and GH Welch *Justice for the Poor: Perspectives on Accelerating Access* (2009, United Nations Development Programme) at 420.

36 L Chirayath, C Sage and M Woolcock “Customary law and policy reform: Engaging with the plurality of justice systems (2005), available at: <<http://www.rrojasdatabank.info>> (last accessed 28 March 2026); DD Ndima “Re-imagining and re-interpreting African jurisprudence under the South African Constitution” (PhD thesis, University of South Africa, November 2013) at 113.

37 Chief's Act 1967, secs 3 and 9.

38 Id, sec 4.

of the office in question”.³⁹ For someone to be appointed a senior chief, they must first be a chief. Further, fellow chiefs in his / her area should find him / her suitable for the position of senior chief under customary law.⁴⁰ The president may also appoint someone a sub-chief if a particular chief asks for a sub-chief; the president is required to indicate in his / her appointment the jurisdiction of the sub-chief.⁴¹ The Act further provides that a paramount chief, senior chief, chief or sub-chief may appoint advisers to help them in their work.⁴² It also empowers chiefs to appoint village heads.⁴³

Under the Act, the functions of the chiefs and village heads include preserving public peace, carrying out customary law functions, assisting the government in collecting tax, and helping the district commissioner in administering the district.⁴⁴ The Act explains in detail the duty of the chief in assisting the executive arm of government in administration, but it fails to give details about the judicial function of the chief and village head. It also fails to provide for the training of chiefs and village heads in dispute resolution, ethical standards for traditional mediators, enforcement mechanisms for mediation settlements or monitoring and evaluation structures, and it does not mention the objectives of dispute resolution in customary law or the advantages of mediation, including its cost-effectiveness, speed, ease of access and the simplicity of procedures. A mention of the objectives and advantages of customary law would help Malawians to appreciate traditional mediation. Further, the Chief's Act does not set up institutions to promote traditional mediation, such as mediation committees, nor mechanisms to promote public awareness of it.

Malawi's traditional mediation practice: Key features, benefits and challenges

Key features of traditional mediation

Compared to Western mediation, data from the field reveals that the key features of traditional mediation in Malawi are its voluntariness, communitarian nature, party semi-autonomy, semi-confidentiality, informality, flexibility and non-neutrality.

Traditional mediation's voluntary nature

Our respondents explained that Malawi's traditional mediation is voluntary, meaning that it promotes access to justice. Commentators also argue that mediation promotes access to justice when it is voluntary.⁴⁵ Not all matters in customary law in Malawi are resolved through mediation; some are resolved through negotiation, arbitration and adjudication at the traditional courts and by the judiciary. Frank Sander argues that the availability of multiple mechanisms to resolve disputes enhances access to justice because parties choose the most suitable mechanism.⁴⁶ Carrie Menkel-Meadow argues that not all matters can be resolved through one dispute resolution mechanism due to differences such as “different kinds and numbers of parties, issues, structures of disputes and legal matters”.⁴⁷ In Malawian customary law, parties are free to choose mediation or any other suitable dispute resolution mechanism. Referral to mediation is by the parties, chief or village head. Although chiefs and village heads recommend suitable cases to go for mediation, the parties reserve the right to accept or reject the recommendation.

The practice of traditional mediation in Malawi is unlike the modern Western practice such as court-annexed mediation, which may have mandatory mediation programmes. For instance,

39 Id, sec 4(a) and (b).

40 Id, sec 4(c).

41 Id, sec 5.

42 Id, sec 14.

43 Id, sec 9(1).

44 Id, sec 7.

45 H Genn *Judging Civil Justice* (2010, Cambridge University Press) at 117.

46 F Sander “Varieties of dispute processing” (1976) 70 *Federal Rules Decisions* 79 at 131.

47 C Menkel-Meadow *Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the Semi-Formal* (2013, Georgetown Law Center) at 423.

Western mediation as practised in the High Court of Malawi is mandatory, because parties are forced to go for mediation before trial in civil matters.⁴⁸ In *Msindo v National Bank of Malawi*, the court confirmed that mediation in the High Court of Malawi is compulsory.⁴⁹ Similarly, in other jurisdictions, some mediation programmes are mandatory. In the US, mandatory mediations are ordered by statutes or judges who exercise discretion when referring particular cases to mediation.⁵⁰ In Ghana, the Alternative Dispute Resolution Act of 2010 permits courts to refer a case to mediation if the court finds it appropriate.⁵¹

Proponents of mandatory mediation argue that it is necessary because it validates parties who may want it but who avoid initiating it for fear they will appear weak, helps the parties to appreciate the benefits of mediation and brings about public awareness of mediation.⁵² Making mediation mandatory increases the number of cases mediated, because voluntary mediation has low uptake. To illustrate this, at one point, out of 4,500 cases in England's London county courts in which parties were free to choose mediation to resolve their disputes, only a few disputants (160 cases) freely chose mediation.⁵³ However, when England passed the Civil Procedure Rules, which authorized courts to encourage parties to use mediation and imposed sanctions where parties did not cooperate without good reasons, cases going to mediation increased by 141 per cent.⁵⁴

Supporters of voluntary mediation reject it being mandatory because it violates party self-determination.⁵⁵ Colleen Kotyk contends that "the very premise of mediation is its voluntary nature ... When a court or statute mandates mediation, however, a cornerstone of its foundation is removed, causing serious structural flaws."⁵⁶ Unlike litigation, which disempowers the parties so much that they are passive participants and are not in full control of their case, in mediation, "you are in control of what is happening to you".⁵⁷ The voluntariness of mediation means parties are free during the whole of the mediation without being forced at any point in the process or before it; parties freely choose to go for mediation, to choose the mediators, mediation procedures, venue and time, and have the liberty to "withdraw from mediation at any time".⁵⁸ The parties themselves must agree with the mediation settlement freely.⁵⁹ In *Halsey v Milton Keynes General NHS Trust*, the court emphasized that mediation is a voluntary process, and stated that courts should not impose mandatory mediation if parties are unwilling because that violates their right to a trial.⁶⁰ In *Morrow*

48 Court (High Court) (Civil Procedure) Rules 2017, order 13(1).

49 *Msindo v National Bank of Malawi* [2009] MWSC 34.

50 R Kulms "Mediation in the USA: Alternative dispute resolution between legalism and self-determination" (November 2012), available at: <<https://doi.org/10.1093/acprof:oso/9780199653485.003.0025>> (last accessed 12 December 2023).

51 Alternative Dispute Resolution Act 2010, sec 64(1).

52 *Remuneration Planning Corp Pty v Fitton* [2001] NSWSC 1208 (14 December 2001); J Pearson and N Thoennes "Divorce mediation: An overview of research results" (1985) 19/4 *Colombia Journal of Law and Social Problems* 451; FE Sander, HW Allen and D Hensler "Judicial (mis)use of ADR? A debate" (1996) 27 *University of Toledo Law Review* 885 at 886.

53 Lord Chancellor's Department "Alternative dispute resolution: A discussion paper" (November 1999), Annex B, available at: <<http://www.dca.gov.uk/consult/civ-just/adr/annexbfr.htm>> (last accessed 28 December 2020).

54 Lord Chancellor's Department "Emerging findings: An early evaluation of civil justice reforms" (March 2001), para 1/12, available at: <<http://www.dca.gov.uk/civil/emer/emer.htm>> (last accessed 23 December 2020).

55 MA Noone and LA Ojelabi "Ethical challenges for mediators around the globe: An Australian perspective" (2014) 45 *Washington University Journal of Law and Policy* 145 at 165.

56 CN Kotyk "Tearing down the house: Weakening the foundation of divorce mediation brick by brick" (1997) 6 *William and Mary Bill of Rights Journal* 277.

57 N White *Alternative Dispute Resolution* (2008, Law Reform Commission) at 112–13.

58 SE Merry "Myth and practice in the mediation process" in M Wright and B Galaway (eds) *Mediation and Criminal Justice: Victim, Offenders, and Community* (1989, Sage Press); RL Wissler "The effects of mandatory mediation: Empirical research on the experience of small claims and common pleas courts" (1997) 33 *Williamette Law Review* 565; Wahad "Court-annexed and judge-led mediation", above at note 7 at 61; American Arbitration Association "Model standards of conduct for mediators", above at note 15.

59 Brand, Steadman and Todd *Commercial Mediation*, above at note 16.

60 *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576.

v Chinadotcom Corp, the court emphasized that voluntariness is crucial for the success of a mediation process because parties are likely to cooperate to reach an agreement if they willingly enter the process.⁶¹

Although the Chief's Act fails to state whether mediation in customary law is voluntary or mandatory, our respondents stated that Malawi's traditional mediation is voluntary. Although traditional mediation is a group mediation, this research found that traditional mediation takes place only when the parties themselves freely choose it.⁶² Moreover, the parties freely choose the mediators, time, venue and outcomes. As a voluntary process, traditional mediation promotes access to justice because it safeguards the self-determination of the parties, promotes procedural justice, "makes the parties more willing to reach an agreement", increases settlement rates and produces durable settlements.⁶³ The voluntary aspect makes disputants satisfied with the mediation, ensures compliance with settlements and safeguards the parties' right to trial because the parties who want to go for trial are able to do so.⁶⁴

Traditional mediation's communitarian nature

The second feature of Malawi's traditional mediation is that it is communitarian. While Western mediation emphasizes individualism and autonomy, African mediation embodies the collective aspect of dispute resolution.⁶⁵ For instance, participants in mediation at the High Court of Malawi, which is Western in style, are the parties, their lawyers and the mediators.⁶⁶ Relatives and friends of the parties are not allowed to attend.

The Chief's Act does not mention anything about participants in Malawi's traditional mediation. However, data from the field shows that traditional mediation is communitarian, although not to the threshold asserted by Nolan-Haley and Boniface. Nolan-Haley argues that the collective nature of dispute resolution in Africa implies that parties and their communities make decisions.⁶⁷ Boniface contends that African mediation allows the entire community to take part, and everyone is free to speak during the mediation process.⁶⁸ Traditional mediation in Malawi is communitarian but does not follow the above assertions; the participants differ according to the choice of each chief or village head. First, some chiefs and village heads allow the entire community to take part and allow every participant to speak during the mediation. In this case, the participants are the parties, their relatives, the village head or chief, counsellors and witnesses. This practice is fully communitarian and consistent with the assertions above. Second, some chiefs and village heads allow the entire community to attend mediation sessions but restrict speaking to a few individuals, including the parties, parents, *mwinimbumba* [the elders of the extended family], elderly members of the community and the people who know the matters at hand. Although this mediation practice is communitarian for involving the entire community, it fails to meet the threshold asserted by Boniface because not everyone is allowed to speak. Both these practices, however, enhance access to justice. Allowing every party to speak during the mediation has the danger of making it adversarial but enables the parties to get to the

61 *Morrow v Chinadotcom Corp* [2001] NSWSC 209 (28 March 2001).

62 Boniface "African-style mediation", above at note 10.

63 RA Baruch and JP Folger "Mediation and social justice: Risks and opportunities" (2012) 27/1 *Ohio State Journal on Dispute Resolution* 1; Genn *Judging Civil Justice*, above at note 45; T Hedeem "Coercion and self-determination in court-annexed mediation: All mediations are voluntary, but some are more voluntary than others" (2005) 26/3 *The Justice System Journal* 273; G Nicolau "Where goeth ADR—Ruminations of an older warrior" in *Massachusetts Association of Mediation Programmes and Practitioners* (1995, Boston Massachusetts Association of Mediation Programmes). Quote from Kotyk "Tearing down the house", above at note 56 at 309.

64 Hedeem "Coercion and self-determination in court-annexed mediation", id.

65 Boniface "African-style mediation", above at note 10.

66 Courts (High Court) (Civil Procedure) Rules 2017, order 13(4)(1).

67 Nolan-Haley "Mediation and access to justice", above at note 14 at 70.

68 Boniface "African-style mediation", above at note 10.

root of the matter and come to durable solutions, which enhances access to justice.⁶⁹ Furthermore, allowing the entire community to attend mediation sessions may make the enforceability of the confidentiality rule difficult, but it makes the mediation accountable and transparent.⁷⁰ This includes situations where the parties are not allowed to speak. Parties and the mediators are likely to protect public values because the entire community is watching. Moreover, since the entire community is available, it may ensure that the parties comply with the mediation settlements.⁷¹

Third, other chiefs and village heads limit the number of participants from either side. For instance, a Lomwe village headman said he allows the parties' parents and *mwinimbumba* to participate in mediation. A Yao chief stated that he allows only two or three relatives of either party – those that the parties recommend, who know the case and who can assist in resolving the dispute. Every participant is free to speak during the mediation, but these mediations are not fully communitarian. Fourth, some chiefs and village heads do not allow any participants apart from the parties and the mediators, not even witnesses. This mediation practice is not communitarian and resembles Western mediation.

Party semi-autonomy in traditional mediation

On self-determination, Nolan-Haley argues that Western mediation empowers disputants and promotes their autonomy.⁷² Self-determination entails the freedom of the parties to choose mediation, the procedures, mediators, venue and outcomes, and the liberty to “withdraw from mediation”.⁷³ The self-determination of the parties is a foundational principle of mediation. It enhances access to justice because it promotes the active participation of the parties in the dispute resolution, enables the parties themselves to make decisions to resolve disputes and gives wider options to the parties to resolve disputes, including making apologies.⁷⁴ Xavier contends that self-determination promotes access to justice because it enables parties to reach win–win remedies that meet their needs and interests.⁷⁵ Since the parties freely make the settlements themselves out of consensus, mediation promotes a non-confrontational setting for resolving disputes, which preserves relationships and promotes access to justice.⁷⁶

However, some commentators argue that self-determination is a virtue only in Western mediation, not in African traditional mediation, because dispute resolution in Africa is communitarian.⁷⁷ Although the Chief's Act does not mention anything about self-determination, this research has found that it is a value, despite the communitarian nature of Malawi's traditional mediation. This finding challenges the assertions in the literature that self-determination is not important in traditional mediation. Some practices in traditional mediation in Malawi show self-determination: First, parties freely choose to go for mediation but are encouraged by family members and the chief or village head. Second, although the chief or village head usually acts as a mediator when the parties bring cases to him / her, the parties have the freedom to ask the chief or village head to give them someone else to conduct the mediation. This means the parties have the freedom to choose their mediators. Third, chiefs and village heads allocate the dates, times and venues for the mediation with the consultation of the parties. Fourth, parties to the traditional mediation freely make decisions to resolve the

69 Ibid; Nicolau “Where goeth ADR”, above at note 63.

70 Nolan-Haley “Mediation and access to justice”, above at note 14.

71 Boniface “African-style mediation”, above at note 10.

72 Nolan-Haley “Mediation and access to justice”, above at note 14.

73 Brand, Steadman and Todd *Commercial Mediation*, above at note 16; Wahad “Court-annexed and judge-led mediation”, above at note 7; American Arbitration Association “Model standards of conduct for mediators”, above at note 15.

74 CC Hutchinson “The case for mandatory mediation” (1996) 42 *Loyola Law Review* 85 at 89; Baruch and Folger “Mediation and social justice”, above at note 63; N Alexander “Mediation on trial: Ten verdicts on court-related ADR” (2004) 22 *Law in Context: A Social Legal Journal* 1.

75 A Xavier “Mediation: Its origin and growth in India” (2007) 27 *Hamline Journal of Public Law and Policy* 2.

76 Alexander “Mediation on trial”, above at note 74.

77 Nolan-Haley “Mediation and access to justice”, above at note 14.

dispute, without being forced by anyone. Although sometimes the entire community participates, these participants only assist the parties to make decisions; they do not force the parties to settle. The liberty of the parties to choose mediation and the mediators, venue, time and outcome promotes the self-determination of the parties and promotes access to justice.⁷⁸

However, in some cultures in Malawi the attendance of many participants and their contributions during the mediation may influence the parties to resolve in a particular way. In this case, it can be argued that there is no strict adherence to party autonomy. Moreover, our research found that sometimes parties go *kunsengezi* [to a private place] with their relatives to decide the way forward. One can argue that such practices show that traditional mediation offers semi-autonomy.

Semi-confidentiality in traditional mediation

Western mediation values confidentiality. Commentators argue that confidentiality is necessary for the success of mediation proceedings, provides parties with the opportunity to avoid publicity and increases the chances for the parties to settle because they can discuss matters freely.⁷⁹ Confidentiality promotes openness and honesty in mediation: parties share more about their cases because they do not fear such information will be used against them in a subsequent litigation.⁸⁰ In *Cutts v Head*, the court stated that parties that wish to settle in mediation “should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of proceedings”.⁸¹ In *Foxgate Homeowners’ Association v Bramalea California, Inc*, to promote frank participation in mediation, the court rejected admitting the evidence of a mediator who stated that one of the parties did not cooperate during the mediation and acted in a way that sought to frustrate the process.⁸²

While the principle of confidentiality is an important virtue in Western mediation, Nolan-Haley argues that it is not a virtue in African traditional mediation due to the latter’s communitarian nature.⁸³ However, this study found that the confidentiality of mediation is a virtue in traditional mediation in Malawi, although perhaps not to the level of Western mediation. All the respondents agreed that confidentiality is important for the success of the mediation. A Yao chief, for instance, said he tells everyone at the mediation to keep *chinsinsi* [confidentiality]. Similarly, a Lomwe chief said, “Chinsinsi ndichofunika” [confidentiality is important]. The existence of a confidentiality rule in traditional mediation enhances access to justice because it provides parties with the opportunity to avoid matters being made public to everyone, promotes open and honest discussion among the parties and enables them to have trust in the mediation proceedings.⁸⁴ However, a challenge is that it is difficult to enforce the confidentiality rule, especially where the entire community is allowed to take part. In this case, one can argue that traditional mediation is semi-confidential. Although traditional mediation values confidentiality, it is almost impossible to enforce it when the entire community participates.

While confidentiality is necessary, it has its disadvantages. Critics contend that confidentiality makes mediation unaccountable to the public.⁸⁵ Since the society is unable to evaluate the mediation proceedings and outcomes, it cannot establish whether the procedures and outcomes are fair and

78 Baruch and Folger “Mediation and social justice”, above at note 63.

79 LR Freedman and ML Prigoff “Confidentiality in mediation: The need for protection” (1986) 2/1 *Journal on Dispute Resolution* 37; R Feehily “The development of commercial mediation in South Africa in view of the experience in Europe, North America and Australia” (PhD dissertation, University of Cape Town, 2008) at 144; Boule and Rycroft *Mediation Principles*, above at note 9 at 241.

80 Freedman and Prigoff “Confidentiality in mediation”, id; Feehily “The development of commercial mediation”, id.

81 *Cutts v Head* [1984] Ch 290 at 306.

82 *Foxgate Homeowners’ Association v Bramalea California, Inc* [2001] 108 Cal Rptr 2d 642, 654.

83 Nolan-Haley “Mediation and access to justice”, above at note 14.

84 Freedman and Prigoff “Confidentiality in mediation”, above at note 79; Feehily “The development of commercial mediation”, above at note 79.

85 O Fiss “Against settlement” (1984) 93 *Yale Law Journal* 1073 at 1075–76.

just. There is a real danger that weak parties may not be protected because of the confidentiality rule.⁸⁶ The confidentiality of mediation also hinders the generation of precedents from which the society can learn and the development of law.⁸⁷

The above challenges sometimes necessitate the provision of exemptions to the confidentiality rule in mediation. For example, the principle of confidentiality is not applicable where there is a waiver by the parties.⁸⁸ In *Chantrey Vellacott v Convergence Group plc*, parties agreed to waive confidentiality to allow the court to analyse the mediation deliberations and make a determination as to the costs.⁸⁹ The court found that the behaviour of the defendant during the mediation was wrong and awarded the costs to the plaintiff. Furthermore, confidentiality may not apply where there is a legitimate interest in public accountability and transparency or where there is professional malpractice by the mediator or one of the participants.⁹⁰ The confidentiality rule is exempted where due process rights in the mediation are violated, where a party issues threats and intimidation to the other party or where a party's behaviour is deceptive, misleading or inconsistent with fair-trading legislation or trade practices.⁹¹ It also does not apply where a party makes a fraudulent representation, where a party's behaviour is criminal or where the formal courts seek to determine the existence of a mediation settlement or its terms.⁹² In *Tomlin v Standard Telephones & Cables*, the court held that where there are arguments about the existence of a mediation agreement, the court will look at the mediation proceedings to make such a determination.⁹³ While confidentiality is important in traditional mediation in Malawi, the Chief's Act does not mention it. Malawi's traditional mediation may learn from the above exemptions to the confidentiality rule.

The informal and flexible nature of traditional mediation

Unlike Western mediation, such as the court-annexed mediation of the High Court of Malawi, which is semi-formal and relatively inflexible, Malawi's traditional mediation is flexible and informal. In court-annexed mediation, for example, the judge-mediator decides the date and venue, prepares the procedures for mediation and gives the parties time limits. The judge-mediator also imposes sanctions for non-compliance. Trials in Malawi have complex evidential and procedural rules and use complex legal jargon, which may hinder access to justice to some Malawians due to their low levels of education.⁹⁴ Similarly, the consent order is written in English.⁹⁵

Traditional mediation, on the other hand, is flexible and informal because chiefs and village heads allocate the time, date and venue of the mediation with consultation with the parties. The mediation does not take place at the traditional court of the chief or village head where s/he conducts adjudication; it takes place elsewhere so that parties do not confuse the mediation with adjudication. Further, unlike judges, who put on gowns during a trial, which may intimidate the parties, chiefs and village heads have no specific regalia; they put on ordinary clothes. This practice may help the participants not to feel intimidated and may help them to speak freely; they are also not forced to dress in a special

86 RS Webb "Court-annexed ADR – a dissent" (1994) 70/2 *North Dakota Law Review* 232.

87 DT Eisenberg "What we know and need to know about court-annexed dispute resolution" (2016) 67/2 *South Carolina Law Review* 246 at 247.

88 *Unilever plc v Proctor and Gamble Co* [2000] FSR 344, [2000] 1 WLR 2436, [2001] 1 All ER 783.

89 *Chantrey Vellacott v Convergence Group plc* [2007] EWHC 1774 (Ch), [2007] All ER (D) 492 (Jul).

90 *Ferster v Ferster* [2016] EWCA Civ 717 (12 July 2016).

91 *Simmons v Ghaderi* [2008] 44 Cal 4th 570, 582; *Forster v Friedland* [1992] Court of Appeal of England and Wales, unreported; Alternative Dispute Resolution Committee of the Litigation Lawyers Section, *Mediation: A Guide for Victorian Solicitors* (1995, Law Institute of Victoria) at 41.

92 C Irvine "Mediation confidentiality: Limitations and a proposal", available at: <<http://mediationblog.kluwerarbitration.com/2012/09/12/mediation-confidentiality-limitations-and-a-proposal/>> (last accessed 26 October 2024); Alternative Dispute Resolution Committee *Mediation*, id; E Deason "The quest for uniformity in mediation confidentiality: Foolish consistency or crucial predictability?" (2001) 85 *Marquette Law Review* 80 at 93.

93 *Tomlin v Standard Telephones & Cables* [1969] 3 All ER 201.

94 Scharf et al "Access to justice", above at note 4.

95 Kapanda "A critical evaluation", above at note 5.

way. Chiefs and village heads also do not impose sanctions for non-compliance; the imposition of such sanctions can be an obstacle to access to justice.⁹⁶ Moreover, the parties in traditional mediation are not subjected to strict rules of evidence, and the mode of communication is through vernacular languages, with no legal jargon. All this promotes access to justice. As Ojelabi argues, access to justice means that matters are resolved “as simply as possible”;⁹⁷ it also entails having a dispute resolution mechanism which is user-friendly.⁹⁸ Rigid procedural rules, including rules of evidence, can be an obstacle to access to justice.⁹⁹ In Malawian customary law, in contrast, mediation procedures are simple, user-friendly and flexible.

The non-neutrality of traditional mediators

The impartiality of mediators is another principle of mediation. Both Western and traditional mediation in Malawi value the impartiality of mediators. Mediators should know their own biases and avoid such biases in their mediation.¹⁰⁰ The requirement of the impartiality of mediators is consistent with international law: the Universal Declaration of Human Rights (UDHR) provides that access to justice entails ensuring that “everyone has the right to an effective remedy by the competent national tribunals” and “a fair and public hearing by an independent and impartial tribunal”.¹⁰¹

In traditional mediation in Malawi, the Chief’s Act does not mention anything about the impartiality of mediators, and there is no guidance on what chiefs and village heads should do to ensure impartiality. However, the impartiality of the mediators is crucial. All our respondents stated that one of the qualities of a good mediator is that s/he should be *munthu osakondera* [a person who is impartial]. They explained that one of the factors that make parties not settle at mediation is mediator partiality. To ensure impartiality, chiefs and village heads recuse themselves where there is conflict of interest, for example if one of the parties is their relative. A Chewa senior group village headman said he requests his counsellors to mediate the matter in such circumstances, while a Yao chief said he invites another chief to conduct the mediation.

Traditional mediators in Malawi are impartial but not neutral. This finding resembles the literature review. Nolan-Haley argues that while Western mediation values mediator neutrality, African mediation does not value this. African mediators play various roles in the mediation process depending on circumstances and needs, including facilitating mediation processes, expressing their opinions, giving counsel and making recommendations.¹⁰² Similarly, in traditional mediation in Malawi, mediators play various roles and mix mediation styles. For example, a Lomwe village headman said the duty of traditional mediators is *kuwaongolera* [to guide] the parties, implying facilitative mediation, which aims at assisting the parties to make decisions.¹⁰³ A Yao chief stated that sometimes he makes recommendations in mediation, pointing to evaluative mediation.¹⁰⁴ Other respondents stated that traditional mediators seek “kulunzanitsa anthu amene ayambana” [to reconnect people who have quarrelled], “kubweretsa mtendere” [to bring peace] and “kuopa nkondo” [to avoid fighting], pointing to transformative mediation. As Folger and Bush argue, a dispute

96 D Quek “Mandatory mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation programme” (2010) 11 *Cardozo Journal of Conflict Resolution* 479 at 496.

97 LA Ojelabi “Improving access to justice through alternative dispute resolution: The role of community legal centres in Victoria, Australia” (research report, Faculty of Law and Management, LA Trobe University, September 2010) at 12.

98 JS Ngcobo “Enhancing access to justice: The search for better justice” (paper presented at the Access to Justice Conference: Towards Delivering Access to Quality Justice for All, Johannesburg, 6 July 2011), available at: <<https://www.studoc.com>> (last accessed 24 April 2026).

99 European Union Agency for Fundamental Rights “Access to justice in Europe: An overview of challenges and opportunities” (2010) at 40–42, available at: <<https://fra.europa.eu>> (last accessed 30 September 2025).

100 P Marshall “The partial mediator: Balancing ideology and the reality” (2010) *ADR Bulletin of Bond University* 1761.

101 Universal Declaration of Human Rights 1948, arts 8 and 10.

102 Nolan-Haley “Mediation and access to justice”, above at note 14 at 79.

103 L Riskin “Understanding mediators’ orientations, strategies, and techniques: A grid for the perplexed” (1996) 1 *Harvard Negotiation Law Review* 7 at 24.

104 Ibid.

affects the interaction between the parties; the transformative mediator seeks to remove hostilities and restore positive communication between them.¹⁰⁵ Thus chiefs and village heads apply a mixture of mediation styles to ensure access to justice. The evaluative model may undermine the self-determination of the parties, but may resolve the dispute expeditiously and increase settlements.¹⁰⁶ A survey in the US showed that the use of evaluative skills leads to more settlements.¹⁰⁷ The facilitative and transformative models may delay resolving disputes but promote party autonomy in mediation.¹⁰⁸

The non-neutrality of traditional mediators in Malawi seeks to ensure substantive and procedural justice. Commentators contend that mediators are always required to be impartial but not necessarily neutral.¹⁰⁹ There is no point in mediators being neutral if injustice is likely to happen.¹¹⁰ Ojelabi and Sourdin argue that mediators should, for example, “address power imbalances, abuse issues, participant vulnerability and other matters which may result in injustice”.¹¹¹ Gunning explains that power imbalances arise due to factors including a lack of finances, lack of legal representation, lack of legal knowledge, sickness, poor education and a language barrier.¹¹² These factors have a large impact on a party’s capacity to negotiate equally with the other party. In such circumstances, it is incumbent upon mediators to balance the power relationships.¹¹³

Mediators must ensure just outcomes (substantive justice) by promoting informed consent.¹¹⁴ This includes dispute resolvers helping parties to choose suitable dispute resolution mechanisms, informing the parties about laws and rights, and ensuring legal knowledge, legal representation and access to information.¹¹⁵ Legal knowledge and access to information require that states promote the right to education.¹¹⁶ Furthermore, mediators must ensure procedural justice by ensuring the use of codes of conduct for lawyers and mediators, promoting mediator skills, ensuring that the parties understand the mediation process and participate freely, and giving all parties the opportunity to be heard.¹¹⁷ Mediators should ensure that the parties produce the outcomes and that the mediation process remains voluntary while promoting respect and dignity.¹¹⁸

105 RA Bush and JP Folger *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (1994, Jossey-Bass) at 9–11.

106 NA Welsh “The thinning vision of self-determination in court-connected mediation: The inevitable price of institutionalization?” (2001) 6 *Harvard Negotiation Law Review* 1 at 23; Z Zumeta “Styles of mediation: Facilitative, evaluative, transformative mediation”, available at: <<https://www.mediate.com/articles/zumeta.cfm>> (last accessed 20 August 2023).

107 TJ Stipanowich “The international evolution of mediation: A call for dialogue and deliberation” (2015) 46 *Victoria University of Wellington Law Review* 1191 at 1206.

108 Baruch and Folger “Mediation and social justice”, above at note 63.

109 Nolan-Haley “Mediation and access to justice”, above at note 14 at 79.

110 L Mulcahy “The possibilities and desirability of mediator neutrality: Towards an ethics of impartiality” (2001) 10 *Social and Legal Studies* 505 at 509.

111 LA Ojelabi and T Sourdin “Using a values-based approach in mediation” (2011) 22 *Australian Dispute Resolution Journal* 258 at 259.

112 IR Gunning “Know justice, know peace: Further reflections on justice, equality and impartiality in settlement oriented and transformative mediations” (2004) 5 *Cardozo Journal of Conflict Resolution* 87.

113 R Field “Exploring the potential of contextual ethics in mediation” in R Mortensen, F Bartlett and K Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics: Re-imagining the Profession* (2012, Routledge) 151.

114 Genn *Judging Civil Justice*, above at note 45.

115 White *Alternative Dispute Resolution*, above at note 57; T Sourdin “A broader view of justice” in M Legg (ed) *The Future of Dispute Resolution* (2012, LexisNexis) 155; Resolution adopted by the UN General Assembly, 20 December 2012, A/RES/67/187; International Covenant on Civil and Political Rights 1966, arts 14 and 19.

116 United Nations Declaration on Human Rights 1948, art 26.

117 J Stulberg “Mediation and justice: What standards govern?” (2005) 6 *Cardozo Journal of Conflict Resolution* 213 at 215; White *Alternative Dispute Resolution*, above at note 57.

118 Genn *Judging Civil Justice*, above at note 45.

The benefits of traditional mediation

Traditional mediation has many advantages compared to Western mediation. First, it is more expeditious. The general argument in support of any mediation is that it minimizes costs, time and caseloads, which ultimately promotes access to justice.¹¹⁹ However, research is inconclusive as to whether Western mediation reduces costs and time. One US study showed a quicker resolution of disputes through mediation than through the courts; similar cases taken to mediation were concluded seven weeks before the court made its judgment.¹²⁰ However, a study conducted by Kuhner on court-annexed mediation in the US found that mediation did not save time.¹²¹ Similarly, in Malawi, reports show that mandatory mediation in the Commercial Division of the High Court has not led to a speedy disposal of cases.¹²²

By contrast, traditional mediation in Malawi is always expeditious. A Yao chief said mediation “sizitenga nthawi” [is fast]. Chiefs and village heads said the speed depends on the type of matter, its complexity and the number of witnesses. Some cases are concluded within 30 minutes, one hour or a day; sometimes it may take one or two weeks or at most a month. There are times when the chief or village head adjourns the case to another session on another day to help the parties reflect. This quick resolution of disputes promotes access to justice. The European Agency for Fundamental Rights contends that delay in resolving disputes is tantamount to a denial of justice, and international law provides that access to justice entails expeditious dispute resolution.¹²³ Traditional mediation complements the efforts of Malawi’s formal courts, which have delays. Kanyongolo reports that cases take too long to be completed at trial in Malawi and observes “that court proceedings are characterized by long delays at all stages, including in delivering judgment after finishing hearing the case”.¹²⁴ In *Katte Klitsche de la Grange v Italy*, the court held that trials should be completed within a reasonable time, which means that there should not be delays in carrying out the trial and that any delays deny parties access to justice.¹²⁵

Second, traditional mediation is more accessible than Western mediation. International law provides that access to justice entails having institutions of dispute resolution that are easily reachable.¹²⁶ In this study, respondents said that traditional mediation is more easily accessible than the formal courts. The Malawi judiciary has an insufficient number of judges, magistrates and court buildings in the rural areas where 85 per cent of Malawians live.¹²⁷ Many courts in the rural areas “are poorly resourced, poorly managed and offer a limited range of services”; for example, some lower-level magistrates’ courts are not operational or have limited jurisdiction.¹²⁸ Public transport in rural areas is expensive and irregular, and the roads are bad. The lack of sufficient courts in villages makes trials and mandatory mediation unavailable to most Malawians. By contrast, traditional mediation is

119 Eisenberg “What we know and need to know”, above at note 87 at 247.

120 T Stipanowich “ADR and the vanishing trial: The growth and impact of alternative dispute resolution” (2004) 1 *Journal of Empirical Legal Studies* 843 at 843.

121 TK Kuhner “Court-connected mediation compared: The cases of Argentina and the United States” (2005) 11 *ILSA Journal of International and Comparative Law* 519 at 535.

122 Kapanda “A critical evaluation”, above at note 5.

123 European Union Agency for Fundamental Rights “Access to justice in Europe”, above at note 99 at 40; Icelandic Human Rights Institute “Right to due process”, available at: <<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-due-process>> (last accessed 8 January 2021).

124 Kanyongolo *Malawi: Justice Sector*, above at note 4 at 23.

125 *Katte Klitsche de la Grange v Italy* [1994] ECtHR 27 October 1994, NO 12539/86.

126 International Covenant on Civil and Political Rights, arts 6, 14 and 15.

127 Scharf et al “Access to justice”, above at note 4; Kanyongolo *Malawi: Justice Sector*, above at note 4 at 23.

128 Scharf et al “Access to justice”, above at note 4.

readily available to everyone, and mediators are sufficient in number. Parties to traditional mediation do not have to travel long distances because mediation takes place in their own locations.¹²⁹

Third, traditional mediation is cheaper than Western mediation and litigation. Studies on Western mediation are not conclusive as to whether it reduces costs: some reports show that it does, for instance in Northern California, a divorce case takes an average of USD 5,234 (including the lawyer's fees) to be completed through mediation, while litigation takes an average of USD 12,226.¹³⁰ However, a study carried out by McAdoo and Welsh in Minnesota discovered that court-annexed mediation did not reduce costs.¹³¹ Similarly, another study showed that in Michigan, mediation increases costs for litigants but reduces costs for the courts.¹³² Another study on court-annexed mediation in the US, conducted by Kuhner, found that mediation did not save costs for the parties.¹³³ Some US studies reveal that court-annexed mediation is affected by the same administrative complexities and costs as litigation.¹³⁴ In Malawi, the mandatory mediation programme at the Commercial Division of the High Court does not show reduced costs.¹³⁵ By contrast, traditional mediation is cost-effective and promotes access to justice; it is always cost-effective because parties do not pay the mediator, mediation settlements do not usually involve any payment but forgiveness, any compensation payments are small amounts, and there are no lawyers to be paid. Since the parties usually reside in the same location, there are no transport costs.

Commentators argue that the high cost of litigation makes access to justice impossible because many people are too poor to afford it.¹³⁶ The delays associated with litigation also result in high legal costs, and high court fees violate access to justice.¹³⁷ In Malawi, most people are not able to afford the costs, including legal representation fees and transport costs for the parties and the witnesses.¹³⁸ Although international law requires parties to have legal representation, poor people in Malawi do not have this, which may lead to unfair court decisions and settlements in the mandatory mediation of the High Court of Malawi.¹³⁹

Fourth, traditional mediation focuses on the maintenance of relationships more than Western mediation does. Proponents of mediation contend that it preserves relationships: the Centre for Democracy and Governance argues that it can bring community members together and can help to enhance social harmony.¹⁴⁰ While litigation is adversarial because it "polarizes parties, creates additional rifts and otherwise strains relationships to a point that future dealings are difficult if not impossible", mediation is not combative.¹⁴¹ Disputants come up with the decision together, which increases the possibility that parties will continue their relationship. As such, commentators argue

129 Gloppen and Kanyongolo *Courts and the Poor of Malawi*, above at note 4 at 275; Kanyongolo *Malawi: Justice Sector*, above at note 4 at 20.

130 JB Kelly "Is mediation less expensive? Comparison of mediated and adversarial divorce costs" (1990) 8 *Mediation Quarterly* 15 at 20.

131 B McAdoo and N Welsh "Look before you leap and keep on looking: Lessons from the institutionalization of court-connected mediation" (2005) 5 *Nevada Law Journal* 399 at 417.

132 L Nussbaum "Mediation as regulation: Expanding state governance over private disputes" (2016) 2 *Utah Law Review* 361 at 376.

133 Kuhner "Court-connected mediation", above at note 121 at 537.

134 F Sander et al *Alternative Dispute Resolution Practitioners' Guide* (1998, United States Agency for International Development Centre for Democracy and Governance) at 16.

135 Kapanda "A critical evaluation", above at note 5.

136 H Genn "What is civil justice for? Reform, ADR, and access to justice" (2012) 24 *Yale Journal of Law and the Humanities* 397.

137 European Union Agency for Fundamental Rights "Access to justice in Europe", above at note 99 at 42; *Kreuz v Poland* [2001] ECtHR 19 June 2001, No 28249/95.

138 Scharf et al "Access to justice", above at note 4; Gloppen and Kanyongolo *Courts and the Poor of Malawi*, above at note 4 at 274.

139 International Covenant on Civil and Political Rights, art 14; Scharf et al "Access to justice", above at note 4.

140 Sander et al *Alternative Dispute Resolution*, above at note 134.

141 Hutchinson "The case for mandatory mediation", above at note 74 at 88.

that mediation is important in disputes where the maintenance of relationships matters, including family, employment and commercial relationships.¹⁴²

Unlike Western mediation, such as the judge-led mediation of the High Court of Malawi, which emphasizes the reduction of caseloads, time and costs for resolving disputes,¹⁴³ African traditional mediation focuses on the reconciliation of parties and the maintenance of peace and relationships. The objectives of customary law are reconciliation, social harmony and the maintenance of relationships, so compensation is the preferred sanction, not imprisonment, because the latter breaks communities while compensation maintains contacts.¹⁴⁴ Chiefs and village heads explained that the main objectives of traditional mediation in Malawi include ensuring “mtendere” [peace], “kuyanjan-itsa anthu” [reconciling people] and ensuring the parties in the disputes live “ngati anakamodzi” [like one family]. Traditional mediation also seeks deterrence. In this regard, a Lomwe village headman said that chiefs and village heads want in mediation “timudzudzule asadzabwerezerenso” [to rebuke the culprit not to commit the offense again]. One Lomwe group village headman said that mediation “mumakhala ngati mukulimbikitsa mgwirizano wa anthu” [strengthens people’s relationships]. Xavier argues that the ability of mediation to promote non-confrontation in dispute resolution and preserve relationships enhances access to justice.¹⁴⁵

Challenges facing traditional mediation

Traditional mediation faces many challenges, which may reduce access to justice. First, it discriminates against women; this resonates with the general criticism against mediation that it may not protect the parties’ legal rights, including the rights of weaker parties.¹⁴⁶ Chiefs and village heads in Malawi’s traditional mediation lack statutory and constitutional knowledge on human rights, which may reduce the quality of justice because they are incapable of advising parties about their rights. A 2000 report by Scharf and a 2006 article by Kanyongolo showed discrimination against women in Malawian customary law.¹⁴⁷ Kanyongolo, for example, observed that traditional courts are dominated by men as leaders. The current study found that while there are some women chiefs and village heads, the majority of them are men. Similarly, a report on customary law in Southern African countries, including Malawi, showed that traditional courts do not consider men and women equal before the law and are biased against women.¹⁴⁸

In our research, respondents acknowledged that some Malawian chiefs and village headmen favour men in matters to do with gender violence, for example cases of domestic violence where a husband beats his wife. Some chiefs and village headmen say that this is “mankhwala a banja” [medicine for the marriage] and that the wife should not complain; they dismiss such cases. This is discrimination against women, which denies justice to them. Such practices violate international and national laws which promote equality; the UDHR provides that “all human beings are born free and equal in dignity and rights”, while the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol) provides that “every woman shall have the right to dignity inherent in a human being and the recognition of her human and legal

142 Sander et al *Alternative Dispute Resolution*, above at note 134 at 21.

143 Courts (High Court) (Civil Procedure) Rules 2017, order 13(2)(1)(a).

144 United Nations “Human rights and traditional justice systems in Africa” (2016, United Nations), available at: <https://www.ohchr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf> (last accessed 10 January 2021).

145 Xavier “Mediation: Its origin and growth in India”, above at note 75.

146 Fiss “Against settlement”, above at note 85; L Nader “Disputing without the force of law” (1979) 88 *Yale Law Journal* 998 at 1012.

147 Scharf et al “Access to justice”, above at note 4; Kanyongolo *Malawi: Justice Sector*, above at note 4 at 147.

148 L Chaka-Makhooane et al “In search of justice: Where do women in Lesotho go?” (2000, Women and Law in Southern Africa Research and Education Trust).

rights”.¹⁴⁹ Similarly, the International Covenant on Civil and Political Rights provides that everyone shall enjoy rights without discrimination under any ground “such as race, colour, sex, language, [and] religion”.¹⁵⁰ The UDHR advocates for the abolition of discriminatory customary practices against women and guarantees women’s rights in marriage.¹⁵¹ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also prohibits discrimination against women, and prohibits any discrimination in marriage, guarantees equal rights for husbands and wives, and requires states to abolish customary practices which discriminate against women.¹⁵² The Maputo Protocol obliges member states to “combat all forms of discrimination against women through appropriate legislative, institutional and other measures”, prohibits violence against women and requires states to take measures to protect women from violence; it also guarantees equal rights for husbands and wives in marriages.¹⁵³ Similarly, the Malawi Constitution prohibits discrimination against women and provides that spouses in marriage “shall enjoy full and equal respect and shall be protected by law against all forms of neglect, cruelty or exploitation”.¹⁵⁴

This means that men and women should be treated equally when they approach traditional mediators in Malawi. Telling wives to endure gender violence because it is *mankhwala a banja* violates international and constitutional law. To ensure justice in traditional mediation, the Centre for Democracy and Governance states that traditional norms must contain reasonable standards of justice which avoid discrimination against certain people in society.¹⁵⁵ Bagshaw recommends that mediators should make efforts to deal with power imbalances “both within the mediation process and within the culture, context and structures within which the mediation takes place”, ensuring that the rights of weaker parties are not infringed and protecting the weaker parties from settling for less.¹⁵⁶ Kanyongolo recommends the training of chiefs and village heads on human rights issues.¹⁵⁷ Finally, if it is not possible for mediation to offer justice, parties should resort to other dispute resolution mechanisms.¹⁵⁸

Second, there is a lack of training for traditional mediators. Chiefs and village heads are not trained in mediation at their inauguration and do not receive ongoing formation. This lack of training may reduce the quality of the justice obtained. International law provides that access to justice entails the existence of competent, impartial and independent dispute resolvers.¹⁵⁹ On Malawi’s traditional mediation, our respondents said that mediators require certain qualities to be good: a mediator is expected to be “munthu osakondera” [someone impartial], “wanzeru” [wise], “zinthu amazit-sata bwino” [someone who follows issues well], and “wantima woupeza” [someone who is calm], “wachilungamo” [just], “osunga chinsinsi” [confidential], “wambiri yabwino” [with good reputation], exemplary, humble and respectful. To ensure such qualities in mediators, there is a need for training.

The success of mediation depends on the competence of the mediators.¹⁶⁰ Mediators should be individuals who are well respected and not involved in scandal, corruption or criminality.¹⁶¹ For

149 Universal Declaration of Human Rights 1948, art 1; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 2003, art 3(1).

150 International Covenant on Civil and Political Rights, art 2.

151 Universal Declaration of Human Rights 1948, arts 5 and 7–9.

152 Convention on the Elimination of All Forms of Discrimination against Women 1979, arts 2, 3 and 16.

153 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, arts 2(1), 3(1) and 6.

154 Constitution of Malawi, secs 20 and 22.

155 Sander et al *Alternative Dispute Resolution*, above at note 134 at 24–25.

156 Bagshaw “Mediation in the world today”, above at note 3 at 193.

157 Kanyongolo *Malawi: Justice Sector*, above at note 4 at 147.

158 Sander et al *Alternative Dispute Resolution*, above at note 134 at 28.

159 African Charter on Human and People’s Rights, art 26.

160 Sander et al *Alternative Dispute Resolution*, above at note 134 at 40.

161 L Roxdeiczzer and A Campa *Alternative Dispute Resolution Manual: Implementing Commercial Mediation* (2006, World Bank Group) at 126.

example, in Asia-Pacific countries, respected elders of the community conduct traditional mediation.¹⁶² China's People's Mediation Committees, Sri Lanka's Mediation Boards and Taiwanese mediation experiences are attributed to respected local mediators.¹⁶³ Roxdeiczner and Campa argue that having a good mediator enhances confidence in mediation programmes.¹⁶⁴ A study carried out by McAdoo and Welsh in Minnesota found that the qualification of the mediator contributed to the success of the mediation.¹⁶⁵ The European Commission for the Efficiency of Justice says that "unqualified mediators can damage the reputation of the profession in the eyes of the general public and reduce the rates of recourse to mediation". It proposes the training and accreditation of mediators, accreditation bodies, maintaining a list of registered mediators, having continuous professional development and having disciplinary bodies with the authority to suspend or remove a mediator from the list of registered mediators.¹⁶⁶

Third, traditional mediation in Malawi lacks a comprehensive legal and institutional framework; the Chief's Act is not comprehensive. Traditional mediation lacks guidelines for the conduct of mediation, ethical codes for mediators, mediation committees to train and accredit traditional mediators, and structures for the evaluation and monitoring of mediation. This lack of laws and institutions results in other challenges: A Lomwe chief said some parties like to "kudelera" [look down upon] the mediator, which results in non-compliance with mediation settlements. Traditional mediation lacks strong measures to deal with those who do not comply with mediation agreements and lacks measures to address breaches of ethical codes by chiefs and village heads.

Fourth, chiefs and village heads in Malawi have been criticized for exercising both executive and judicial powers. Since they are under the control of the president and at the same time resolve disputes, there is a lack of separation of powers. Chiefs and village heads may be used by government officials selfishly. Since the president appoints, dismisses and decides the salary of the chiefs and village heads, chiefs tend to rely on the president for their survival and show loyalty to the sitting president and his or her government or political party.¹⁶⁷

Fifth, chiefs and village heads have poor salaries. At the time of the interviews, between 2021 and 2023, the chief received MWK 100,000 (USD 98) per month, while the senior group village head received MWK 20,000 (USD 19.60). Village heads received only MWK 10,000 (USD 9.80) per month. Respondents reported that small salaries make some of the chiefs and village heads engage in bribery and corruption. The Centre for Democracy and Governance contends that customary law should avoid corruption in order for parties to trust the processes. It argues that corruption can increase costs for parties and diminish the possibility of securing a mediation settlement.¹⁶⁸ In our research, some interviewees stated that one of the factors that makes parties fail to settle is when mediators are biased, and bias may come in if chiefs or village heads receive bribes. To avoid corruption, the Centre for Democracy and Governance asserts that mediators should get some financial or material support even when they are volunteers.¹⁶⁹ Increasing salaries for chiefs and village heads may help to reduce cases of bribery.

Sixth, Malawi lacks any evaluation and monitoring of traditional mediation. There is no institution in place to monitor the processes and outcomes to check whether they promote justice. There has never been any evaluation of traditional mediation by the Ministry of Local Government, under

162 Bagshaw "Mediation in the world today", above at note 3.

163 Sander et al *Alternative Dispute Resolution*, above at note 134 at 40.

164 Roxdeiczner and Campa *Alternative Dispute Resolution Manual*, above at note 161 at 50.

165 McAdoo and Welsh "Look before you leap", above at note 131 at 409.

166 European Commission for the Efficiency of Justice (CEPEJ) "European handbook for mediation lawmaking" (14 June 2019) at 46, available at: <<https://www.coe.int/en/web/cepej/cepej-work/mediation>> (last accessed March 2026).

167 National Initiative for Civic Education "Chiefs should not be a threat to democracy", available at: <<http://www.nice.mw/index.php/archives/41-archived-articles/130-chiefs-should-not-be-a-threat-to-democracy>> (last accessed 20 December 2020).

168 Sander et al *Alternative Dispute Resolution*, above at note 134 at 29.

169 Id at 30.

which chieftaincy falls, or by NGOs. In other jurisdictions, for example in the US, ADR coordinators monitor mediation sessions and ensure their evaluation. The ADR coordinators prepare questionnaires for the parties and the lawyers to sign after the mediation process.¹⁷⁰ Chiefs and village heads can make arrangements to hear feedback from the parties about mediation sessions. Roxdeicz and Campa state that it is always important to measure the performance of mediation programmes to establish whether or not they meet objectives. The evaluation should determine whether the mediation reduces costs and delays and improves relationships. All this should be established through statistics.¹⁷¹

Recommendations

This article makes the following recommendations to improve traditional mediation in Malawi: First, Malawi's Parliament should repeal the Chief's Act and enact comprehensive legislation known as the Traditional Mediation Act. The proposed legislation should explain the matters for traditional mediation, referral to mediation, the roles of chiefs and village heads, mediation procedures, mediators' ethical codes, and enforcement mechanisms for mediation settlements. The Act should further explain the objectives of traditional mediation, its advantages and the principles of mediation, including the self-determination of parties, confidentiality, flexibility, informality and neutrality. Second, Malawi must establish traditional mediation institutions and programmes. The Ministry of Local Government should set up a Traditional Mediation Board to oversee traditional mediation. Third, we recommend the training of chiefs, village heads and their counsellors in mediation. The Traditional Mediation Board should spearhead the training. People should receive training in mediation at the time of their inauguration as chiefs and village heads and should receive ongoing formation. The training should include human rights, ethics and the concept of mediation. The Traditional Mediation Board should put in place measures to address breaches of ethical codes by chiefs and village heads. Fourth, traditional mediation should be monitored and evaluated by the Traditional Mediation Board to ensure quality mediation services. The evaluation may include allowing parties to assess the mediator's conduct and other factors, including the principles of mediation. Arrangements may be made for parties to give feedback at the end of proceedings. Fifth, the Malawian government should fund traditional mediation programmes. Funds are needed to support the training of chiefs, village heads and counsellors in customary law. Malawi also needs funds to establish mediation institutions, policies and public awareness campaigns. The government should include funds for these programmes in its yearly budgets.

Conclusion

Traditional mediation plays a crucial role in promoting access to justice in the rural areas of Malawi. The majority of Malawians rely on customary law, such as traditional mediation, to resolve disputes. Traditional mediation is the most accessible, cheapest, fastest and least complex means of dispute resolution in Malawi, unlike litigation or court-affixed mediation. Its communitarian nature makes it more accountable and transparent. However, the government of Malawi has neglected it and has left it to operate on its own, which threatens the provision of a quality service. While the Constitution provides for the use of customary law, there is no comprehensive and effective law in Malawi to promote traditional mediation. The Chief's Act is a mere skeleton which fails to include many issues of mediation, including its principles, ethical codes and institutions. This undermines the use of traditional mediation and threatens the provision of quality services in customary law. International law is also inadequate because there is no comprehensive mediation convention covering all fields of law, including traditional mediation. Again, this hinders the growth of traditional mediation and

¹⁷⁰ Id at 101.

¹⁷¹ Roxdeicz and Campa *Alternative Dispute Resolution Manual*, above at note 161 at 31.

the provision of quality services. For traditional mediation to provide the best services to Malawians, there is a need to address the challenges mentioned above, including having a comprehensive legal and institutional framework at international, regional and national levels.

Competing interests. None