

**PARADIGMS OF ALTERNATIVE
DISPUTE RESOLUTION AND JUSTICE
DELIVERY IN ZAMBIA**

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SUMMARY

Alternative Dispute Resolution¹ was developed as an alternative to the traditional dispute resolution mechanism, litigation, which had become costly, time-consuming, did not give the parties control over the outcome of their disputes and was generally cumbersome. ADR refers to a variety of techniques for resolving disputes without resort to litigation in the courts.² The concept behind the introduction of ADR methods was, *inter alia*, to reduce the delays and costs associated with litigation; to introduce relatively less formal methods of dispute resolution; to introduce consensual problem solving and empower individuals by enabling them to control the outcome of their dispute and develop dispute resolution mechanisms that would preserve personal and business relationships. ADR processes were thus intended to produce better outcomes all round.

From the time ADR appeared on the scene, its usage has gained international recognition with both common law and civil law countries following the trend. Being faced with similar problems associated with litigation, Zambia has followed the trend and adopted some ADR mechanisms. Most commonly used ADR mechanisms in Zambia are mediation/conciliation, arbitration and negotiation. The legal and institutional frameworks for ADR in Zambia are firmly in place. It is thus, not far fetched to predict a successful future for ADR in which it will enjoy the support of the major stakeholders and play a vital role in justice delivery in Zambia.

This thesis has a section on the conceptual framework for ADR and discusses the development of ADR internationally and some processes in use. It examines

¹ Hereinafter referred to as “ADR”.

² These techniques are dealt with in Chapter Three.

selected institutions of justice delivery in Zambia with a view to evaluating their operations and contribution to justice delivery in Zambia. It traces the development of institutions of justice delivery in Zambia from colonial times up to the present and assesses their performance. ADR processes currently in use in Zambia are critically examined and their shortcomings reviewed. The legal and institutional frameworks for ADR and the role they play of providing the supporting structure for ADR in the country are evaluated. Future prospects for ADR are indicated and recommendations for successful implementation of ADR in Zambia are given.

Key terms:

Alternative Dispute Resolution; Development; Evaluation of Performance of Alternative Dispute Resolution; Conceptual Framework; Institutions of Justice Delivery; Formal; Informal; Judicial System; Courts; Alternative Dispute Resolution Methods; Legal/Institutional Frameworks; Zambia.

CHAPTER ONE

INTRODUCTION

For a very long time courts world-wide have played a vital and leading role in justice delivery. However, experience has shown that sometimes litigation is a seemingly endless exercise and self-torturing ordeal. Serious concerns have repeatedly been expressed over spiraling costs and fees and delays in litigation procedures, congestion in courts, the all-too legalistic procedures, and the intimidating court-room atmosphere. In addition, the adversarial nature of litigation with the 'win all or lose all' attributes have been found uncondusive to continued business or social relationships. All these factors have to some extent contributed to making litigation nerve-wracking to litigants. This state of affairs has brought about increasing dissatisfaction with litigation among disputants and other stakeholders and has necessarily led to the development of more flexible means of dispute resolution.

Increasing globalisation of the modern business world has also been a factor in the development of more flexible means of resolving disputes that provide alternatives to court-based litigation governed by the law and procedure of a particular state or country.¹ . Further, the legal profession has experienced vast changes in the last decade of the twentieth century. Not insignificant among them, is the growing interest among advocates in the use of alternatives to traditional court litigation to resolve their clients' disputes more efficiently and economically, with less risks and better results.² ADR is premised upon the principle of consensus. It is non-authoritarian and operates within the structure of a specific community according to the culture of the community's prevailing moral norms. Western societies have in the last twenty years or so come to

¹ Paul Mitchard (1997). *A Summary of Dispute Resolution Options*. p.3.

² John W. Cooley (1996). *Mediation Advocacy*. p.1.

appreciate the necessity for access to justice through ADR techniques based on the so called 'co-existential justice' or the process for conciliatory solutions³ and the worldwide trend in the last decade of the twentieth century has been to resort to ADR due to the shortcomings observed in the formal system of justice delivery.

The position in Zambia has more or less conformed to the situation discussed above. The Zambian community has traditionally turned to the court or what is known as the formal institution of justice for resolution of their disputes. However, over a period of time it has become evident that courts have lamentably failed to cope with the ever-increasing caseloads. The reasons for this state of affairs are varied.

Over the years the population of Zambia has been growing at a fast rate, while the economy has been declining. The declining economy has led to a scarcity of resources.⁴ Courts have not been spared from the effects of the declining economy.⁵ Judges' salaries and other conditions of service have been poor and not attractive at all to potential judges in private practice. This state of affairs has led to a shortage of judges,⁶ and has been exacerbated by the high number of judges, magistrates and other members of the judiciary who have died, while others are being appointed to other positions outside the judiciary. Conversely, the number of lawyers being admitted to the Bar has continued to rise.⁷ The rise

³ Peter Erasmus (1999). 'Adopting the AFSA Arbitration Experience for Zambia and Zambian Legislation.' Paper presented to the National Convention on the Revitalisation of Arbitration in Zambia held at Mulungushi International Conference Centre on 20 August, 1999, pp.3-4.

⁴ GRZ, *Governance: National Capacity Building Programme for Good Governance in Zambia*. 31 March 2000. p.40.

⁵ Zambia - Country Reports on Human Rights Practices, 2005. Released by the Bureau of Democracy, Human Rights and Labour. March 8, 2006.

⁶ The Weekly Post, January 24-30, 1992, "Independent Judiciary Needs Strengthening. See also Chanda, A.W. *National Integrity Systems Country Study Report: Zambia, 2003* at p.28.

⁷ Statistics from the Law Association of Zambia (LAZ) Secretariat confirms this trend. In 2003 there were 508 paid up LAZ members. In 2004 the number rose to 536 and rose further in 2005 with 552 paid up members. In 2006 the number of paid up members had risen further to 578. A search of the Legal Practitioners' Roll at the High Court Civil Registry in Lusaka for the period 2004 to 2006 revealed the

in the numbers of lawyers being admitted to the Bar and practicing law has meant an increase in the number of cases being filed on a daily basis in our courts.

Any litigation lawyer knows only too well the frustrations brought about by frequent and long adjournments of cases in courts. Frequent adjournments lead to lengthy delays in disposing of cases, while long adjournments occasioned by judges' busy schedules or counsel's sometimes unnecessary applications meant to delay the proceedings or to buy some time for their clients, do not help matters. Compounding matters are the long waits for rulings or judgments. The end result has been a huge backlog of cases dating back to years⁸. This state of affairs has not only discouraged some would-be litigants, but has also been a blemish on the court's record as the foremost vehicle for justice delivery in Zambia.

Thankfully, in the face of all the problems enumerated above, the judiciary has made a bold move and taken measures to reduce the backlog. One such measure has been the creation of a Commercial List at the High Court of Zambia in which commercial actions are entered. A Commercial List Registry has been created where commercial actions are filed and some High Court judges with special training have been assigned to these actions. Commercial actions filed in the Commercial List Registry are meant to be disposed off at a much faster pace through rules that ensure that cases are disposed of in the shortest possible time and imposition of penalties on defaulting parties and counsel to ensure

following statistics: In 2004 there were 36 admissions to the Bar; in 2005 there were 60 admissions while as of August, 2006 there were 34 admissions. This figure is bound to rise since there is one more admission ceremony scheduled for December, 2006.

⁸ While swearing in two Deputy Chairpersons of the Industrial Relations Court in 2002, President Levy Mwanawasa of Zambia reportedly expressed unhappiness with delayed judgments at the Court. He reportedly called for quick handling of cases by the Court to avoid a backlog and ensure it revamped its operations; Zambia Daily Mail, Saturday October 12, 2002, p.1.

compliance.⁹ The judiciary has also introduced a court-annexed mediation programme under which cases already in court and deemed suitable for mediation are allocated to judiciary-trained mediators for mediation. If the mediation fails, the cases are referred back to the court. In a further endeavour to reduce the backlog and ensure that justice is delivered as speedily as possible and thus restore the confidence of the public in the formal justice delivery institutions, the former Chief Justice of Zambia Mr. Matthew Ngulube, is on record as having directed that no judge would be allowed to make routine adjournments¹⁰. However, despite these laudable measures, the problem of backlog of cases is far from over.

The formal system of justice has been unable to meet the needs not only of the business community, employees, etc., but also those of the ordinary citizens. The inability of the formal system of justice to meet the needs of society has been due, *inter alia*, to the content of substantive law, as well as prohibitive costs, structure and procedural requirements of the courts. In addition, most litigants attest to finding the court environment intimidating. As a result, many people are denied access to the courts. Apart from the cost considerations, litigation is adversarial and not concerned with future relationships between or amongst the parties. It is outside the control of litigants and judges have little room for creativity when issuing judgments.

However, despite the gloomy picture painted above, all is not lost. There has been a worldwide trend of regional integration and the Southern African region has followed this trend. There are thus, regional groupings such as the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA) both of which Zambia is a member. Regional

⁹ This was done through the amendment of the High Court Rules. A 'commercial action' is defined as any cause arising out of any transaction relating to commerce, trade, industry or any action of a business nature. See the High Court (Amendment) Rules, 1999, S.I No. 29 Of 1999.

¹⁰ The Post Newspaper of 6th January, 2000 at p.6.

integration has called for fast resolution of disputes among business houses in member countries. ADR can contribute to speedier resolution of disputes among business houses in the countries constituting the regional groupings.

Admittedly ADR is a relatively new concept in Zambia, whose popularity and prominence has been evident in the last ten or so years.¹¹ However, it has a promising future in Zambia and courts themselves are encouraging litigants to resort to ADR.¹² It is against this background that ADR is slowly taking root in Zambia. There is every reason to believe that ADR will be more successful than courts at resolving disputes to the satisfaction of disputants.

The general objective of the study is to trace the development of ADR internationally in general and assess the impact of ADR on the justice delivery system in Zambia in particular. The specific objectives are to investigate and assess the performance of the traditional or formal justice delivery institutions in Zambia; to examine the reasons for the introduction of ADR in Zambia; to evaluate the performance of ADR to date, and assess its future prospects and recommend, where appropriate, measures for improvement.

This is a legal study that adopts to a large extent an interdisciplinary approach. This is justified for two reasons. Firstly, as Abel R, L¹³ points out in reference to an emerging trend in the study of law, there seems to be increasing activities to study law in the context of society. Law does not operate in isolation or in a vacuum. Thus for a study of law to be meaningful, it should reflect, define and shape fundamental social values. Because law reflects social values, it can be

¹¹ Silungwe, Annel*. (1990). 'Alternative Dispute Resolution.' Paper presented at the First Judicial and Law Association of Zambia Seminar on ADR held at Lusaka, Zambia from 16 – 17 October, 1990.

*Zambia's first indigenous chief justice.

¹² As the discussion in Chapter Seven, *infra* shows.

¹³ Lukham, R., and Abel, R.L. (Ed). (1991) *Law in Context, Sociology and Legal Institutions, Litigation and Society* Law and Social Inquiry: Case Studies of Research, Law in Social Change and Development. No.5 (SIAS - Uppsala, p.34.

changed to create new behavioural norms. Secondly, it seems that for small developing countries with developing economies such as those in Sub-Saharan Africa, including Zambia, the interdisciplinary approach to the study of law is inevitable. This may be termed as the 'social scientific study methodological approach' because it enables the legal phenomenon to be evaluated in the context in which they actually reside. Finally, the nature of the study entails that it be mainly descriptive, analytical and evaluative, done with the assistance of the research techniques mentioned above.

The basic research tools which the study has employed in the investigation, collection and analysis of data is the traditional legal methods of literature survey normally employed in the normative, positive analysis of traditional sources of law. Thus, statutes, codes, case law, text books and journals have been used as sources of information for this dissertation. However, investigation of the law was undertaken within a realist framework, which acknowledges the limitations of the law¹⁴. Historical and comparative research methods have also been employed in the study. The former has been resorted to because the study has of necessity delved into the philosophical basis of ADR. Further, it has been essential to give the reader the historical background to the development of dispute resolution in Zambia to enable the reader to appreciate where it all started from and the direction Zambia is taking. This ensures that the reader grasps the philosophical underpinnings of ADR and at the same time, understands the development of ADR. A comparative research method has been employed in the study to show how ADR has developed and grown in some selected countries and how the said countries have benefited from the introduction and use of ADR. Further, this research method has been employed to learn about the challenges the selected countries have faced and what lessons

¹⁴ Allot, A. (1980). *The Limits of the Law*.

Zambia can learn from them, and to provide a basis for suggestions for future developments in the field of ADR.

This thesis is premised on the following assumptions:

1. that Zambia is a sovereign state with full powers of sovereignty to enter into international treaties and commit itself to other international obligations and interact at the international level;
2. that like all other people, the people of Zambia have disputes that arise during the course of their interaction with each other within the state and in their interaction with nationals and governments of other states;
3. that Zambia has a common law background and a dual legal system, based on statutory and customary law; and
4. that the Zambian population has grown tremendously over the years since independence, especially in the urban areas. The increase in population has led to an increase in the number of court cases throughout the country. However, the increase in the number of cases filed on a daily basis has not been matched by a corresponding increase in court rooms and judicial power. This has contributed to the backlog of cases in our courts;

Chapter One is an introductory chapter, while Chapter Two looks at two concepts relevant to the topic under discussion, namely dispute and justice. It is the author's considered view that it is important for a study of this nature to delve into these two concepts because it assists in the comprehension of the basis for the various arguments reflected in the thesis. It is also important to know the distinction between justiciable disputes and behavioural conflicts because of the differences in their resolution. It is beneficial to the reader to have an understanding of the various meanings assigned to the concept of justice and

crucially, to understand the concepts of dispute and justice in the context of ADR. This Chapter also delves into the 'alternative'/'appropriate' dispute resolution discourse and the quest for an ADR philosophy.

Chapter Three discusses the development of ADR internationally and examines some major ADR mechanisms available. It is observed in this chapter that the development of ADR is way ahead in countries such as the United States of America and Canada. The United States has a much wider array of ADR mechanisms in use today because ADR has been in use for a much longer period there and has evolved to the stage where it is presently.

Chapter Four deals with the historical background to dispute resolution in Zambia. The development of dispute resolution in Zambia from the pre-colonial period, through the colonial period right up to the post-independence period, is explored. As such, the evolution and development of the judicial system in Zambia from the time of the British South Africa (BSA) Company rule right through the establishment of colonial rule, and the Federation of Rhodesia and Nyasaland, to independence in 1964 is covered.

Chapter Five discusses the contemporary judicial system. It examines the establishment, composition, jurisdiction, law, practice and procedure of the various courts in the judicial hierarchy, from the local courts to the Supreme Court. Some commissions and non-governmental organisations (NGO's) are also brought into the perspective, for the reason that they also play some significant roles in the justice delivery system of Zambia. The family and the church have also been brought into the discussion because the family forms the basic unit of society and depending on the type of dispute, is usually the first dispute resolution mechanism of choice. As the study shows, the church plays a significant role in justice delivery. Its inclusion therefore, is necessary. Admittedly, commissions, the family, the church and NGO's are not institutions of

justice delivery along the same lines as courts. However, as the discussion in Chapter Six below shows, they provide some access to justice and are therefore, part and parcel of justice delivery in Zambia. An example of an NGO that provides access to justice is the Legal Resources Foundation (LRF). The LRF has introduced programmes at grass root level, which are greatly assisting the disadvantaged members of society to access justice. It has established centres in communities where it provides legal services.¹⁵ Additionally, this institution empowers people with knowledge to access justice.

It is the author's view that the performance of these institutions of justice delivery could be enhanced if firstly, they had access to the much needed resources and secondly, if they were to adopt some appropriate ADR mechanisms to aid with the resolution of the various disputes they face in their operations. Negotiation and mediation are two ADR mechanisms which could be employed by almost any institution in Zambia. Personnel from the institutions of justice delivery under discussion could also receive training in mediation and arbitration. Mediation and arbitration courses for professionals are currently offered on a regular basis at the Zambia Centre for Dispute Resolution (ZCDR) in Lusaka.

In Chapter Six the author evaluates the performance of the justice delivery institutions discussed in Chapter Five. Such evaluation is essential as it lays the basis for the introduction of ADR in the country. Thus, questions regarding the performance of these institutions are considered. The author argues that the traditional institutions of justice delivery have not performed to expectations because of the many constraints they face, mostly to do with insufficient monetary, material and human resources. Consequently, the case for the introduction and development of ADR has been made.

¹⁵ LRF, *About the Legal Resources Foundation*. <http://www.lrf.zm/aboutlrf.html>. Last accessed 1 September, 2006.

In Chapter Seven, the introduction and development of ADR in Zambia up to date is brought under the microscope. The types of ADR methods currently in use in Zambia are examined and a critical evaluation of the legal and institutional frameworks supporting ADR is done. It is apparent from the chapter that both the legal and institutional frameworks for ADR are firmly in place in Zambia and that ADR is entrenched but its full benefits are yet to be realised.

Chapter Eight is a concluding chapter and summarises the findings from the study. It concludes by giving recommendations in terms of institutional and legal frameworks for the successful management of ADR in Zambia. It is shown in this chapter that granted the advantages of ADR, it is neither a panacea which can cure all ills nor a substitute for litigation. Rather, ADR should be seen as being complementary to litigation. It is also argued in the conclusion that despite being court-annexed, mediation has taken root in Zambia and positive results are beginning to show. However, although Zambia has come some way in introducing ADR, it is still in its infancy and still has a longer way to go before the full benefits are realised. There's need for more mediators and arbitrators to be trained. It is proposed that courts should be empowered with the necessary skills, manpower and resources for efficient delivery of justice.

It is suggested that the approach to the training of lawyers in the law school should be changed from the adversarial one to one that is aimed at promoting consensual problem-solving methods. This would ensure that the school stops producing lawyers whose sole objective is to win at all costs. It is observed that a start in the right direction has been made in the Law School at the University of Zambia with the introduction of courses in mediation and arbitration.¹⁶ It is

¹⁶ These courses are offered to fourth year students as Alternative Dispute Resolution (ADR) - 1 and 2. ADR 1 is aimed at introducing students to ADR. The course is structured as a survey and overview of the ADR processes. However, the primary focus is on the theory of and law of negotiation and mediation. The practical application of these processes is also considered. ADR 2 is aimed at introducing students to

recommended that practicing lawyers should fully embrace ADR in their practices and ensure that their clients are aware of the other alternatives to litigation before matters are filed in court. It is suggested that ADR education be made an integral part of learning institutions including schools, where children would be taught skills in dispute resolution. This would inculcate a culture of consensual dispute resolution from an early age and members of the public would be re-oriented from their long held belief that only courts are capable of dealing with their disputes.

arbitration. The course is structured as an overview of the arbitration process. The theory and processes of arbitration are part of the syllabus. The practical application of arbitration is also an important aspect of the course.

CHAPTER TWO

CONCEPTUAL FRAMEWORK OF ADR

A professor of law rightly points out that the theoretical foundations and concepts that have been responsible for ADR developments cannot be overlooked for the reason that the underlying knowledge base provides the essential framework for policy makers and practitioners alike to rely on when deciding how or whether to use ADR processes or techniques in various dispute settlements.¹ The author could not agree with the learned professor more and for that reason, does in the succeeding section, among other things, examine two basic concepts that have contributed to shaping the way ADR is today. These are the concepts of 'dispute' and 'justice'.

2.1 Concept of Dispute

2.1.1 Justiciable disputes distinguished from behavioural conflict

To the layman, conflict and dispute may mean much the same thing since both involve a disagreement over some issue. However, there are some conceptual differences between the two terms. Conflict exists where there is an incompatibility of interests.² The Concise Oxford English Dictionary defines conflict as a serious disagreement or argument; a prolonged armed struggle; an incompatibility between opinions, principles, etc.³ Uncontained conflicts sometimes manifest themselves in verbal or behavioural disagreements which could lead to violence and conflicts at the international level. Such conflicts have the potential for violence and for that reason are usually condemned. However, conflict is an integral part of human behaviour, and there could be no movement

¹ Andrew J. Pirie (2000). *Alternative Dispute Resolution: Skills, Science and the Law*. p.3.

² Henry J. Brown, and Arthur L. Marriot (1993). *ADR Principles and Practice*. p.5.

³ (2002) 10th Edition.

or change without it. Decision-making necessarily contains an element of conflict; exchanges of ideas involve conflict; the democratic process is built on the basis of the normalcy of a conflict of ideas and interests.⁴ Conflict is an eternal feature of human existence.⁵ An irreconcilable conflict becomes potentially damaging when natural mechanisms for solving it such as negotiation or discussion are inadequate to deal with it. In such a case other methods or processes may have to be resorted to.⁶ Conflict management or resolution is usually approached through processes providing an understanding of the conflict and seeking to deal with it by consensual means.⁷ Although some conflicts may be resolved by dispute resolution procedures such as injunctions or interdicts or other court orders which restrain unlawful behaviour, by arbitration and by mediation, conflicts are not necessarily amenable to resolution by dispute resolution processes.⁸ On the other hand, disputes are amenable to resolution by dispute resolution processes.

A dispute may be defined as a class of conflict which manifests itself in distinct, justiciable issues. It involves disagreement over issues capable of resolution by negotiation, mediation or any other dispute resolution process involving a neutral third party. The differences can usually be examined objectively by the parties in the case of negotiation or by the neutral in the case of the other methods and the neutral can take a view on the issues to assess the correctness of one party or the other. David Foskett notes that an 'actual' dispute will not exist until a claim is asserted by one party which is 'disputed' by the other.⁹ According to Brown and Marriot,¹⁰ the question as to whether or not a 'dispute' exists can be highly relevant, for example, where arbitration or other dispute resolution

⁴ Id. n 2 above.

⁵ Id. n 1 above, at p. 40

⁶ Id. n 2 above.

⁷ Ibid.

⁸ Brown and Marriot, id. n2 above at p.6.

⁹ (1989). *The Law and Practice of Compromise*. p.5.

¹⁰ Id. n 2 above at p.6.

provision in a contract provides that disputes are to be referred to arbitration or to any other stipulated process. If no dispute exists, then a party wishing to enforce any aspect of the contract may do so through the courts; but if a dispute does exist then the specified process must be followed. Disputes between people are normal part of human interaction.¹¹ Whenever people gather together whether in families, clubs, teams, political parties, nations or international coalitions, disagreements will emerge.¹² Prathamesh Popat, points out that it is elementary knowledge both that disputes arise in society due to interaction amongst its members and that the greater and/or the more frequent the interactions amongst those with differing needs or conflicting interests, the higher the chances of disputes.¹³

Disputes are an expression of people's differences and by airing those, opportunities are provided to better understand one another so as to peacefully resolve the differences. Popat is of the view that the opening up of world markets, given their diversities, has been a contributor to the eruption of differences, misunderstandings and miscommunications, often culminating in complex disputes.¹⁴ According to Popat, the advent of e-commerce and the Internet has emphatically underlined the phenomenon of the 'global village'. The unsavoury result of this has been that disputes are not only arising at a far greater pace than ever before, but the same entail even greater complexities due to their cross-border and cross-culture nature.¹⁵ Pirie correctly states that the ways in which disputes are resolved can redefine relationships, redraw boundaries, redistribute wealth, reform laws, restrict movements, remove barriers, reshape thinking, and reframe problems and much more.¹⁶

¹¹ S. Patterson and G. Seabolt (Ed.). (2001). *Essentials of Alternative Dispute Resolution*. p.4.

¹² Ibid.

¹³ Popat D. Prathamesh (2003). Online Dispute Resolution in India – Proceedings of the UNECE Forum on ODR. <http://www.odr.info/unece2003>. Last visited on 1 September 2006.

¹⁴ Ibid. n 13 above.

¹⁵ Ibid.

¹⁶ id. n 1 supra, at p.4.

The distinction between behavioural conflicts and justiciable disputes is important in the ADR discourse because of the differences in approaches which need to be taken in their resolution and the limitations of dispute resolution processes in relation to behavioural conflicts. It has been argued that although conflict can cause distress and is usually viewed negatively, it can function in positive ways and may motivate people to take action and change their situations in ways that improve their lives and better fulfill their self-interests. Those in conflict who want to get it resolved may be forced to consider their role in creating the conflict and often gain insight about themselves and others.¹⁷

2.1.2 Nature of disputes

Disputes vary in nature and range. Even within a category, differences are readily apparent due to differences in issues and factors that can influence the opposing parties. For this reason, it is easy to see why no one dispute resolution process can be suitable for all types of disputes. Some simple disputes may be resolved through negotiation, while some disputes require the assistance of a neutral third party who can introduce carefully devised procedures for examining and possibly, evaluating the issues. Yet some disputes require the intervention of an expert neutral third party or the use of an adjudication process. Thus, processes will range from relatively informal ones suitable for personal disputes, to very sophisticated and professionally designed procedures which can be used for major, complex and often highly technical issues.

It is thus of utmost importance for a neutral third party to understand the particular dispute she is faced with and its implications and also the various dispute resolution processes available. This is so because such a neutral third party would be able to select or design a process most suitable for the particular

¹⁷ Jay Folberg, Dwight Golann, Lisa Kloppenberg, and Thomas Stipanowich (2005). *Resolving Disputes – Theory, Practice and Law*. p.20.

issues having had a better insight into the parties' concerns, motivations, aspirations and interests. In any event, parties have greater confidence in a neutral third party who clearly understands their dispute and the underlying issues as she is most likely able to reach a settlement which is acceptable to both parties.

2.1.3 Subject matter of disputes

According to Brown and Marriot, disputes are not readily capable of neat categorisation. Nevertheless, some analysis of and broad classification may provide a better understanding of what a dispute may involve, and where it fits in the range of disputes, conflicts and possible resolution processes.¹⁸ These authors list the following as some of the possible subject matters of disputes while noting that many disputes are complex and boundaries may overlap and blur:

- (i) International – including matters of public law;
- (ii) Constitutional, administrative and fiscal – including issues relating to citizenship and status rights; local authorities, governmental and quasi-governmental bodies; planning permission; taxation; and social security;
- (iii) Organisational – including issues arising within organisations involving management, structures and procedures, and intra-organisational disputes;
- (iv) Labour – including pay claims and industrial disputes;
- (v) Corporate – including disputes between shareholders, and issues arising on liquidation and receivership;
- (vi) Commercial – this is very wide and includes contractual disputes, issues arising in commercial relationships such as partnerships, joint

¹⁸ Id. n 2 above, at p.2.

ventures and others. Issues can arise in different fields of commercial activity, such as banking, shipping, commodities, intellectual property, the construction industry and many others;

- (vii) Consumer disputes – between supplier and consumer;
- (viii) Property disputes – including those between landlord and tenant, or joint tenants, rent reviews, boundary disputes and the like;
- (ix) Issues arising in tort – including negligence and failure of duties, and including also insurance claims relating to these;
- (x) Issues arising on separation and divorce – including those relating to children, property and all financial matters;
- (xi) Other family issues – including Inheritance Act claims, family businesses and other disputes within families;
- (xii) Trust issues – including issues between trustees and beneficiaries;
- (xiii) Disputes giving rise to consequences in criminal law;
- (xiv) Neighbourhood, community, gender, race and ethnic issues; and
- (xv) Inter-personal disputes arising between individuals.¹⁹

The above classification is not exhaustive and shows just how wide the subject matter of disputes can be.

2.1.4 Nature of issues

Issues surrounding disputes are wide-ranging in nature. A dispute may relate to rights, status, reputation, lifestyle, quantifiable monetary claim or any other aspect of personal or commercial activity. The issue can be single or a variety of issues; they may range from being simple to very complex. Further, the issues may relate to fact or law or a mixture of both; technical differences; differences of understanding; differences of perception of fairness, concepts of justice and morality, culture, values and attitude and a host of other issues.²⁰

¹⁹ Ibid.

²⁰ Id. n 2 above, at p.3.

2.2 Concept of Justice

'Justice' is a difficult concept to define and one capable of varying meanings depending on one's perspective.²¹ According to Torstein Eckhoff, it is characteristic of principles of justice that they are general and vague.²² Attempts to concretise the concept have not been entirely successful. However, some conceptions of justice by some leading theorists are outlined here to assist the reader to appreciate the problems of definitions associated with the concept and get a better perspective of the concept.

2.2.1 Social Justice

John Rawls' thesis and conception of justice is premised on what he terms 'the original position'. From this original position of inequality and behind a veil of ignorance, people set up institutions and determine the principles that will assign rights and duties and distribute benefits.²³ Since people are not aware of what positions they will occupy in future, they will choose what is just and unjust and this will regulate all future agreements. Rawls refers to justice as fairness because principles of justice are agreed to in an initial situation which is fair. The exact principles may differ from society to society, hence too the conception of justice. According to Rawls however, since everyone's well-being is dependent upon a scheme of co-operation, the people will choose two basic principles, namely, equality in the assignment of basic rights and duties (liberties) and socio-economic inequalities would be arranged in such a way that they benefit everyone particularly the least advantaged, and are attached to positions and offices open to everyone.²⁴ According to Rawls,²⁵ justice is the first

²¹ Thus according to a Women and Law in Southern Africa Research Trust (Zambia) Publication, the concept of justice has proved to be a very elusive one. See WLSA (1999) *Women and Justice in Zambia: Myth or Reality*, p.7.

²² (1974). *Justice – Its Determinants in Social Interaction*. p.34.

²³ See generally, Rawls, J. (1971). *A Theory of Justice*.

²⁴ Rawls op.cit.

virtue of social institutions.²⁶ He presents the main idea of justice as fairness, a theory of justice that generalises and carries to a higher level of abstraction the traditional conception of the social contract.²⁷ Additionally, according to Rawls, one may think of a public conception of justice as constituting the fundamental charter of a well-ordered human association.²⁸ The primary subject of justice, according to this theory, is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social co-operation.²⁹ In summary, Rawls defines the concept of justice as meaning a proper balance between competing claims.³⁰ Mulela Margaret Munalula, points out that Rawls provides a contemporary institution-focused understanding of justice in voluntary contractual arrangements.³¹ She alludes to the fact that Rawls' work has been widely acclaimed and equally widely criticised for his theory of justice.³² According to the critiquing philosophers, criticisms of Rawls' theory has exposed deep and irremediable flaws rendering any attempt to develop a critique of existing institutions and procedures based on such theory abortive.³³ Dias argues that the search for justice is dependent upon control of power and liberty.³⁴ He strongly criticises John Rawls' attempt to formulate a general theory of justice, on the grounds of the theory's ahistorical and sweeping assumptions. Those arguing in favour of Rawls' theory are of the view that such criticism misses the

²⁵ Id. n 23 above.

²⁶ Id. n 23 above, at p.3.

²⁷ Ibid.

²⁸ Id. n 23 above, at p.5.

²⁹ Id. n 23 above, at p.7.

³⁰ Id. n 23 above, at p.10.

³¹ Mulela Margaret Munalula (2001). 'The Legitimacy of Sovereign Debt: A Case Study of Zambia'. Unpublished SJD Thesis. University of Notre Dame, Indiana. p.12.

³² Some philosophers consider Rawls' theory to be misconceived, unsound, ahistorical and therefore, dysfunctional. Such critics are of the likes of David L. Schaffer (1979). *Justice or Tyranny? : A Critique of John Rawls' A Theory of Justice* .Port Washington, N.Y.: National University Publications; R.P. Wolfe (1977). *Understanding Rawls: A Reconstruction and Critique of A Theory of Justice*. Princeton, New Jersey: Princeton University Press. On the other hand, the likes of Westphal, Jonathan (1996). *Justice*. Indianapolis/Cambridge: Hackett Publishing Company, argue in favour of Rawls' theory.

³³ Id. n 32 above.

³⁴ Dias, R.W.M. (1970). *Jurisprudence*.

common sense moral point of Rawls' conception.³⁵ Thus Westphal, for example, argues that Rawls' theory is a psychologically and historically realistic entry point to the question about what is just and therefore such questions often arise from the experience of injustice: from a conflict between the demands of individuals acting from a particular place or interest in society.³⁶ It is for the above reason that Munalula feels that Rawls provides a valuable framework for a critique of institutions and procedures at domestic and international levels.³⁷ Rawls' theory is therefore, a useful starting point, at the abstract level, for regulating power and maximising justice in an institution or system.

Thomas Pogge³⁸ argues that Rawls' theory provides a conception of justice intended to render existing social institutions more just, to mitigate and alleviate the plight of those who are deprived and disadvantaged by existing unjust institutions and to accept certain constraints upon conduct and policies in anticipation of the ideal just ground rules being sought.

2.2.2 Legal Justice

In the legal domain there is the concept of legal justice. According to Robin West, the American ideal of legal justice seemingly consists of at least three distinct, although inter-related commitments: firstly, legal justice requires of lawyers a commitment to and therefore, an understanding of the concept of the rule of law, or a government of laws rather than of men.³⁹ Secondly, an adherence to some recognisable regime of individual rights, which rights, as Dworkin⁴⁰ formulates, are the means by which justice is secured in law; the metaphorical bridge from the moral ought demanded by justice, to the legal

³⁵ See Westphal, J. Id. n 32 above.

³⁶ Id. n 32 above.

³⁷ Munalula, Id. n 31 above, in a footnote at p.12.

³⁸ Thomas Pogge (1989). *Realising Rawls*. p.8.

³⁹ West, L. R. (2003). *Re-Imagining Justice – Progressive Interpretations of Formal Equality, Rights and the Rule of Law*. West describes this as the 'dominant interpretation of legal justice'.

⁴⁰ Dworkin, Ronald. 'No Right Answer'. In Hacker, P., and Rax, J. (Ed.) (1977). *Law, Morality and Society*. p.184.

imperative demanded by law. Thirdly, legal justice requires a commitment to legal or formal equality.⁴¹ Formal equality requires that cases be decided according to rules and that means treating like cases alike (doctrine of *stare decisis*) and that unlikes be re-thought until their similarity with some pre-existing pattern is identified.⁴² According to Simmonds,⁴³ justice in its formal dimension is essentially a matter of the consistent application of rules. Formal justice requires that, given the criteria of likeness and differences which are established in the law, these criteria should indeed be the determining element in judicial and official decisions applying the law.

2.2.3 Procedural and substantive justice

Legal justice can be procedural or substantive. Procedural justice deals with the way procedures are shaped to achieve the most just distribution possible. A distribution will be said to be just if it is made as accurately as possible according to a measure outside of the procedure. This kind of justice is called distributive justice, substantive justice or outcome justice. As Simmonds⁴⁴ puts it, if I believe in distribution according to need and you believe in distribution according to desert, we hold different substantive conceptions of justice but we are agreed on the principle of formal justice.⁴⁵

2.2.4 Justice and ADR

The above discussion on justice has not been motivated by a desire on the part of the author to indicate a preference of one definition over another. Rather, it was motivated by a desire to show the difficulties one is faced with in the endeavour to define 'justice' and also, to provide a conceptual background to the

⁴¹ Robin L. West, id. n 39 above, at p.2.

⁴² Ibid.

⁴³ Simmonds, N.E. (1986). *Central Issues in Jurisprudence – Justice, Law and Rights*. p.88.

⁴⁴ Ibid.

⁴⁵ According to Eckhoff, id. n 22 above, at p. 35, distributive justice deals with equality between recipients in situations in which values are allocated. However, it is an open question to which allocations the required equality should apply.

discussion on ADR and justice delivery in Zambia. It is the author's view that a consideration of the development ADR and the processes⁴⁶ must necessarily lead one to the conclusion that the pursuit of the greater ends of justice has been a major part of the reasons for the evolution of ADR processes. The various types of ADR processes have in their own ways, endeavoured to bring justice of varying degrees to parties to disputes. However, some critiques of ADR are not in full agreement with this observation. Thus, with regards to formal justice, that is, the equal treatment of all parties to a dispute, critics of ADR who are concerned with the effect of power and status on dispute resolution processes argue that informality may disadvantage already powerless groups, such as minorities, women and the poor.⁴⁷ They suggest that privacy and flexibility exacerbate power disparities by removing social inhibitions and institutional protection. Some commentators like Caroline Harris Crowne,⁴⁸ however, argue that it is not at all clear that informal processes like ADR disadvantage weaker groups any more than formal processes like adjudication. While formality may encourage people to be on their 'best' behaviour and to play by the rules, it also poses its own barriers to 'justice' – adjudication rewards those with expert knowledge of the law, or the means to hire attorneys, and those who are familiar with social etiquette in formal, professional settings.⁴⁹ Critics of ADR, who are concerned with the public interest in the resolution of disputes, have argued that disputant satisfaction⁵⁰ may camouflage serious injustice from public view.⁵¹ Social activists who want to ensure that 'justice' is done may distrust individual disputants and ADR neutrals to uphold public standards.

⁴⁶ Done in Chapter Three below.

⁴⁷ See Richard L. Abel (Ed.). (1982). 'The Contradictions of Informal Justice.' In *The Politics of Informal Justice: the American Experience* p.267, who argues that informal processes disadvantage the underprivileged. See also Richard Delgado et al., (1985). 'Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution.' *Wisconsin Law Review*, p.1359 who argues that informality of ADR magnifies power imbalances and fosters prejudice.

⁴⁸ Caroline Harris Crowne (2001) 'The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice.' *New York Univ. Law. Review*, p.1781.

⁴⁹ Ibid.

⁵⁰ Associated with ADR processes.

⁵¹ See Owen M. Fiss (1984). 'Comment, Against Settlement.' *93 Yale Law Journal*. p.1085.

Proponents of these opposing views have justified their positions. However, the author is inclined to agree more with Caroline Harris Crowne's assertion that it is not clear that ADR necessarily disadvantages weaker groups any more than the formal processes. This is because formal processes like litigation can also equally disadvantage the weaker groups who might not have the resources to hire the best legal brains to take care of their interests.

The concept of justice is vital to ADR processes.⁵² In the context of ADR, the concept of justice entails the empowerment of the disputants to play an active role in the resolution of their disputes; to exercise some degree of control over the outcome of their disputes and to arrive at settlements of their disputes voluntarily arrived at which take into account their interests. The degree to which these ideals are achieved depends on the type of process utilised. Ideally justice must be delivered with speed and efficiency and minimum costs, but practical considerations have proved otherwise. The problems that disputants have encountered in the courts in their pursuit of justice have raised serious doubts among the people regarding the capacity of courts to deliver justice to litigants in a meaningful and acceptable manner. This study shows that ADR has contributed immensely to disputants' pursuit of justice in the jurisdictions under study and that there are positive indications that ADR is increasingly contributing to disputants' pursuit of justice in Zambia.

2.3 'Alternative' / 'Appropriate' Dispute Resolution discourse

There has been a lively debate in the United States about the aptness of the ADR acronym. While some people have pointed out that the courts are really the 'alternative' process, others have suggested that the word 'alternative' in ADR is

⁵² One would indeed argue that the concept is equally important to courts of law as well. Aren't they the perceived 'fountain' of justice?

really being used in the sense of 'one of many'.⁵³ Another view is that the 'A' really stands for 'Appropriate'. From this, it is apparent that there are basically three schools of thought regarding this discourse. Karl Mackie points out the paradox that most proponents of ADR now agree that the term 'alternative' is inappropriate.⁵⁴ Much of ADR's value lies in the notion of a spectrum of dispute resolution mechanisms, with alternatives adding to and enhancing, rather than replacing the litigation option. If one agrees with the argument that ADR is not a substitute for more formal methods of dispute resolution, but is a supplement to such methods, and that the whole point of having a wide range of dispute resolution processes is to provide appropriate dispute resolution mechanisms for various disputes, it would not be far-fetched to argue that the proponents of 'appropriate' in the acronym ADR have a valid argument. It is the author's view that those who contend that courts are really the alternative are missing the point. Litigation cannot be the alternative because even before ADR appeared on the scene, the court was there as the dispute resolution institution. In addition, some disputes cannot be resolved through the use of ADR, examples in this regard are cases involving constitutional, civil rights or other fundamental issues; cases where there are allegations of fraud or bad faith; cases where one party lacks capacity; cases where one party believes he has a clear cut case and feels that he is entitled to succeed in full and sees no reason to compromise; or assesses that the other party is unreasonable or obsessive or the matter has become one of principle; or where one party wants to be publicly vindicated. Ultimately, when all else fails, the court is available. Litigation is thus the main dispute resolution process and the ADR processes are there not as substitutes but as complementary processes.

⁵³ Professor Frank E.A. Sander is one of the proponents of this view and suggests that a better acronym would perhaps be AMDR (Alternative Methods of Dispute Resolution). See Sander, F.E.A. (1997). 'Dispute Resolution Within and Outside the Courts – An Overview of the US Experience.' In Rao, P.C. and Sheffield, W. (Ed.). *Alternative Dispute Resolution: What it is and how it works*, at p.123 (footnote 1).

⁵⁴ See Karl Mackie (Ed.). (1991). *A Handbook of Dispute Resolution: ADR in Action*, p.3.

2.4 The quest for an ADR Philosophy

Presently there is no single ADR philosophy or consensus that any one of the different ADR approaches can properly and authentically represent the 'true spirit' of ADR.⁵⁵ However, by examining the main underlying objectives of ADR, it is possible to establish whether and to what extent there is an ADR philosophy. Some of the major underlying objectives of ADR are: the principle of co-operative problem-solving; empowerment of individuals;⁵⁶ reduction of delays and costs associated with litigation; production of better outcomes; preservation or enhancement of personal and business relationships; simplification of procedures and relative informality.⁵⁷

The principle of co-operative problem-solving is regarded as one of the main objectives of ADR, but it has been argued that some parties in ADR may well be using the process as a means to an end in getting their case settled without necessarily feeling any sense of being engaged in mutual problem solving.⁵⁸ It has been argued by some commentators that ADR does not depend for its effectiveness on the parties adopting a problem-solving approach. ADR processes can be equally effective where the parties adopt positional bargaining, competitive negotiation, problem-solving modes or any permutation of these or other approaches.⁵⁹ As for empowerment, it is true that in many forms of ADR, the parties are empowered to some extent in that they are given a greater responsibility for the resolution of their own issues. However, not all ADR processes, probably with the exception of mediation, empower the parties to any significant extent. Moreover, where there are power imbalances between the parties, it is doubtful if the weaker party is indeed 'empowered'. ADR does indeed provide better outcomes. Without the restraints of conventional

⁵⁵ Brown and Marriot, id. n 2 supra, at p.9.

⁵⁶ By controlling the outcome of their disputes.

⁵⁷ Brown and Marriot, id. n 2 above, at pp. 9 – 10.

⁵⁸ Brown and Marriot, Id. n 2 above at. p.11.

⁵⁹ Ibid.

litigation, parties can, with the assistance of a neutral third party, adopt the process that is most appropriate for the particular dispute. Further, the process being consensual,⁶⁰ the prospects of coming up with better terms for settlement are enhanced. The reader should, however, be cautious of the fact that a party may show willingness to participate in ADR not for purposes of reaching a negotiated settlement, but may have the intention of engaging in bad faith bargaining or using the process to harass or maintain unwanted contact with another party. Thus, a party who is willing to use ADR may not necessarily be willing to settle. Consensual participation by the parties could well be the fundamental assumption of most ADR methods and a key source of its legitimacy, but such ideals are based on the assumption that parties participate in good faith with a common desire to resolve their dispute. Unfortunately, that might not necessarily be the case.

In jurisdictions which lack the benefit of years of experience with ADR, most litigants and their lawyers need some encouragement and some degree of compulsion to use ADR. With regards to the contention that ADR reduces costs and delays, that depends on the type of process and the complexity of the issues involved in the dispute.

Negotiation and mediation are regarded as being more cost-saving than arbitration, which can be as protracted and expensive as litigation if the case is complex or if it is a complex international commercial arbitration involving a number of issues and parties. In his address to the ICCA Conference in Beijing on 18 May 2004, Arthur Marriot related his experience with regard to international arbitration. He told the Conference that with the exception of commodity and maritime cases, international arbitration, certainly as practiced in the recognised international centres such as London and New York, has become

⁶⁰ Consensual ADR processes exclude court-ordered processes where the consent of the parties is unnecessary for the court to order the parties to use the particular process.

more expensive and more complex in his professional lifetime rather than less.⁶¹ Generally speaking, however, ADR is considered relatively cheaper than litigation.

One of the major objectives of ADR is the preservation or enhancement of personal and business relationships which would otherwise be irreparably damaged by the adversarial process of litigation. This is particularly important in situations where continuing personal or business relationship is indicated. In addition, due to the informality of ADR processes,⁶² parties can formulate their own rules of procedure and decide on the language they wish the proceedings to be conducted in. This creates a more conducive atmosphere for negotiated settlements.

Bearing the above objectives in mind, and while acknowledging the difficulty in achieving any one agreed ADR philosophy, Brown and Marriot came up with the following as perhaps embodying much of the essence of ADR:

ADR complements litigation and other adjudicatory forms, providing processes which can either stand in their own right or be used as an adjunct to adjudication. This enables practitioners to select procedures (adjudicatory or consensual) appropriate to individual disputes. ADR allows parties' greater control over resolving the issues between them, encourages problem-solving approaches, and provides for more effective settlements covering substance and nuance. It also tends to enhance co-operation and to be conducive to the preservation of relationships. Effective neutral third party intercession can help to overcome blocks to settlement, and by expediting and facilitating resolution it can save costs and avoid delays and risks of litigation. ADR processes, like adjudicatory procedures, have advantages and disadvantages which make them suitable for some cases but not for others.⁶³

⁶¹ (2004). 'Arbitrators and Settlement.' 70 *Arbitration International* No.4 at p.297.

⁶² With the exception of arbitration and other adjudicatory processes where some formalities are observed.

⁶³ *Id.* n 2 *supra* at, pp.13-14.

It is the author's considered view that Brown and Marriot's analysis of ADR above is as close to an ADR philosophy as one can get. The analysis clearly embodies much of the essence of ADR.

CHAPTER THREE

THE DEVELOPMENT OF ALTERNATIVE DISPUTE RESOLUTION

3.1 Development of ADR internationally

The concept of ADR is as old as time. Sir Francis Bacon¹ expressed this concept in the following words, "It is generally better to deal by speech than by letter and by the mediation of a third than by a man's self".²

Informal dispute resolution has a long tradition in many parts of the world societies dating back to 12th Century in China, England and America³. Early advocates of ADR include Abraham Lincoln, himself a gifted trial lawyer to whom is attributed the following exhortation to law students, "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the loser in fees, expenses and waste of time".⁴

And Mahatma Gandhi who said:

I realised that the true function of a lawyer was to unite the parties...A large part of my time during the twenty years of my practice was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.⁵

Some forms of ADR like negotiation, mediation and even arbitration are not new, having been used in earlier societies. With reference to England, Derek Roebuck writes that a cursory glance at the ways in which earlier societies dealt with

¹ 1561 – 1621.

² John H.B. Roney (1999). 'Alternative Dispute Resolution: A Change in Perception.' 10 International Company and Commercial Law Review. 11, at p.329.

³ K. Jayachandra Reddy (1997). "Alternative Dispute Resolution." In P.C. Rao and William Sheffield (Ed.). *Alternative Dispute Resolution: What it is and how it works* at p.79.

⁴ 'Notes for a Law Lecture.' July, 1850. In Basler P. Roy (Ed.). *The Collected Works of Abraham Lincoln*. <http://home.att.net/~norton/lincoln78.html> Last visited 27 August, 2006.

⁵ See Prabhu R.K. Mohan – *Mala: A Gandhian Rosary* (Being a thought for each day of the year gleaned from the writings and speeches of Mahatma Gandhi) found online at:

<http://www.mahatma.org.in/books/showbook.jsp?link=bg&lang=en&book=bg0007&id=1&cat=books>. Last visited 26 August, 2006.

disputes long before there were courts or judges, or lawyers, or even written law, not only shows that they have always used mediation and arbitration, but that there is early evidence of assemblies where they met to deal with a wide range of business including disputes between individuals and groups.⁶ In the United States of America, ADR has grown rapidly since the political and civil conflicts of the 1960's. The community dispute resolution movement spawned from the social activism of the 1960's and helped to propel the ADR movement generally. With the promulgation of the Civil Rights Act in 1964 came the creation of the Community Relations Services (CRS) which utilised mediation and negotiation to assist in preventing violence and resolving community-wide racial and ethnic disputes. The CRS helped to resolve numerous disputes involving schools, police, prisons and other government entities throughout the 1960's.⁷ The introduction of new laws protecting individual rights as well as less tolerance for discrimination and injustice, led more people to file law suits to settle conflicts.⁸ For example, the Civil Rights Act, 1964 outlawed discrimination in employment or public accommodations on the basis of race, sex, or national origin.⁹ Laws such as this gave the American people new grounds for seeking compensation for rights violations. Parallel to this, the women's movement and environmental movement were also growing, a situation which led to a host of court cases. These developments led to a significant increase in the number of lawsuits being filed in United States courts. Eventually the system became overloaded with cases, resulting in long delays and sometimes procedural errors.¹⁰

In the 1970's, broad-based advocacy for increased use of ADR techniques emerged. This trend, often described in the United States as the 'Alternative

⁶ (2006). 'The Prehistory of Dispute Resolution in England.' 72 *Arbitration International*. No.2 at p. 93.

⁷ Dana H. Freyer (1997). 'The American Experience in the Field of ADR.' In P.C. Rao and William Sheffield (Ed.). *Id.* n 3 above, at p.109.

⁸ Stephen B. Goldberg, Eric D. Green and Frank E.A. Sander (1985). *Dispute Resolution*. p.3.

⁹ *Id.* n 7 at p.4.

¹⁰ *Ibid.*

Dispute Resolution Movement,' was officially recognised by the American Bar Association in 1976 when it established a Special Committee on Minor Disputes.¹¹ The ADR movement came not only with an increased use of arbitration but also the development and application of other ADR techniques such as mediation, conciliation, facilitation, mini-trials, summary jury trials, expert fact-finding, early neutral evaluation and variations thereof.¹²

Although the development and use of ADR mechanisms have proliferated in recent years, arbitration, a well established alternative to litigation, is not a new procedure. Its use in the United States pre-dates both the Declaration of Independence and the Constitution.¹³ For example, arbitral tribunals were established as early as 1768 in New York and shortly thereafter in other cities primarily to settle disputes in the clothing, printing and merchant seaman industries.¹⁴ The modern form of ADR was developed in the United States in response to the direction litigation was taking and the undesirable manner in which it was being fought. It developed to provide individuals and businesses with a means to obtain final resolution of their disputes without going to court.¹⁵ Processes like mediation and arbitration soon became popular ways to deal with a variety of conflicts because they helped alleviate pressure on the overburdened court system. ADR first established itself in a significant way in the United States in the field of labour-management disputes but it was not uncommon for commercial contract disputes to be submitted to private arbitration.¹⁶ The use of ADR in the United States has since significantly increased in the following fields, namely, consumer disputes; divorce; parent/child disputes; disputes within

¹¹ Later changed to Dispute Resolution Section. See Dana H. Freyer, n 7 above.

¹² Dana H. Freyer, id. n 7 above. Most of these techniques are discussed later in this Chapter.

¹³ Dana H. Freyer, Id. n 7 above, at p.108.

¹⁴ Ibid.

¹⁵ Jethro K. Lieberman & James F. Henry (1986). 'Lessons from the Alternative Dispute Resolution Movement.' 53 University of Chicago. Law Review at p. 424.

¹⁶ Paul Pretorius (1990). 'Alternative Dispute Resolution – A Challenge to the Bar for the 1990's.' 3 Consultus, No.1, at p. 39.

institutions; disputes between citizens and government; public disputes and many others. It would thus be a great disservice to the ADR discourse to conduct a study of ADR without reference to its development and practice in the United States of America, for such a study would be incomplete. This should be hardly surprising because many of the ADR forms originated and have been developed in the United States and due to the vast experience that the country has had in ADR, it provides a useful source of information and experience when analysing the concept.

As Henry J. Brown and Arthur L. Marriott succinctly point out,¹⁷ there are a number of reasons why ADR has found increasing favour in the United States. Firstly, the level of litigation there has grown to enormous proportions and court lists are so full that very long delays in obtaining trial dates are common; the costs of litigation are high and not ordinarily recoverable; and very high awards are often granted, making litigation an extremely hazardous exercise which has led increasingly to dissatisfaction with the system. ADR has become a significant part of conflict resolution in the United States involving Federal and State institutions, public authorities, the American Bar Association, universities and private organisations and individuals.¹⁸

From the time it was introduced in the United States of America, ADR has spread far and wide to places such as Canada, Australia, Hong Kong, the United Kingdom, India, South Africa, New Zealand and many other countries including Zambia. These countries have also experienced the problems of litigation faced by the United States of America, albeit to a lesser degree.

In the United Kingdom, as in the United States of America, the development of ADR can principally be attributed to the dissatisfaction with the traditional

¹⁷ (1993). *ADR Principles and Practice*. p.14.

¹⁸Paul Pretorius, op.cit. n 16 above, at p.39.

dispute resolution mechanism, the court. The concerns by society about the civil and indeed criminal justice systems, to some extent, have contributed to the increasing interest in ADR in the United Kingdom and elsewhere. According to Brown and Marriot,¹⁹ the civil justice system in England and Wales is faced with many problems identical in name, if not in cause, to those of the United States. They allege that by far the most serious complaint is denial of access to justice. According to the duo, in England and Wales only the poor and the very rich are able to undertake defended litigation, the former because they are legally aided and the latter because they can afford it. The bulk of the population is excluded from the courts by the costs of litigation and the virtual certainty under English cost rules that the burden of cost will be worsened by an adverse result. With such background, it is hardly surprising that in recent years English courts have shown an increasing willingness to encourage litigants to explore mediation and other methods of ADR before (or even after) going to trial. With the introduction of the Civil Procedure Rules in April 1999,²⁰ English judges suddenly found they had a number of weapons in their arsenal to encourage mediation and other forms of ADR. Rule 1.4 of the Civil Procedure Rules requires the court to deal with cases:

'Justly' by 'actively managing cases'. This is said to include...

- (2) (e) Encouraging the parties to use an ADR procedure if the Court considers that appropriate and facilitating the use of such procedure; and
- (f) Helping the parties to settle the whole or part of the case.²¹

ADR is not a recent phenomenon in India although it has been organised on more scientific lines, expressed in more clear terms and employed more widely in dispute resolution in recent years.²² The concept of parties settling their

¹⁹ Id. n 17 above, at p.23.

²⁰ S.I. No. 3132L.17 of 1998 which came into force on 26 April, 1999.

²¹ See Kent Dreadon. (2005). 'Mediation: English Developments in an International Context.' 71 *Arbitration International*, No. 2 at p.112.

²² Rao, P.C. (1997). 'Alternatives to Litigation in India.' In Rao, P.C. and Sheffield, W. (Ed.). *Alternative Dispute Resolution: What it is and how it works* (1997) at p.27.

disputes by reference to a person or persons of their choice was well known to ancient India.²³ The reasons for the increase in the use of ADR in India in recent years are similar to those in the United States and are neatly summarised by Rao and Sheffield in the foreword to their book as the time consuming nature of litigation, expense and stress which have lead to the countries seeking alternatives to it.²⁴

The Rt. Hon. Sir Thomas Bingham, Master of the Rolls, in his foreword to Rao and Sheffield's book,²⁵ aptly summarises the experience that many a person go through as they attempt to seek resolution of their cases in courts. He says the cost, delay, anxiety, uncertainty and sometimes cruel outcome of litigation make the experience one scarcely to be endured and never to be repeated. It is therefore, safe to conclude that the development of ADR in the United States and indeed the other countries mentioned above, has its origins in the dissatisfaction of many people with the way in which disputes are traditionally resolved. This is poignantly reflected in the criticisms of the courts, the legal profession and at times, in a sense of alienation from the whole legal system. This is one good reason for every legal practitioner to be familiar with available alternatives for dispute resolution and skillful in their use. As some commentators put it, the story about a carpenter with only a hammer and nails who has but one way to fix things is analogous to the limitations of a lawyer who only knows how to resolve disputes in court or a gladiator who only knows how to fight.²⁶

It would appear that civil law systems are not exempt from the difficulties faced by common law jurisdictions of high costs and delays, amongst others. Thus,

²³ Ibid.

²⁴ Id. n 22 above.

²⁵ Id. n 22 above.

²⁶ Folberg J, Golann D., Kloppenberg, L., and Stipanowich, T. (2005) *Resolving Disputes – Theory, Practice and Law* (2005. p.1.

Arthur Marriot reveals,²⁷ that in some leading jurisdictions of the European Union such as France and Germany, the cost and delay of going to law is beyond the means of the average citizen as it is in England.²⁸ He further goes on to say that in other jurisdictions such as Italy, the delay and cost in using the state courts is a public scandal. These problems have led the European Commission to consult widely on using alternative dispute resolution as an adjunct and alternative to the courts.²⁹

3.2 Types of Alternative Dispute Resolution Mechanisms

A wide variety of ADR procedures or techniques have developed over the years as a result of the unprecedented growth in international trade as well as a result of the endless search for quicker and cheaper alternatives to litigation.³⁰ Some of these procedures are Negotiation, Conciliation/Mediation,³¹ Arbitration,³² Adjudication, Med-Arb, Mini-Trial, Private Judging ('Rent-a-Judge'), Summary Jury Trial, Early Neutral Evaluation, Neutral Fact-Finding Expert, Last Offer Arbitration and Mediation and Last Offer Arbitration³³. These techniques have been developed along scientific lines by some leading universities and ADR centres in the United States, Great Britain, Canada and Australia.³⁴ As far as the United States is concerned, significant academic resources have been devoted to

²⁷ In his address to the International Congress and Convention Association (ICCA) Conference in Beijing on 18 May, 2004.

²⁸ (2004) 'Arbitrators and Settlement.' *Arbitration International*, 70, No.4 at p. 297.

²⁹ *Ibid.*

³⁰ As Rao, *id.* n 22 *supra*, puts it at p. 24; the primary objective of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of "access to justice for all." In other words, says Rao, the ADR system seeks to provide cheap, simple, quick and accessible justice.

³¹ Conciliation is often used interchangeably with mediation due to the similarities between them. However, conciliation is a less formal process than mediation. The conciliator's role is to help the parties to a dispute reconcile their differences by performing the role of go-between, communicating each side's position and settlement options. In mediation the mediator performs similar tasks but the procedure is more formal. In this thesis conciliation and mediation is used interchangeably.

³² Some ADR commentators do not regard arbitration as a form of ADR because of its similarity to litigation. However, due to the fact that arbitration was originally regarded as part of ADR, and because of its role in the other hybrid processes which have since developed, it will be treated as such in this thesis.

³³ MEDALOA.

³⁴ See O.P. Motiwal* (1998). 'Alternative Dispute Resolution in India.' 15 *Journal of International Arbitration*. No. 2, at p 117. *Secretary of the International Centre for Alternative Dispute Resolution, New Delhi, India.

the scientific study of conflict and the development of appropriate institutions and practices to deal with that conflict.³⁵

3.2.1 Broad categories of ADR procedures: Adjudicatory And non- Adjudicatory

ADR procedures can be broadly divided into two categories, namely, adjudicatory and non-adjudicatory. The adjudicatory procedures such as arbitration, adjudication and binding expert determination, lead to a binding ruling that decides the case. The non-adjudicatory procedures contribute to resolution of disputes by agreement of the parties without adjudication. The adjudicatory processes can also be classified as determinative, while the non-adjudicatory processes can be said to be facilitative. The non-adjudicatory processes like mediation or conciliation are facilitative because the neutral helps the parties to negotiate an agreement.³⁶ While litigation is public, ADR processes generally enable the parties to preserve their privacy. It is in this vein that Caroline Harris Crowne argues³⁷ that ADR represents a different paradigm of justice. She notes that whereas adjudication is concerned primarily with serving the interests of the public (the 'public-service' paradigm), ADR is concerned primarily with serving the interests of disputants (the 'customer-service' paradigm) albeit, while alluding to the fact that adjudication also serves some interests of parties to a lesser extent and ADR also serves some public interests.

Despite there being a wide variety of ADR techniques or methods, each method offers unique functions which can be tailored to suit a particular case. It is thus a

³⁵ According to Paul Pretorius who undertook two study tours of the United States of America in order to learn about alternate forms of dispute resolution. Id n 16 above, at p.39.

³⁶ Caroline Harris (2001). 'The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice.' 76 New York Univ. L.R. at p.1768. Some commentators commonly distinguish 'evaluative mediation' in which a mediator assesses the merits of the dispute and proposes a resolution, from a purely 'facilitative mediation' in which the mediator does not express any opinion on the merits or terms of resolution. However, even in evaluative mediation, the mediator's assessments are not binding, and the parties decide whether or not to settle the dispute.

³⁷ Id. n 36 above, at. p.1769.

testimony to the flexibility of ADR that the neutral practitioner can, having regard to special requirements of the case or circumstances of the parties, design a distinctive format for those particular parties and their particular dispute, by creating a hybrid process. Being free from the constraints of conventional litigational rules and procedures, and due to ADR's capability of ranging between quite formal and structured procedures to very informal ad hoc processes, the practitioner is able to create a hybrid process for an individual case.³⁸ Descriptions of the ADR processes outlined above are given below.

3.2.2 Negotiation

Negotiation has been defined as "the process we use to satisfy our needs when someone else controls what we want".³⁹ The same author argues that negotiation normally occurs because one has something the other wants and is willing to bargain to get it.⁴⁰ Negotiation is a process whereby parties to a dispute hold discussions or dealings about a matter with a view to reconciling differences and establishing areas of agreement, settlement or compromise.⁴¹ Being communication for the purpose of persuasion, negotiation is the pre-eminent mode of dispute resolution.⁴² It is as old as mankind and usually precedes all other forms of dispute resolution. The parties to a dispute negotiate or talk among themselves to resolve the conflict or to work out a compromise. This is the simplest and very often the quickest way of settling commercial disputes, because the parties themselves are in the best position to know the strengths and weaknesses of their own cases.⁴³ Thus, disputants are in the best position to discuss and work out a compromise. Disputants normally try and settle their differences through negotiation and when that fails, resort to other forms of dispute resolution,

³⁸ Brown and Marriot, id. n 17 above, at p.273.

³⁹ Robert Maddoc (1988). *Successful Negotiations*, p.14.

⁴⁰ Ibid.

⁴¹ Glossary to Brown and Marriot. id n 17 above, at p.422.

⁴² Goldberg, Sander and Rogers (1992). *Dispute Resolution and Other Processes*. p.17.

⁴³ Margaret Wang (2000). 'Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?' 16 *Arbitration International*, No.2, at p.191.

including taking the matter to court. A lot of disputes end after the parties negotiate a settlement themselves or with the help of their legal representatives. Some commentators point out that there are basically two approaches to negotiation, namely, the problem solving approach and the competitive approach.⁴⁴ According to Bernstein, the problem solving approach puts more emphasis on parties' interests, rather than on parties' rights while the latter approach puts emphasis on the parties' rights but both approaches necessarily involve the consideration of the alternatives to a negotiated settlement, that is, the consideration of the likely outcome and cost of an adjudicatory procedure such as litigation or arbitration.⁴⁵

Negotiation has the advantage of informality. Thus, the parties save on time. Other advantages of negotiation include minimal costs and the opportunity of the parties to control the pace of the negotiation. According to Wang,⁴⁶ negotiation is believed to be the quickest means of settling commercial disputes, provided that the parties communicate with each other and are willing to compromise. This is because the communication process is directly between the parties, instead of having to go through a third party. However, negotiation as a dispute resolution mechanism is not always the best, especially in international commercial disputes where parties belong to different cultures. In order to negotiate successfully, parties to a dispute must be willing to negotiate and compromise, be detached and objective. However, parties to a dispute normally have hard feelings towards each other and as such, these qualities are not readily available. When an international commercial dispute has arisen, disputants experience more difficulty than parties faced with a dispute within the same culture. This is because there is often no common basis for negotiation as parties from different cultures tend to think differently and have different

⁴⁴ Ronald Bernstein, John Tackaberry, Arthur L. Marriot and Derek Wood (1998). *Handbook of Arbitration Practice*. p.585.

⁴⁵ Ibid.

⁴⁶ Margaret Wang, id. n 43 above, at p.199.

perceptions of what is right and what is wrong. Further, different styles of negotiation due to different cultural influences make it much more difficult for parties to reach a compromise.⁴⁷

Negotiation offers the advantage of allowing the parties themselves to control the process and outcome in that no third party or neutral is involved. The parties decide what the important facts are and they decide together on the best solution. An agreement or solution reached after negotiation is obviously more satisfying to the parties than one reached after the intervention of a third party.

3.2.3 Conciliation/Mediation

The term conciliation is often used interchangeably with mediation. However, conciliation is often viewed as being more facilitative and non-interventionist while mediation is seen to allow for more mediator pro-activism. However, the reverse can also be true.⁴⁸ The accompanying process in conciliation may be less structured than in mediation but a conciliator still endeavours to bring disputing parties together to assist them to focus on the key issues.

Historically, labour disputes were the first significant area in which mediation was used. Attempts at mediating labour disputes were made in the 19th Century both in England and the United States. In the latter country, government sponsored mediation dates from 1913 when the Department of Labor appointed Commissioners of Conciliation to be made available to the parties in labour disputes.⁴⁹ Resort to mediation increased in the 1930's with the passage of national collective bargaining legislation as a means of dealing with impasses between a union and management in the collective bargaining process.

⁴⁷ Id. n 43 above, at p.191.

⁴⁸ Paul Newman (1999). *Alternative Dispute Resolution*. p.9.

⁴⁹ Goldberg, Sander and Rogers (1992), op.cit. n 42 above, at p.295.

Mediation thus served as a form of 'social intervention' through which outside neutrals assisted labour and management to find a socially desirable solution.⁵⁰

Mediation has since grown to be one of the most common types of ADR world-wide.⁵¹ In mediation, a neutral third party or mediator assists the parties to reach a solution that works for them, also known as a settlement. There's no requirement for the parties to reach a settlement and sometimes do not. Mediation allows the parties to be heard without constraining them with a binding adjudication. In mediation the mediator has the opportunity to meet the parties separately and in doing so, he's able to determine the desires of each party and is able to help the parties realistically evaluate weaknesses.⁵² Whilst the mediator cannot force a settlement, the courts can enforce a settlement reached by the parties. Mediation is designed to optimise the negotiation process and relies on the self-determination and co-operation of the parties.⁵³ Mediation is suitable for any issues capable of being settled by negotiation between the parties, especially for disputes where the parties have or have had a business, professional, or personal relationship. It is used for commercial, civil, labour, family, inter-personal, community, complex public disputes, environmental cases in which there are many parties, as well as potential solutions that the court itself cannot provide, and a wide range of other disputes.⁵⁴ The reader should note that mediation is either rights-based or interest-based. In the former case, the mediator looks to the rights that the disputants would have in court and with that guideline as a bench mark, tries to help the disputants to resolve the dispute within those parameters. For example, in a personal injury claim, such a rights-based mediator might seek to predict the likely outcome in court if the case went to trial, and then use that information to help the parties reach an acceptable

⁵⁰ Ibid.

⁵¹ Helen Johnson Ashford and Kathleen Cobb Kaufman (1999). 'ADR: What is it?' 49 *Federation of Insurance and Corporate Counsel Quarterly*. 4 at p.435.

⁵² Ibid.

⁵³ Caroline Harris, *id.* n 36 above, at p.1768.

⁵⁴ Brown and Marriot, *id.* n17 above at p.291.

settlement.⁵⁵ The latter approach focuses on the interests or needs of the parties. Inherent in this approach is the desirability of fashioning a new relationship between the two disputants that will address the general question of future conduct acceptable to both parties and that may incidentally yield an acceptable solution to the present dispute. This approach does not necessarily look at what the court might decide if the matter were to go to court. Of paramount importance are the interests or needs of the parties and a solution acceptable to both. In practice, most mediators combine elements of both types of mediation, but the distinction is still conceptually useful.⁵⁶ Interest-based mediation has the following characteristics, namely, it looks to the future; focuses on relationships; seeks to restructure relationships; results in accommodative resolution; results in custom-made solutions and has a role for clients.

Mediation may not be appropriate in cases where the dispute between the parties includes allegations of fraud and bad faith, or where one party is convinced that she has a clear-cut case or wants to be vindicated publicly on an issue in dispute, or where one or both parties feel there is a need for a ruling on the point to establish a binding precedent. Mediation would not be suitable where the consensual ADR processes would not be appropriate including for example, where constitutional principles, civil rights or other fundamental issues are in question; where remedies available only from the courts are needed, such as injunctions; where a party lacks capacity to contract; where rights may be lost by delay in bringing proceedings; or where for any other reason attempts to settle would not be appropriate.⁵⁷

⁵⁵ Frank E.A. Sander 'Dispute Resolution within and outside the Courts- an Overview of the US Experience.' In Rao and Sheffield (Ed.) *id* n 22 above, at p.125.

⁵⁶ *Id.* n 55 above, at p.126

⁵⁷ Brown and Marriot, *op. cit.* n 17 above, at p.291.

3.2.4 Arbitration

Arbitration is also one of the most widely known forms of ADR. It is a semi-judicial and more formal dispute resolution process whereby parties are heard before a neutral decision maker known as the arbitrator. The procedure before an arbitrator is similar to that before a court. Thus, parties may make opening statements, introduce documents and examine witnesses under oath. However, the rules of evidence are relaxed and hearsay evidence is often considered. Like court adjudication, arbitration involves the presentation of proofs and arguments by the parties to the arbitrator or panel of arbitrators who issue a binding decision known as an award.⁵⁸ In countries such as the United States of America, arbitration comes in a variety of forms, some simple and others more complex. Thus, disputants who wish to avoid the delays and expense of litigation, may opt for a form of arbitration with simple procedures. In procedurally simple arbitration, the arbitrator may have complete discretion to structure the process and to decide what standards should govern the determination.⁵⁹ Some disputants who prefer a trial-like process can use a more complex arbitration with rules similar to those in trials. Arbitration has a number of advantages over litigation some of which are as follows. Firstly, it is especially suitable for disputes where a neutral with a highly specialised knowledge of the subject-matter of the dispute is needed for example, in construction disputes; or where the parties' business relationship makes the publicity and formality of the courts unsuitable.⁶⁰ Secondly, it offers the parties the confidentiality they desire; thirdly, it is less formal than litigation. Fourthly, costs are normally lower than litigation costs and offers quicker resolution of disputes. However, the benefits of less costs and quicker resolution of disputes associated with arbitration may not be

⁵⁸ However, Wetsch points out that depending upon the contract clause or other agreement brought by the parties to arbitration, the neutral's order can be binding or non-binding. If the order is binding, the parties have limited rights of appeal. If the decision is non-binding, the parties may still go to court. See, Wetsch, Sherry, R. (2000). 'ADR- An Introduction for Legal Assistance Attorneys.' *Army Lawyer*, Issue 331, at p.8. In Zambia an arbitrator's award is binding on the parties and they have limited rights of appeal. This topic is pursued in Chapter Seven *infra*.

⁵⁹ Caroline Harris, *op.cit.* n 36 above, at p.1773.

⁶⁰ Brown and Marriot, *op.cit.* n 17 above at p.288.

realised in cases involving complex issues against reluctant respondents as such cases may take long periods to dispose of thereby increasing the costs. Arbitration has an advantage over litigation where enforcement of foreign awards is concerned. In addition to potential jurisdictional problems, a litigant might face difficulties in enforcing the judgment in the country where the defendant has assets due to the fact that enforcement is a private matter for that country.⁶¹ Further, arbitration appears to have greater effectiveness due to the number of international conventions and laws which have been widely adopted such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁶² which has been adopted by a large number of countries including Zambia.⁶³ This Convention imposes a mandatory obligation on Contracting States to stay judicial proceedings involving disputes which are a subject of arbitration agreements as defined in the Convention and also provides for the international enforcement of arbitral awards. Consequently, arbitral awards have a greater international efficacy in as far as enforcement is concerned, as it allows for the recognition and enforcement of arbitral awards internationally, rather than within the confines of a sovereign state as is the case with litigation. Nevertheless, as Wang rightly observes, the New York Convention is not completely effective because there are still countries who are not parties to it.⁶⁴

Arbitration is not the best dispute resolution mechanism where the dispute can be resolved by negotiation or mediation, especially where the parties have a business, professional or personal relationship which could be preserved. As can be deduced from the discussion on negotiation above, it is a far much faster and cheaper method of resolving disputes than arbitration. Relatively speaking, mediation is also much faster and cheaper at resolving disputes than arbitration.

⁶¹ Margaret Wang, *id.* n 43 above at p.202.

⁶² The New York Convention.

⁶³ This Convention is discussed further in Chapter Seven below with regards to Zambia.

⁶⁴ *Id.* n 43 above at p.206.

3.2.5 Adjudication⁶⁵

Adjudication is the determination of a dispute by an independent expert or panel of experts. This is a person or people chosen because of their appropriate specialist technical knowledge and experience. Adjudication can be swift because it comprises essentially of an exchange of written submissions followed by a hearing. This can lead to a decision within a very short time. The most significant advantage of adjudication is the ability of the parties to benefit from the technical expertise and experience of the adjudicator or panel or adjudicators. The likelihood of the process resulting in a technically correct decision is thereby increased. Further, the results of adjudication can be contractually binding on the parties. The procedure can also permit the adjudicator or panel of adjudicators to open up, review and revise decisions made and certificates issued during the administration of a contract. However, like all other forms of ADR, there are also disadvantages to the use of adjudication as a dispute resolution mechanism. One of these is the risk of becoming involved in what is effectively 'mini-arbitration'.⁶⁶ Participants have some of the disadvantages of arbitration but without the corresponding benefits. For example, the adjudicator has no power to compel the production of documents. Moreover, the result of adjudication, whilst contractually binding, is not directly enforceable, that is, one can use the result to seek judgment, but one cannot use the results as if it were a judgment. Further, the joinder of

⁶⁵Adjudication can be defined as any dispute resolution process in which a neutral third party hears each party's evidence and arguments and renders a decision that is binding on them. This decision is usually based on objective standards. The term adjudication includes arbitration and litigation. Sometimes adjudication is treated as a dispute resolution process in its own right. This is the way it is treated in this thesis.

⁶⁶ Stephen R. Jagusch (1999). 'Principles of International Arbitration.' Paper presented to the International Bar Association African Regional Conference on *Practicing Law in the 21st Century-Meeting the Challenges*. Held at the International Conference Centre in Accra, Ghana. 7-10 April, 1999, p.6.

related disputes or parties can only be achieved with the express agreement of all concerned parties.⁶⁷

3.2.6 Med-Arb

One of the significant developments of the dispute resolution movement in the United States of America has been the spawning of various 'hybrid' dispute resolution processes, each of which blends in some way the particular feature(s) of some of the basic processes. ADR exists because of the need and desire to promote the amicable settlement of disputes. Sometimes, however, no one method of ADR can completely satisfy the special circumstances of a particular set of parties. Consequently, new methods are devised to meet these needs. Thus additional methods of ADR have been created that borrow elements from various types of ADR.⁶⁸ One such hybrid dispute resolution process is the "Med-Arb", which refers to a combination of mediation and arbitration. In med-arb the parties try to reach an agreement through mediation and when that fails, the mediator or another third party makes a binding decision.⁶⁹ Med-arb is therefore a hybrid form of ADR which commences with a mediator who tries to resolve a case between two disputing parties. It is a blending of mediation with its persuasive force, and arbitration, with its guarantee of an assured outcome. As such, it is thought to get the best of both worlds.⁷⁰ If the parties reach a settlement, it can be reduced to writing and signed by the parties, thus making it binding. If the parties fail to reach a settlement, the mediator then acts as an arbitrator and gives a binding or non-binding award, depending on the agreement. The advantage of med-arb is that the same neutral acts as mediator and if necessary, as arbitrator. The neutral in these circumstances will obviously have the advantage of knowing the facts of the case well at the arbitration

⁶⁷ Ibid.

⁶⁸ Patterson, S and Seabolt, G. (2001). *Essentials of Alternative Dispute Resolution*, p.161.

⁶⁹ See generally, Tom Arnold (1996). 'Vocabulary of ADR Procedures' (Part 2) *Disp. Resol.*, Jan - March 1996 at pp. 62-63.

⁷⁰ Frank E.A. Sander Id. n 55 above at p.129.

stage. Further, the process will be much more efficiently handled to the benefit of the parties. Med-arb was first used in United States public sector collective bargaining particularly for public safety groups, for example, police and fire departments, where strikes are generally illegal. In many States, the state legislature has called for a hybrid system to resolve these disputes peacefully and efficiently.⁷¹ Med-arb is now used in the United States for labour contract negotiation disputes. It may also be used for any dispute requiring mediation, but where the parties wish to proceed to arbitration if the mediation is inconclusive.⁷² Med-arb is not appropriate or suitable in any case where either mediation or arbitration would be inappropriate or for any case where the parties may want to disclose confidential information to the mediator, which might compromise them if the mediator were to become an adjudicator.⁷³

The reader should take note that there has been some conceptual objection to a combination of the roles of mediator and arbitrator in one person. In fact the Chartered Institute of Arbitrators' policy in this regard is that it is unethical for a mediator to go on to act as an arbitrator. Therefore, it will not appoint the same panelist to act as an arbitrator, where he or she has acted as a mediator for the same dispute.⁷⁴ The argument is that where the same person acts as mediator and arbitrator in the same case, issues of natural justice and bias are likely to arise. It has been suggested that irregularities in connection with such a process could lead to an arbitral award being unenforceable as a result of a potential challenge under Article V of the 1958 New York Convention.⁷⁵ The main

⁷¹ Christopher Honeyman, 'Hybrid Processes', July, 2003. The Beyond Intractability Knowledge Base Project, Registered Trademark, University of Colorado. [Http://www.beyondintractability.org](http://www.beyondintractability.org).

⁷² Brown and Marriot, op.cit n 17 above at p.292.

⁷³ Ibid.

⁷⁴ See the Chartered Institute of Arbitrators News Watch of Monday June 5, 2006.

⁷⁵ Ibid. Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958) states "1. Recognition and Enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) ...; (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (c) ...; (d) The composition of the arbitral authority or the arbitral

conceptual objection to the combination of roles, according to Arthur Marriot,⁷⁶ is that parties will be reluctant to speak freely in private to mediators who will decide the case should the mediation fail. This undermines the primary goal of the process, namely, free communication with the neutral third party. In any case, it would be difficult for the mediator turned arbitrator to forget or ignore what he was told in private and confidentially.⁷⁷ It is further argued that the roles of mediator and arbitrator are fundamentally incompatible in that whereas the arbitrator's interaction with the parties is confined to adversary hearings in which the parties present evidence and contest opposing evidence, mediation usually involves extensive confidential *ex-parte* communication with individual parties.⁷⁸ Parties who know that their mediator will decide should mediation fail may be less candid in communicating with the mediator.⁷⁹

However, it would appear that despite these concerns, the system does work. Marriot reports that there is evidence in certain major Asian jurisdictions such as China and Japan that the combination of roles in one person is very effective.⁸⁰ According to Marriot, the risks are apparently understood by the parties who consent to the combination of roles, expressing a clear wish to settle the case. Moreover, experienced arbitrators have long experience in the conduct of

procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or..."

⁷⁶ 'Arbitration and Settlement,' *id.* n 28 above, at p. 303.

⁷⁷ This problem was exemplified in the case of *Township of Aberdeen v. Patrolmen's Benevolent Association* (N.J. S. Ct., App. Div. 1996), a decision under the New Jersey law regarding a Med/Arb arrangement in a public employment contract. When negotiations over a new collective agreement between the township and the police officers' union reached an impasse, the union petitioned for the initiation of arbitration under the state's Compulsory Interest Arbitration Act. Prior to the start of the hearings, the parties agreed to have the arbitrator attempt to mediate the dispute. When mediated settlement negotiations fell apart, the case went to arbitration. The arbitrator rendered an award in favour of the union, largely on the basis of the township's shifting positions during the mediation. Although the interest arbitration statute and implementing regulations permitted Med/Arb, the court struck down the award on the basis that the arbitrator had improperly relied on information gained during the course of mediation and not presented in the arbitration hearing.

⁷⁸ Folberg, Golann, Kloppenberg and Stipanowich (2005). *Resolving Disputes – Theory, Practice and Law*, p. 645.

⁷⁹ *Ibid.*

⁸⁰ *Id.* n 76, above, p. 303.

disputes and can recognise weaknesses in evidence, argument, fact and law and they expect parties and their advisers not to defend weak or untenable positions to the last breath. Further, to discuss such matters privately and confidentially with the arbitrator as mediator is the best way of clarifying the point which matters and facilitating a negotiated settlement.⁸¹ Marriot agrees that there are serious questions which arise from a combination of roles, if the mediation does not succeed and arbitrators reassume their role.⁸² But Marriot fears, on the other hand, that too much can be made of this, for the parties have freely consented to the process, usually on the basis of trust in the arbitrator and the application of commonly accepted principles and procedures of voluntary mediators.⁸³

3.2.7 Mini-Trial⁸⁴

Mini-trial is an ADR technique developed by some imaginative litigants in the Federal District Court in California to aid in the settlement of a complex and protracted patent and trademark infringement case.⁸⁵ That case had been languishing in the Federal Court in Los Angeles for a number of years, racking up significant attorneys' fees without apparent progress. The counsel in that case decided that they needed a new kind of process to resolve the dispute efficiently and expeditiously. They hired a retired judge to preside over an information exchange. In other words, they provided for a procedure whereby the plaintiff would present the essence of his case followed by a questioning of the plaintiff

⁸¹ Ibid.

⁸² Id n. 28 above, at p.305.

⁸³ Ibid.

⁸⁴ Paul Newman, op.cit. n 48 above, at p.8, writes that the 'Mini-Trial' is a misnomer to the extent that it is not really a trial at all. With the legal rules of evidence usually discarded, it is a settlement procedure designed to convert a legal dispute back into a business problem.

⁸⁵ The term 'mini-trial' was coined by the New York Times in a report on the first known case using that procedure: a major patent infringement action between Telecredit Inc. and TRW Inc. which took place in the United States in 1977. See Brown and Marriot op cit. n 17 above, at p. 262, who also state that the name is not really apt, since it is not a trial but a non-binding ADR process which assists parties to a dispute to gain a better understanding of the issues, thereby enabling them to enter into settlement negotiations on a more informed basis.

by the defendant on the apparent weaknesses of the plaintiff's case. Subsequently, the defendant would be given a chance to present the essence of his case.

In a mini-trial, the parties may or may not be represented by attorneys. At the end of the proceedings, the executives try to negotiate a settlement. If successful, the settlement is often set out in a legally enforceable written document. If an agreement is not reached, then the presiding officer will give his views concerning how the case would be resolved in court. The parties then use this additional information to discuss settlement. If settlement is not reached, the procedure has no evidentiary effect and the case returns to court.⁸⁶

The advantages of a mini-trial are, among others, elimination of lengthy trial; professional presentation of each party's case without formal rules of procedure or evidence; those who ultimately decide whether the dispute should be settled⁸⁷ have the opportunity to be guided by a person with some degree of prestige and outside objectivity; and, the presentations are made to, and the ultimate decision made by, persons with the requisite authority to commit to settlement the bodies which they represent.⁸⁸ The mini-trial gives those with settlement power a brief display of their case in its best light.⁸⁹ The mini-trial is also suitable for any issues capable of negotiation especially substantial commercial or technical disputes with mixed fact and law issues; including patent, construction and contract disputes; product liability, joint venture disagreements and many kinds of cases. The mini-trial is particularly suitable where senior executives who frequently are not involved in the genesis of the dispute, wish to bring their business judgment into settlement negotiations with the benefit of a thorough analysis of the case.⁹⁰

⁸⁶ Brown and Marriot *op.cit* n 17 above. See generally, Chapter 14, pp. 262 – 272.

⁸⁷ And if so, on what terms.

⁸⁸ Newman, *op.cit*, n 48 above, at p.10.

⁸⁹ Helen J. Ashford and Kathleen C. Kaufman, *op.cit*. n 51 above at p.437.

⁹⁰ Brown and Marriot, *id.* n 17 above at p.293.

It is totally flexible and can be tailored to the needs of the individual case. The mini-trial is not suitable where the case turns exclusively on issues of law or credibility. It is generally used for substantial cases and not for smaller disputes where the cost and time factors may not be warranted.⁹¹

3.2.8 Private Judging ('Rent-a-Judge')

Private Judging or 'Rent-a-Judge' was developed in the United States of America and is available in those jurisdictions where legislation has been passed to provide for it, such as Texas, California, New York, Ohio and Oregon⁹². It came about as a reaction to the long periods required to bring actions to trial and was a development of the litigation system rather than a truly ADR technique.⁹³ A judge designates a neutral person chosen by the parties to hear the case as referee. If the parties fail to agree on a referee, the court may appoint one. The referee decides the date and place of hearing and exercises all the usual powers of a judge. The parties share the cost of compensating the judge (referee) as well as the costs of the whole procedure. Private judging is binding upon agreement of the parties. In some states, including California, the private judge is authorised by statute to render a judgment that has the same finality, precedent and appealability of a judicial decision.⁹⁴ Private judging is particularly suitable for actions in which there's a great need for confidentiality or particularly time sensitive.⁹⁵ It is largely used in technical, complex business litigation.⁹⁶ It is also indicated in cases where the parties want a court-rendered judgment but also want the trial to be closed to the press and the public. For example, where the defendant's reputation may be damaged by evidence to be presented at a trial, private judging could offer privacy and confidentiality.⁹⁷ However, one

⁹¹ Ibid.

⁹² Brown and Marriot, id. n 17 above at. p42.

⁹³ Newman, id. n 48 above, at. p.64.

⁹⁴ Ashford and Kaufman, id. n 51 above, at p.439.

⁹⁵ Ashford and Kaufman, id. n 51 above, at p.438.

⁹⁶ Brown and Marriot, id. n 17 above, at p.42.

⁹⁷ Patterson, S. and Seabolt, G. (2001) id. n.68 above, at p. 156.

disadvantage of private judging is the possibility of selecting a judge who will not perform as expected. Sometimes a private jurist will prove to be more deferential to one side than the other, especially if he or she has received business in the past from one of the attorneys involved or the judge might prolong the trial in order to earn a larger fee.⁹⁸

3.2.9 Summary Jury Trial

Summary jury trial is similar to a mini-trial, the difference being that in the former the parties receive some indication of how a jury would decide their case. Lawyers for both sides present a particular aspect of the case generally based on information that is subject to discovery and admissible at trial, to a sample jury panel which renders a non-binding decision. The jurors then answer questions posed by the attorneys about their determination. Thereafter, the attorneys and representatives begin settlement negotiations. If the parties fail to reach a settlement, the advisory jury verdict cannot be admitted at trial. However, the fact that the parties and their attorneys have had a preview of their case before a sample or advisory jury, acts as a strong impetus for the parties to settle. This device is intended to aid the lawyers in evaluating the likely outcome in court so that they can discuss settlement realistically.⁹⁹ Summary jury trials take place in a court room before a presiding judge and an advisory jury drawn from the regular jury pool. The disadvantage with the summary jury trial is that it is more costly and time consuming than other forms of ADR.¹⁰⁰ For this reason the method is generally reserved for cases that are expected to be time-consuming if tried and is particularly useful in cases that involve novel issues.

⁹⁸ Patterson, S. and Seabolt, G. (2001) *id.* n 68 above, at p. 158. However, one could point out that the possibility of selecting a neutral third party who might fail to perform is there with any other ADR mechanism.

⁹⁹ Tom Arnold, *id.* n 69 above, at pp. 69, 72 and 78.

¹⁰⁰ Ashford and Kaufman, *id.* n 51 above, at p.438.

3.2.10 Early Neutral Evaluation

Early Neutral Evaluation (ENE) is a system begun in 1985 in the United States District Court for the Northern District of California.¹⁰¹ In an experimental programme, cases were selected and referred to a third-party lawyer for evaluation within one hundred and sixty days of the commencement of the litigation.¹⁰² The experiment proved to be very successful. The early neutral evaluator's mandate is to look at the strengths and weaknesses of the case at an early stage of a case and consider how best to conduct the litigation rapidly and economically. The evaluator gives a confidential assessment of the dispute, partly to help the parties to narrow and define the issues and partly to promote efforts to arrive at a settlement. In this ADR technique, the lawyers present their cases to a legal expert, who predicts, based on other cases, what the outcome will be in court. The expert's prediction is supposed to focus subsequent settlement negotiations.¹⁰³ ENE can be used as a reality check by a party with unrealistic expectations and encourage settlement since the strengths and weaknesses of the cases of both parties are brought to the fore.

Some of the benefits of ENE are that it motivates the attorneys to investigate the case early on rather than fire off admissions, interrogatories, and requests for production of documents in knee-jerk fashion.¹⁰⁴ It provides the parties with the opportunity to share information with one another rather than play 'hide the ball'.¹⁰⁵ Further, ENE gets the clients involved in the process as strategists and decision makers; it simulates for the clients the experience of having their day in court; and gives each side a better understanding of their opponent's position as well as a neutral evaluation of the strengths and weaknesses of each side's

¹⁰¹ Brown and Marriot, id. n 17 above at pp. 40 – 41.

¹⁰² Ibid.

¹⁰³ Tom Arnold, id. n 69 above at pp.71 – 72.

¹⁰⁴ Tom Arnold, id. n 69 above, at, p. 160.

¹⁰⁵ Tom Arnold, id. n.69 above, p. 161.

case.¹⁰⁶ The types of cases referred to ENE are wide, including disputes arising in contract, tort or other money claim where liability is not an issue, labour law, intellectual property law, civil rights, securities and banking.¹⁰⁷ This process bears some resemblance to rights-based mediation and court-annexed arbitration.¹⁰⁸

3.2.11 Neutral Fact-Finding Expert

Under this ADR method, the parties to a dispute appoint a neutral expert to investigate facts and form a legal or technical view on the matter presented to the expert and thereafter, make a non-binding or binding report to the parties. The expert reviews the information received and may conduct independent fact-finding and submit the findings to the parties. The expert may facilitate subsequent settlement discussions. Fact finding works best when settlement attempts have failed because the parties cannot reach agreement concerning certain factual issues.¹⁰⁹ It may also be helpful in matters involving scientific issues that can be better understood through the use of an expert, accounting, economic or any other specialised issues. The determination of the neutral is confidential.¹¹⁰ This method is thus suitable for cases with technical issues which would benefit from neutral expert appraisal and reporting. Kinds of issues include patent infringement, medical or other professional negligence, product liability cases and other technical matters.¹¹¹ Use of neutral fact-finding expert is contra-indicated where there are no technical, scientific or specialist issues requiring expert involvement, nor where witness credibility is crucial and would render technical appraisal irrelevant.¹¹²

¹⁰⁶ Ibid.

¹⁰⁷ Brown and Marriot, id. n 17 above, at p41.

¹⁰⁸ Frank E.A. Sander id. n 55 above, at p.128.

¹⁰⁹ Helen Ashford and Kathleen Kaufman, Id. n 51 above, at p.440.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

3.2.12 Last Offer Arbitration

Last offer arbitration is an ADR process often used in disputes involving money claims or salary disputes.¹¹³ It is an impasse resolution procedure which involves an arbitrator being constrained to decide for one or the other side's final offers in a dispute. This is in contrast to conventional arbitration where the arbitrator has the option to compromise, usually within the terms of reference specified by the parties.¹¹⁴ Last Offer Arbitration is also known as 'pendulum', 'either-or', 'flip—flop', and 'final offer arbitration.'¹¹⁵ Specifically designed to be an impasse deterrent, the theory behind it is that it provides an incentive for both parties to moderate their positions to such an extent that third party intervention is not required.¹¹⁶ During arbitration, the parties each submit their last offer of settlement to the arbitrator who has to choose between one offer and the other. The parties are bound by the arbitrator's choice. Thus, the parties set the limits of the arbitrator's award.¹¹⁷ This is a well established procedure in United States industrial relations and has caught on in Great Britain where a number of British workplaces have signed collective agreements incorporating final-offer arbitration.¹¹⁸

3.2.13 Mediation and Last Offer Arbitration (MEDALOA)

Simply put, MEDALOA is a combination of mediation with last offer arbitration. It is one way of combining mediation and arbitration¹¹⁹ and is becoming increasingly popular in the United States of America where it has been successfully used to resolve license disputes quickly and with much less expense than traditional litigation.¹²⁰ This procedure is sometimes called 'baseball

¹¹³ Helen Ashford and Kathleen Kaufman, Id. n 51 above at p.439.

¹¹⁴ David Metcalf and Simon Miller (1992). 'Final Offer Arbitration in Great Britain: Style and Impact. National Institute Economic Review, No. 142.

¹¹⁵ Id. n 114 above.

¹¹⁶ Ibid.

¹¹⁷ Id. n 113 above.

¹¹⁸ Metcalf and Miller, Id. n 114 above.

¹¹⁹ The other ways being 'med-arb' and 'arb-med'.

¹²⁰ Morrison and Foerster, 'Effective Use of Alternative Dispute Resolution (ADR): Legal Updates and News: In the News. <http://www.mofo.com/news/news/files/articl934.html> . Last visited, 11 October 2006.

arbitration' because it is the method used to resolve disputes over salaries of baseball players in the United States of America.¹²¹ In this scenario the parties agree to proceed to mediation with the understanding that should mediation fail, they will then submit their last offer made during the mediation to the neutral. The neutral chooses one or the other and thereafter renders his decision. MEDALOA encourages parties to continue negotiating until their last offers are made. The openness of mediation between the parties is not thwarted by the fact that the parties have agreed to submit the matter to arbitration should they fail to reach a settlement.¹²²

As with Last Offer Arbitration, the neutral is limited to the last offer of the parties, thereby giving the parties some degree of control over the arbitration process. The arbitrator has no mandate to award an amount lower or higher than the last offers made by the parties during mediation, or any amount in between.¹²³ Parties are encouraged to make reasonable settlement offers because, if for example, Party A makes an unreasonable offer, there is a risk that the arbitrator will find Party B's last offer to be more reasonable and therefore, impose Party B's proposal as the binding decision of the arbitrator.

3.3 Matching the Process to the Dispute

The above discussion has been on the types of ADR processes available and their advantages and disadvantages. Making choices about using one mechanism over another invariably raises the issue of the possibility of matching the processes with particular types of disputes. The issue is complex due to the contextual complexity and general uncertainty surrounding most disputes. However, it has been suggested that classification of disputing characteristics will point to one

¹²¹ Ibid.

¹²² Id. n 51 at p.439.

¹²³ Ibid.

process rather than the other.¹²⁴ Thus, for example, the relationship between the disputants is one characteristic. When there is an on-going relationship between the disputants, it is important that the parties work out their own solutions to ensure any agreement is acceptable and long-lasting and their relationship is preserved. Accordingly, negotiation or mediation would be preferable. The nature of the dispute is another factor to be taken into account. Some disputes are 'test' cases and require a definitive precedent to be set by a court, whereas some disputes with no clear governing guidelines and broad implications may be best handled by the disputants themselves. The amount at stake and complexity of the issue and novelty of the issues, are other considerations to be taken into account when considering whether a dispute resolution forum is needed to provide full opportunities for the presentation of evidence and argument. Granted that resolution of all disputes should be speedy and cost effective, but some disputes, due to the amounts involved or the consequences of delay, will require a dispute resolution process that is faster and cheaper than full court adjudication. Power relationship between the parties is a further factor to be taken into account when choosing the appropriate dispute resolution process. Where differences in bargaining strength exist between the parties to a dispute, an adjudicatory or other dispute resolution forum that can eliminate or reduce the inequalities in power would be preferable. Ultimately, choosing the most appropriate dispute resolution process boils down to weighing the advantages and disadvantages of the different techniques.¹²⁵

3.4 Perceived Drawbacks to ADR

With the exception of court-annexed procedures, ADR is essentially a form of private justice and is not a substitute to litigation. The doctrine of *stare decisis* provides courts with guidance in settling current disputes by providing legal

¹²⁴ Sander, E.A., and Goldberg, S. (1994). 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure.' 10 *Negotiation Journal*. p.49.

¹²⁵ See Pirie (2000) *alternative Dispute Resolution – Skills, Science and the Law*, p.86.

precedents. Judges can look to how courts have decided similar disputes in the past to determine what would be an appropriate outcome in a current matter.¹²⁶ Thus reliance on precedent helps to ensure that disputes of a particular type will be dealt with in a similar manner from court to court. Furthermore, legal precedent provides parties with a basis for determining their chances at trial and whether it would be better to settle now.¹²⁷ It is feared that the growing use of ADR which is private justice, will thwart the development of legal precedent and thus undermine the power of the courts to bring about positive social change.¹²⁸ A further perceived drawback of ADR is the fact that while ADR can fashion remedies that are tailor-made to the situation, and which courts of law would be unlikely to award, ADR might be unable to award exemplarily punitive damages to deter similar conduct in future. Only courts of law can award such damages. Thus ADR may not be appropriate for cases of serious frauds, intentional torts and criminal activity. Additionally, as the present study shows, many people are largely unaware of the existence of ADR. Even members of the legal profession are only now becoming aware of the availability and benefits of ADR.¹²⁹ Hence one of the drawbacks of ADR may be its relative obscurity.

The drawbacks of ADR listed above are, however, countered by the fact that ADR does not profess to be a substitute to litigation. It is there as a complement to litigation. As such, litigation still remains the main dispute resolution process available and will be there to provide binding precedents for those people or circumstances where a binding precedent is essential. Similarly, litigation will always be available in public interest cases, particularly egregious cases of fraud, intentional torts and criminal activity. ADR is becoming increasingly visible due to its relative success in achieving outcomes that satisfy the parties involved and

¹²⁶ Patterson and Seabolt, *id.* n 68 above, at p.18

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ This is certainly the situation in the case of Zambia.

the argument of relative obscurity will be a thing of the past in due course. The benefits of ADR clearly far outweigh its drawbacks or disadvantages.

3.5 The Multidoor Courthouse Approach

One of the most significant developments arising out of the relationship between ADR procedures and the court system was the creation in the United States of America of Multidoor Courthouses. The author of the concept was Professor Frank E. A. Sander, Professor of law at Harvard University who delivered a paper in 1976 in Saint Paul, Minnesota to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, jointly sponsored by the Judicial Conference of the United States, the Conference of Chief Justices and the American Bar Association.¹³⁰

Professor Sanders propounded the view that the courts should play a proactive role in improving the justice system by broadening the dispute resolution options available to the parties in dispute. He conceived that the court should be a centre for resolving disputes and dispensing justice. Certain criteria were considered by Professor Sander to be important for determining the effectiveness of a dispute resolution system, namely, cost, speed, accuracy, credibility (to the public and the parties), and workability. In some cases, but not in all, predictability may also be important¹³¹ In that paper Professor Sander examined some dispute resolution alternatives and then proposed the notion of a multifaceted dispute resolution centre, in lieu of the then existing courthouse. Instead of just one 'door' leading to the courtroom, such a comprehensive justice centre would have many 'doors' through which individuals could pass to get to the most appropriate process. Among the doors might be ones labeled 'arbitration', 'mediation', and 'mini-trial'.¹³² The idea was to match disputes to the

¹³⁰ See the Pound Conference Report, cited as 70 Federal Rules Decisions (FRD) 79 at p.113.

¹³¹ Frank E.A.Sander, id n 55 above, at, p.133.

¹³² Ibid.

most appropriate dispute resolution process, thereby providing more effective and responsive solutions to disputes.

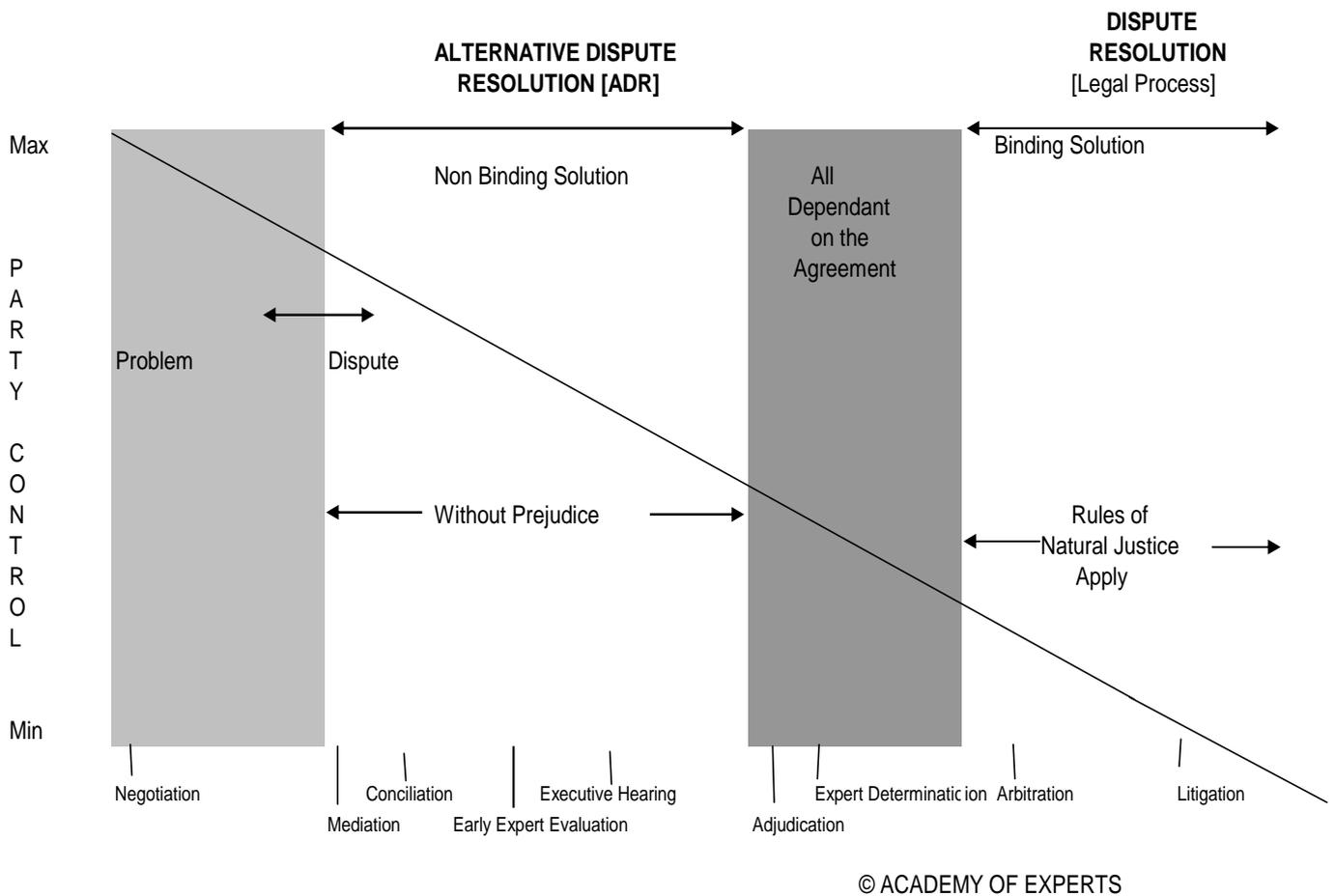
Professor Sander's theories have been tested in practice in several states, most notably in the District of Columbia and the experience found to be favourable and encouraging. The concept has been tested in experiments in various other parts of the United States such as New Jersey, Houston and Philadelphia and a number of American cities or counties now offer multi-door programmes.¹³³ The programmes enable a member of the public to contact the court in person or by telephone, with a complaint or dispute. A preliminary analysis is then made of the case in order to recommend which dispute resolution process is most suitable to resolve it. Various criteria is then applied to reach that decision, for example, the kind of issues involved, what kind of compensation is likely to be awarded if successful, whether witnesses or other evidence will be needed, whether rights need to be protected and what services are available. The enquiring party is then advised about the processes that might be appropriate to the case and is given relevant referral details, which may be to departments within the court or to outside agencies.¹³⁴ The initial preliminary analysis or intake screening is the key feature of the Multidoor Courthouse. Working with a network of courts, government agencies and ADR centres, it aims to give an individual and specialised answer to each enquirer. This may also involve referring any non-legal problems brought in by parties to the appropriate social services agency. The case analysis is done by an intake officer, whose role requires quite a high level of skill. According to Brown and Marriot, the experiment seems to be working favourably.¹³⁵ In the author's view, the experiment is worth emulating by other jurisdictions, including Zambia.

¹³³ Brown and Marriot, *Id.* n 17 above at p.45.

¹³⁴ Brown and Marriot, *id.* n 17 above, at p.46.

¹³⁵ *Ibid.*

The following chart prepared by the Academy of Experts and reproduced as Appendix 1 by Paul Newman in his book,¹³⁶ demonstrates how parties lose control of their disputes the more formalised the method of dispute resolution adopted. It is clear from the chart that negotiations allow the greatest party control and litigation/arbitration, the least.



¹³⁶ Id n 48 above.

CHAPTER FOUR

HISTORICAL BACKGROUND TO DISPUTE RESOLUTION IN ZAMBIA

In order to understand the Zambian court system as it exists today, it is necessary to comprehend its history. This approach is important because the basic features of the judicial system can be traced back to an historical origin or can be accounted for as a latter-day attempt to be rid of some offensive aspect of colonial administration of the courts.¹ From the time the British Government colonised the area in Southern Africa known as Northern Rhodesia², they made a distinction between the European settlers and native Africans.³ The British colonisers came with their own system of law but adopted a policy of qualified toleration of indigenous law which applied to native Africans.⁴ Thus a dual system of law came to exist.

4.1 Pre-Colonial Period Dispute Resolution Mechanisms

In pre-colonial Zambia, dispute resolution mechanisms were based on the indigenous or customary laws of the various ethnic groups⁵. By indigenous or customary law is meant the body of law that is 'home grown' in, or autochthonous to, Africa as distinguished from the body of extraneous law introduced in Africa namely, the Western inspired law introduced in Africa as a result of colonialism.⁶ Also to be distinguished from indigenous or customary law

¹ Earl L. Hoover, John C. Piper and Francis O. Spalding (1970). 'One Nation, One Judiciary: The Lower Courts of Zambia.' *Zambia Law Journal*. Vol.2. Nos. 1 and 2, at p.4.

² Now, Zambia.

³ Hoover, id. n1 above.

⁴ Anyangwe, Carlson (1998). 'The Whittling Away of African Indigenous Legal and Judicial Systems.' *Zambia Law Journal*, Special Edition, at p.49.

⁵ By pre-colonial Zambia we are referring to the period before the British South Africa Company (B.S.A.Company), a commercial concern incorporated by Royal Charter on 29 October 1889, took over the administration of the territory as a British Protectorate.

⁶ . Anyangwe, C. id. n 4 above, at p.46.

is the post-independence nationally legislated norms inspired by Western law.⁷ Customary law is in essence, what people make through their practice and the respect they accord to its precepts and institutions.⁸ During this period, the maintenance of harmony within the family and indeed the village was of paramount importance. Thus, within the nuclear or extended family or village, conflicts had to be resolved soon after they had arisen to preserve harmonious relationships. Heads of families, village elders, headmen, chiefs, paramount chiefs and kings, where kings existed such as in Barotseland⁹, played an important role in this regard.

Dispute resolution mechanisms such as conciliation, mediation and arbitration were part and parcel of the justice delivery system of the time. On a family level, a person in authority, for example a father or husband, would intervene and have the warring members of the family reconcile while giving them the opportunity to resolve the issue themselves amicably. Where that strategy failed, the 'mediator' would hear the disputants and their witnesses and impose a solution on the parties. At this point the neutral third party would in effect be playing the role of arbitrator.

In addition to the dispute resolution mechanisms alluded to above, pre-colonial Zambia had its own forms of courts, known as traditional courts or chiefs' courts. These were institutions where most people took their disputes, when all other methods of dispute resolution failed. Among the Lozi people of Western Zambia,¹⁰ for example, when a dispute between members of the same village could not be settled at home or by local arbitration, the case was referred to the court of councillors of the village. Appeals lay to the King in Council known as

⁷ Ibid.

⁸ Ibid.

⁹ Due to its unique position in the history of Zambia, a discussion of Barotseland follows.

¹⁰ The Lozi people dwell in the great flood plain along the Zambezi River in Western Province. They still maintain their Kingdom and traditional way of life with an elaborate court structure not found anywhere else in the country, which operates parallel with the official judicial system.

the *Kuta*. The Lozi, like the other ethnic groups in the rest of Northern Rhodesia, disapproved of any irremediable breaking of relationships. They nurtured the value that villages should remain united. Throughout court hearings of this kind the judges tried to prevent the breaking up of relationships and to make it possible for the parties to live together amicably in future¹¹. The main role of the traditional courts therefore, was to be conciliatory. They strove to effect a compromise acceptable to, and accepted by, all the parties. Writing about the judicial system of the Barotse people of Northern Rhodesia, Gluckman¹² was of the view that the task of the court officials was related to the nature of social relationships out of which sprung disputes that came before them. In order to fulfill their task, the judges had to constantly broaden the field of enquiries, and consider the total history of relations between the litigants, not only the narrow legal issues raised by one of them.¹³

In his studies Gluckman¹⁴ further discovered that Lozi law in treating the code of Kinship stressed duty and obligation rather than right. Generosity and forbearance were the main obligations and these were extended to neighbours and fellow citizens. Lozi courts did not, therefore, operate along the same lines as present day courts which put emphasis on the legal rights of the litigants at the expense of future relations. The indigenous judicial system could thus be described as being characterised by simple and informal procedures, compensation rather than punishment, peaceable reconciliation and mediation and, in some cases, arbitration. This was so because of the importance attached to the notion of settling disputes without the rupture of harmonious relationships or the creation of life long enmity.¹⁵

¹¹ M. Gluckman (1955). *The Judicial Process among the Barotse of Northern Rhodesia*. p.21.

¹² Ibid.

¹³ Ibid.

¹⁴ M. Gluckman, id. n 11 above, at p.29.

¹⁵ Silungwe, A. (1990). 'Alternative Dispute Resolution'. Paper presented at the First Judicial and Law Association of Zambia Seminar on ADR held at Lusaka, Zambia 16-17 October, 1990.

4.2 Colonial Period Dispute Resolution Mechanisms

The British South Africa Company (BSA Company) governed Zambia, then known as Northern Rhodesia, during the period 1891-1923. The Royal Charter of Incorporation of the British South Africa Company¹⁶ of 29th October 1889 entrusted the administration of Northern Rhodesia to the Company. By terms of its Charter, the Company was under an obligation to submit periodic reports on its administration of the territory to the British Government.

Section 14 of the Charter gave its approval to the differentiation between European settlers and native Africans. It provided that in the administration of justice to the said people or inhabitants, careful regard was always to be had to the customs and laws of the class or tribe or nation to which the parties respectively belonged. This was especially so with regard to the holding, possession, transfer and disposition of lands and goods. It also applied to testate or intestate succession, marriage, divorce, legitimacy, and other rights of property and personal rights. However, this was subject to any British laws which may have been in force in the territory and applicable to the people or inhabitants thereof. While the Charter entrusted the administration of the territory to the BSA Company, in practice the Company left the judicial administration of Africans to Africans. This was because the sheer size of the territory permitted only minimal visits by the BSA Company officers.¹⁷

Between 1900 and 1911, Northern Rhodesia was divided into Barotziland-North-Western Rhodesia and North-Eastern Rhodesia. The two divisions were administered by the British South African Company under different Orders in Council, namely, the Barotziland North-Western Rhodesia Order in Council, 1899 and the North-Eastern Rhodesia Order in Council, 1900.

¹⁶ Hereinafter referred to as the 'BSA' Company.

¹⁷ Hoover, Piper and Spalding, id. n1 above.

The Barotziland-North–Western Rhodesia Order in Council, 1899 applied to North-Western Rhodesia while the North-Eastern Rhodesia Order in Council, 1900 applied to North-Eastern Rhodesia. The former Order in Council established an elaborate judicial system in the areas to which it applied with provision for the appointment of judges and magistrates. English law applied to the territory, except where otherwise stated in the Order. The Order did not extend any official recognition to tribal courts that were already in existence.

The North–Eastern Rhodesia Order in Council, 1900 established a more elaborate judicial structure than the Barotziland-North–Western Rhodesia Order in Council 1899. Article 21 of the 1900 Order in Council created the High Court with civil and criminal jurisdiction over all cases in the territory. Appeals lay to the Majesty in Council with the high commissioner having the power, in criminal cases, to remit or commute in whole or in part any sentence of the High Court.¹⁸ While Article 7 of the Order in Council gave the BSA Company power to appoint an administrator for the territory, Article 8 empowered the commissioner to reject any regulations made by the administrator. Like the Barotziland–North–Western Rhodesia Order in Council, the North–Eastern Rhodesia Order in Council did not extend official recognition to tribal courts. This state of affairs remained the same until the late nineteen twenties.¹⁹ Thus, two distinct systems of judicial administration developed—the officially recognised courts administering English law, and infrequently, customary law, in civil cases between natives and the *de facto* tribal courts administering customary law.²⁰

Between 1900 and 1911 a colonial infrastructure encompassing the administrative and judicial aspects was developed in the two territories.

¹⁸ Arts. 26 and 28, respectively.

¹⁹ Hoover, Piper and Spalding, *id n1* above at p.8.

²⁰ *Ibid.*

Magisterial districts were established in North–Eastern Rhodesia in 1900.²¹ The Barotse Native Police Force was created in 1901.²² In 1902, justices of the peace, magistrates and district commissioners were increased in number. In 1906 North–Western Rhodesia acquired a High Court and two judges appointed by the high commissioner.²³ Barotziland North-Western Rhodesia and North-Eastern Rhodesia were amalgamated in 1911 through the Northern Rhodesia Order in Council, 1911, promulgated on 4 May, 1911. Its provisions were brought into operation by the Northern Rhodesia Proclamation²⁴ on 17 August 1911. The Northern Rhodesia Order in Council revoked the two Orders in Council of 1899 and 1900. With respect to the court systems, the Northern Rhodesia Order followed closely the pattern of the North-Eastern Rhodesia Order in Council 1900, the only material variation being the appointment of High Court Judges.²⁵

In due course, the administration of Northern Rhodesia proved too costly for the BSA Company. Consequently, the Company withdrew from the administration of the territory in 1923 after detailed negotiations between representatives of the Company and the British government and handed over administration of the territory to the Crown on 20th February 1924.²⁶ The 1911 Order in Council was revoked and a governor was appointed for the territory.²⁷ The High Court,²⁸ magistrates' courts²⁹ and native commissioners' courts³⁰ were retained.

²¹ Government Notice No. 1, 1900.

²² High Commissioner Proclamation No. 19, 1901.

²³ High Commissioner Proclamation No. 6, 1906.

²⁴ Number 1 of 1911.

²⁵ Whereas under the BSA Company High Court judges were appointed by the High Commissioner, under the 1911 Order in Council, High Court Judges were now appointed by the Secretary of State – Art. 21 of the Northern Rhodesia Order in Council.

²⁶ Northern Rhodesia Order in Council, 1924. The Crown took over direct control of the territory from 20 February 1924 until Zambia's independence on 24 October, 1964.

²⁷ Art. 6.

²⁸ Art .27(1).

²⁹ Art .32.

³⁰ Art .35.

The Northern Rhodesia Order in Council, 1924 provided for Western-type courts with full jurisdiction, both civil and criminal, over persons and all matters, to be exercised in accordance with introduced law. At the same time, however, it was explicitly laid down that this introduced law was to be in force so far only as the circumstances of the territory and its inhabitants permitted, and subject to such qualifications as local circumstances deemed necessary. In as far as applicability of customary law in cases involving 'natives' was concerned, a 'repugnancy test' was applicable. Thus in such civil and criminal cases, the Western-type courts were to be guided by customary law in so far as it was applicable and not repugnant to justice and morality or inconsistent with any enactment³¹. The introduced law at first applied only to Europeans; but later, it was extended to 'Europeanised' Africans as well.³²

While the dual legal system operated in urban areas, rural areas continued to apply the tried and tested indigenous or customary law. This law also applied to urban dwellers that had not adopted the European mode of life. Since such Africans were in the majority, the overwhelming greater part of all litigation which concerned Africans were conducted in what were known as 'native', 'local', or 'customary' courts. Customary courts generally administered native law and custom and their jurisdiction was limited to 'natives', a term which excluded Europeans. This racial criterion for jurisdiction over persons, as Anyangwe³³ explains, "Led to a duality of status among Africans, that is to say, those subject to Western law and those subject to 'native' law and custom."

Initially the colonial administration left judicial administration of Africans to Africans themselves. Indigenous law and judicial institutions continued as before colonial rule was extended to the territory. However, as the colonial government

³¹ Northern Rhodesia Order in Council 1924, Art.36.

³² Anyangwe, id. n 4 above. The term 'Europeanised' Africans referred to those Africans who had adopted the colonisers' lifestyles and these were mostly the educated Africans.

³³ Anyangwe, id. n 4 above at p.50.

consolidated its tenuous hold over the territory and contact with indigenous people and traditional authorities increased, the colonial administrators and judges abandoned the policy of non-interference and brought restriction to bear on the applicability of indigenous law. Firstly, the colonial government statutorily directed the formal (Western type) courts to apply and enforce only those rules of indigenous law that had passed the non-repugnancy and non-incompatibility tests.³⁴ Secondly, the colonial government, by warrant establishing the courts, reduced the jurisdiction of customary courts. Thirdly, the dual court system led to two distinct systems of judicial administration, namely, customary courts administering customary law and Western-type courts administering introduced law and, infrequently, 'non-repugnant' indigenous law in civil cases between natives.³⁵ The colonial authorities statutorily established urban and rural customary courts and refused to officially recognise the village traditional adjudicating bodies and instead put pressure on the newly introduced customary courts to assume the powers of traditional adjudicating bodies. The newly introduced customary courts were successful to some extent but the traditional adjudicating bodies, particularly in rural areas, managed to retain their traditional powers.

By 1913 two major changes had been effected in the judicial systems. Firstly, the High Court was given the discretion to hear all criminal matters either as a court of first instance or as a court of review.³⁶ Secondly, in cases between Europeans and Africans, the court was empowered to "apply customary law whenever...it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law".³⁷ However, such law or custom should not have been repugnant to natural justice, equity and good government. In the meantime, tribal courts continued to administer justice with relatively little

³⁴See generally, Allot (1970). *New Essays in African Law*.

³⁵ Anyangwe, id. n 4 above.

³⁶ Northern Rhodesia Proclamation No. 1 of 1913,

³⁷ Id. n 36 above, s.5.

interference from the British, a situation apparently neither the tribal courts nor the African litigants desired to see changed.³⁸ The *de facto* courts were apparently, a convenient and economical method by which the BSA Company could control the African populations without having to support a large administrative staff.

At this time, the economic conditions of the majority of Africans were not such as could enable them to live independently of their kin. Therefore, kinship groups and the authority of chiefs and tribal courts remained quite strong. With Africans being reluctant to undermine the authority of the tribal courts by appealing to the official courts, the dual court structure functioned quite smoothly at this stage. At this point in time, recognition was still not extended to tribal courts. However, customary law was applied in civil cases between natives so far as that law was applicable and was not repugnant to natural justice or morality, or to any order made by His Majesty in Council, or to any law or ordinance for the time being in force.³⁹

The problem of management of native affairs with limited administrative staff, led to the adoption of the policy of indirect rule using existing native institutions. To this end, the Native Authorities and Native Courts Ordinances of 1929 were drawn. In 1929 the colonial government extended the official recognition of Native Courts through the Native Courts Ordinance 1929.⁴⁰ The Ordinance provided that the courts would consist of such chief, headman, elder or council of elders in the area assigned to it as the governor directed.⁴¹ The Ordinance neither elaborated on the jurisdiction of the native courts nor established a system of appeals from these courts. However, the Ordinance did entrust the subordinate courts with the power to see to the proper administration of justice

³⁸ 1931 and 1935 Northern Rhodesia Native Affairs Annual Reports, pp. 8 and 29, respectively.

³⁹ Northern Rhodesia Order in Council, 1924, Art.36.

⁴⁰ These courts later became to be known as local courts.

⁴¹ Native Courts Ordinance, No. 3 of 1929 s.3 (2).

in these courts through the exercise of a review and revisory jurisdiction over native court decisions.⁴² The High Court Ordinance of 1933⁴³ clarified the High Court's position vis-à-vis the subordinate courts and extended its powers and jurisdiction to those of the High Court of Justice of England. It also elaborated on the rules and procedure to be followed by the court in cases involving customary law.

Present day local courts trace their roots to the Native Courts Ordinance 1936,⁴⁴ which came about following a decision to create urban native courts, a decision influenced by the influx of labour migrants from rural areas to urban areas, particularly the Copperbelt region. Native courts were empowered to try cases involving customary law so far as the same was not repugnant to justice or morality or inconsistent with the provisions of any Order of the King in Council or with any other law in force in the territory.⁴⁵

4.3 The Judicial System Under The Federation of Rhodesia and Nyasaland.

While under the direct control of the Colonial Office, Northern Rhodesia adopted a policy of closer co-operation with her neighbours. Thus, on 1st August 1953, at the initiative of Britain, the self-governing British colony of Southern Rhodesia and the British protectorates of Northern Rhodesia and Nyasaland formed the Federation of Rhodesia and Nyasaland.⁴⁶ The Capital of the Federation was

⁴² S.6. Native Courts Ordinance No. 3 of 1929.

⁴³ No. 18 of 1933.

⁴⁴ No. 10 of 1936.

⁴⁵ Native Courts Ordinance, No.10 of 1936 s.12 (a). Repugnancy to morality meant anything that offended the sense of rightness or decency or was contrary to fundamental human rights, for example, customary laws supporting slavery would be repugnant to morality.

⁴⁶ The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953 created the Federation and defined the powers of the federal government and those of the territorial governments. The Federation floundered and officially collapsed on 31st December 1963. One of the major reasons for the collapse was that the black African nationalists wanted a greater share of power than the settler community was willing to concede. The Africans demonstrated against the Federation between 1960 and 1961. In 1962 there was a strong movement for its dissolution particularly from Northern Rhodesia.

Salisbury.⁴⁷ As a result of the policy, joint services in various fields were established. Of interest to this study, however, was the establishment of a Court of Appeal for the Federation based in Harare, which determined appeals from the High Courts of the three territories.

On the purely domestic or territorial plane, two final major statutory enactments were passed prior to independence, namely, the High Court Ordinance of 1960⁴⁸ and the Native Courts Ordinance of 1960.⁴⁹ The former was concerned mainly with modernising court rules and procedures, while the latter extended the limits of native court jurisdiction.

4.4 The Judicial System at Independence

The Federation of Rhodesia and Nyasaland was officially dissolved on 31 December, 1963. The former protectorate of Northern Rhodesia, now renamed Zambia, attained its independence as a Republic within the Commonwealth of Nations on 24th October 1964. With the advent of independence, there came a spate of changes in what was now the Zambian judicial system. Chief among these changes was the introduction of a new constitution in January 1964, which established for the first time a Court of Appeal solely for the territory. Provision was made in the Constitution for the appointment of a Justice of Appeal.

At independence, the native courts remained essentially a separate system, unintegrated with the other elements of the judicial system.⁵⁰ Meanwhile, the subordinate courts and High Court during the period to independence continued to administer the laws and procedures imported from England.

⁴⁷ Now Harare.

⁴⁸ No.41 of 1960.

⁴⁹ No.14 of 1960.

⁵⁰ Hoover *et al*, id. n 1 above, at p. 19.

During 1964 the process of integrating the native courts within the judicial system was begun and considerable progress was made.⁵¹ Indeed, the chief justice of the time was said to have attached the greatest importance to a speedy and effective court system within the judiciary and to have regarded the achievement of that objective as the greatest single step in the advancement of law and order in the history of the country.⁵²

To this end, far-reaching changes were made in the native courts system. The native courts became for the first time a part of the Judiciary and were brought under the control of the chief justice. The Judicial Service Commission created under the new constitution made new native court appointments. 1965 was a year of progress and change. For instance, the 1965 Annual Report⁵³ noted that the administrative and establishment problems involved in the integration of the native court system within the judiciary were largely resolved and substantial progress was made in the creation of a unified system of justice for the whole country. The Report referred to the customary law courts as 'local courts'. However, technically, the courts were still native courts until the Local Courts Act was put before Parliament, adopted and brought into force in 1966.⁵⁴ The Local Courts Act repealed both the Native Courts Ordinance and the Barotse Native Courts Ordinance. Additionally, it constituted local courts⁵⁵ and substituted them for the old native courts.⁵⁶ It provided for basic appellate jurisdiction in subordinate courts of the first or second class.⁵⁷ It permitted a local court to exercise the criminal jurisdiction assigned to it regardless of whether the parties were Africans or not and substituted the term 'local court justice' for the term

⁵¹ Republic of Zambia Annual Report of the Judiciary and the Magistracy, 1964 p.1.

⁵² Id. n 51 above at p.4.

⁵³ Republic of Zambia Annual Report of the Judiciary and the Magistracy, 1965 p.1

⁵⁴ Act No. 20 of 1966.

⁵⁵ S.4 of the Act.

⁵⁶ Id. n 32 above, s.72 (1) (a).

⁵⁷ Local Courts Act, s. 56.

'native court member'.⁵⁸ It also substituted Local Courts Advisor for the former Native Courts Commissioner.

⁵⁸ Id. n 54 above, s. 6(1).

CHAPTER FIVE

INSTITUTIONS OF JUSTICE DELIVERY IN ZAMBIA

5.1 Post-independence Judicial System

During the late fifties and early sixties, a wind of change in the form of independence blew across the African continent. Northern Rhodesia attained political independence on 24 October 1964 and was renamed Zambia. As Silungwe¹ notes, the end of the colonial era saw a number of milestones that had an impact on the history of dispute resolution in the country. Firstly, the independence of the judiciary was established under the independence constitution. Secondly, the native and urban native courts were divorced from provincial administration, brought under the aegis of the judiciary and reconstituted as local courts. Thirdly, the newly acquired freedom of movement meant that rural dwellers began to flock to urban areas in search of better standards of living.

White² alludes to the fact that population mobility in the form of labour migrations to and concentration in specific areas where there were plantations, mines, industries, or government services, was evidently a major factor that prompted the creation of urban native courts, later to be known as local courts. The emergence of urban and peri-urban centres, occupied by, among others, labour migrants saw the growth of an environment completely different from the homogenous village milieu. The urban environment had people from different

¹ Silungwe, A. (1990). 'Alternative Dispute Resolution.' Paper presented to the First Judicial and Law Association of Zambia Seminar held at Mulungushi International Conference Centre, Lusaka, Zambia. 16 – 17 October 1990.

² C.M. White (1964). 'The Changing Scope of Urban Native Courts in Northern Rhodesia.' 8 Journal of African Law.p.29.

ethnic communities. There was no headman or chief to whom the migrants could look for protection or to settle their disputes. These factors necessitated the creation of customary courts in urban and peri-urban centres.

Independence brought about an influx of migrants into urban areas. This continued into the seventies and eighties and resulted into fragmentation of society, which became more complex than the traditional way of living. Without the traditional authorities to take their disputes to and families having lost their status as the primary dispute resolution mechanism, people increasingly resorted to courts to resolve their differences.

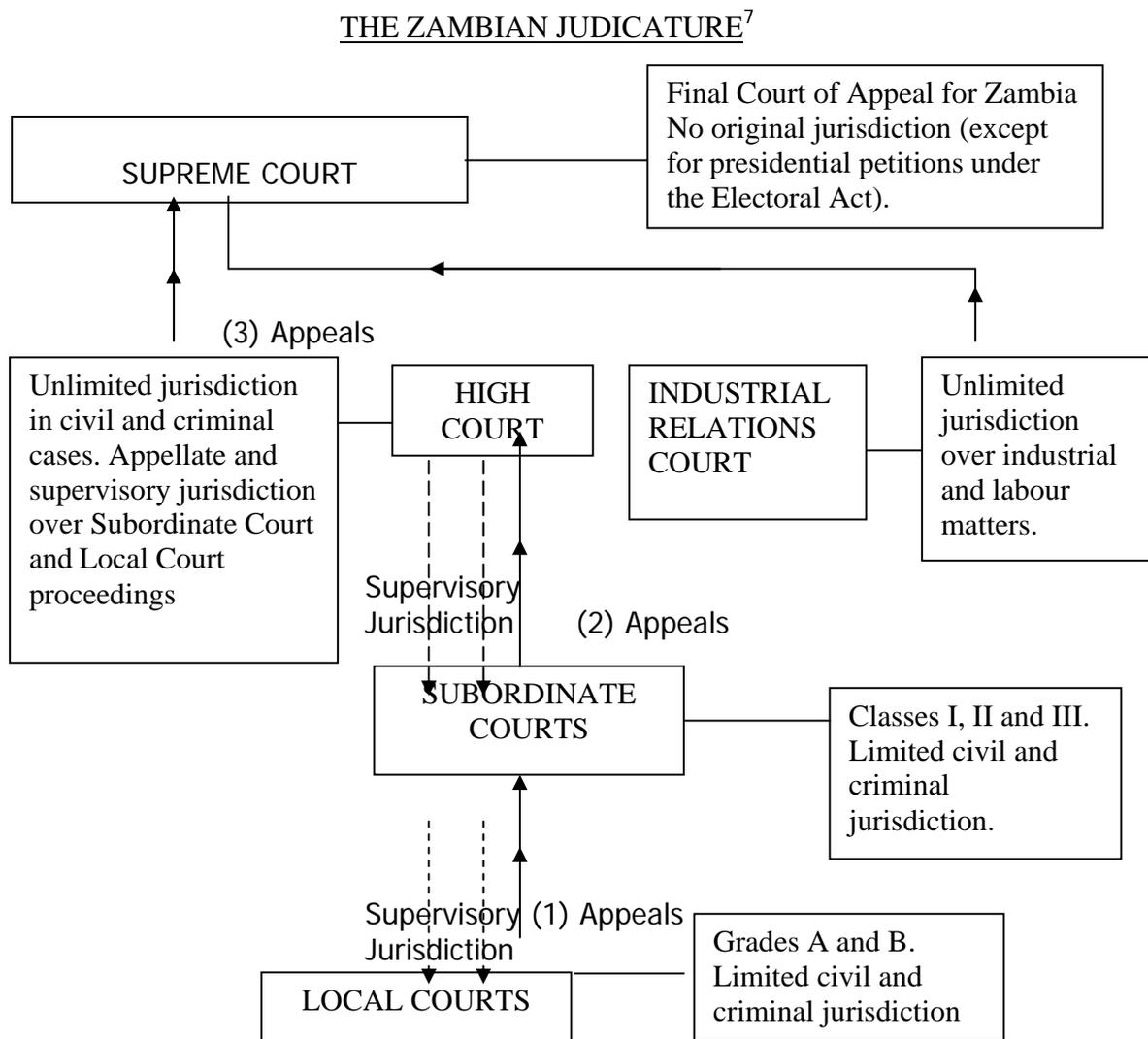
The case loads of courts gradually increased due to the increasing demand on their services and by the nineties, a backlog of cases had slowly begun to build up. Delays in the dispensation of justice became the order of the day. Costs of such kind of justice began to soar and eventually prompted concerned lawyers and members of the bench to increasingly turn to ADR which had proved relatively successful on the international scene. This was the genesis of the ADR movement in Zambia. However, the fact that more people started resorting to litigation for redress did not mean that the other forms of dispute resolution mechanisms had not made any impact on justice delivery in Zambia. As a study carried out by the Women and Law in Southern Africa Research Trust Zambia (WLSA) in 1999³ revealed, the informal structures such as the family, churches, Non-governmental Organisations (NGO's), chiefs' and headmen's courts have played important, albeit supplementary, roles in justice delivery. These roles have been appreciated by members of society and most people have only resorted to courts for redress when these informal means of dispute resolution have failed.⁴

³ *Women and Justice in Zambia: Myth or Reality*, p. 58.

⁴ *Ibid.*

5.2 The Judicature

The Judicature for Zambia comprises of the Supreme Court of Zambia, the High Court of Zambia, the Industrial Relations Court, the Subordinate Courts, the Local Courts and such lower courts as may be prescribed by an Act of Parliament.⁵ The Judicature is autonomous and is administered in accordance with the Judicature Administration Act.⁶ The diagram below illustrates the structure of the Zambian Judicature:



⁵ Art.19 (1) of the Constitution as amended in 1996 by the Constitution of Zambia (Amendment) Act, 1996.

⁶ No. 42 of 1994, Chapter 24 of the Laws of Zambia.

⁷ Illustrative diagram taken from, Kanganja, Joshua Lawson (1980). Courts and Judges in Zambia: The Evolution of the Modern Judicial System. Unpublished Ph.D. Thesis, at p.26.

5.2.1 Local Courts

(i) Establishment and Composition

The Local Courts Act ⁸ has provisions for the recognition and establishment of local courts, previously known as native courts. Section 4 of the Act empowers the Minister of Legal Affairs by court warrant under his hand, to recognise or establish such local courts, as he thinks fit. Section 3 of the Act provides for the appointment, by the Judicial Service Commission, of a Director of Local Courts, a Deputy Director of Local Courts and Local Court Officers. A Local Court consists of a presiding justice either sitting alone or with such number of members as may be prescribed by the Minister in the court warrant. A single court justice constitutes the court in the absence of the presiding justice.⁹

(ii) Jurisdiction and Law

Local courts are of different grades and each grade exercises jurisdiction only within the limits prescribed for such grades.¹⁰ There are presently two grades of local courts: local courts grades A and B. A study conducted by the Women and Law in Southern African Research Trust, Zambia¹¹ in 1999 found that there are 438 local courts countrywide.¹² Local courts have criminal jurisdiction over the hearing, trial and determination of criminal matters committed wholly or partly within their jurisdiction, but only to the extent prescribed for the grades to which they belong. No local court has jurisdiction to try a case in which a person is charged with an offence in consequence of which death is alleged to have occurred or which is punishable by death.¹³

⁸ Act No. 20 of 1966, Chapter 29 of the Laws of Zambia.

⁹ S.6.

¹⁰ S.5 (1).

¹¹ Hereinafter referred to as 'WLSA.'

¹² 113 Grades A and 325 Grades B. See WLSA Trust Zambia (1999), id. n 3 above, at p.58.

¹³ S.11 of the Local Courts Act.

Local courts administer African customary law as long as it is not repugnant to natural justice or morality or incompatible with the provisions of any written law. It should also not be in violation of provisions of by-laws and regulations made under the provisions of the Local Government Act¹⁴ in force in the area of jurisdiction the local court is authorised to administer by the Minister.¹⁵

(iii) Practice and Procedure

The Local Courts Rules regulate the practice and procedure of local courts. However, no legal practitioner, other than a practitioner who is a party and acting solely on his own behalf, may appear or act before a local court on behalf of any party to any proceedings. The exception is in respect of a criminal charge under any of the provisions of by-laws and regulations made under the provisions of the Local Government Act or any written law which such court is authorised to administer.¹⁶

Even though local courts are at the bottom of the judicial hierarchy, in terms of volume of business they handle most of the civil cases arising from torts, contract, land disputes involving customary land and African customary law.¹⁷

5.2.2 Subordinate Courts

(i) Establishment and Composition

Section 3 of the Subordinate Courts Act¹⁸ establishes courts subordinate to the High Court in each district as follows: a subordinate court of the first class to be presided over by a principal resident magistrate, a senior resident magistrate, resident magistrate or magistrate of the first class. The second court in the hierarchy is the subordinate court of the second class to be presided over by a

¹⁴ Chapter 281 of the Laws of Zambia.

¹⁵ S.12 (1) of the Local Courts Act.

¹⁶ Id. n 8 above, s.15.

¹⁷ WLSA, id. n 3 supra, at p.4.

¹⁸ No. 4 of 1972, Chapter 28 of the Laws of Zambia.

magistrate of the second class, and lastly, a subordinate court of the third class to be presided over by a magistrate of the third class. At the time of the WLSA Zambia study in 1999, there were 65 magisterial districts in Zambia¹⁹.

(ii) Jurisdiction and Law

Each subordinate court has the jurisdiction and powers provided by the Act and any other written law, and ordinarily exercises such jurisdiction only within the limits of the district for which each such court is constituted.²⁰ Subordinate courts are courts of record.²¹ They administer law and equity concurrently.²² Further, they are empowered to enforce African customary law provided it is not repugnant to justice, equity or good conscience, or incompatible with any written law.²³ Customary law is deemed applicable in civil cases and matters where the parties thereto are African and particularly in civil cases and matters relating to marriage under African customary law, to tenure and transfer of real and personal property, and to inheritance and testamentary dispositions. A subordinate court will enforce African customary law in civil matters between Africans and non Africans, where it appears that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law. However, in all cases, customary law will not be applied where there is evidence that the parties have agreed to exclude such law.²⁴ A subordinate court has no power to issue writs of *habeas corpus*.²⁵ In criminal matters, subordinate courts have jurisdiction conferred on them by the Criminal Procedure Code,²⁶ the Subordinate Courts Act or any other law.²⁷ The

¹⁹ The position still remains the same to date.

²⁰ Id. n 18 above, s.4.

²¹ Id, n 18 above, s11.

²² Id, n 18 above, s15.

²³ Id. n 18 above, s.16.

²⁴ Proviso to s.16 of the Act.

²⁵ S.8 of the Act.

²⁶ No. 23 of 1933, Chapter 88 of the Laws of Zambia.

²⁷ S.19 of the Subordinate Courts Act.

Chief Justice has the power to authorise an increase in the civil jurisdiction of subordinate courts.²⁸

(iii) Practice and Procedure

The jurisdiction vested in subordinate courts is exercised in the manner provided by the Subordinate Courts Act, the Criminal Procedure Code and rules made under both Acts. In default thereof, the jurisdiction is exercised in substantial conformity with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction.²⁹

5.2.3 Industrial Relations Court

(i) Establishment and Composition

The Industrial Relations Court was established by section 64 of the Industrial Relations Act.³⁰ Section 84 of the Industrial and Labour Relations Act,³¹ ensures the continuation of the Court under it. The Court consists of the Chairman,³² Deputy Chairman and not more than ten members as the responsible Minister may appoint.³³ A bench consists of either the Chairman or the Deputy Chairman and two members. The Chairman and Deputy Chairman must be qualified to be appointed as judges of the High Court.³⁴

(ii) Jurisdiction and Law

The Court has original and exclusive jurisdiction to hear and determine any industrial relations matters and any proceedings under the Act. It may commit and punish for contempt any person who disobeys or unlawfully refuses to carry

²⁸ Id. n 18 above, s.24.

²⁹ Id. n 18 above, s.12.

³⁰ Act No. 36 of 1990.

³¹ Act No. 27 of 1993.

³² Or chairperson.

³³ S.86 (1) of the Industrial and Labour Relations Act, No. 27 of 1993, Chapter 269 of the Laws of Zambia.

³⁴ S.86 of the Industrial and Labour Relations Act

out or to be bound by an order made against him by the Court. However, a complaint or application must be presented within thirty days of the occurrence of the event that gave rise to the complaint or application for the Court to consider it. This requirement can be waived on application by the complainant or applicant and the Court may extend the period for a further period of three months after the date on which the complainant or applicant has exhausted the administrative channels available to that person.³⁵

Industrial relations matters include inquiries, awards and decisions in collective disputes; interpretation of the terms of awards, collective and recognition agreements; and general inquiries into, and adjudication on, any matter affecting the rights, obligations and privileges of employees, employers and their representative bodies.

The Court has jurisdiction to hear and determine any dispute between any employer and employee notwithstanding that such dispute is not connected with a collective agreement or other trade union matter.³⁶ Unlike the High Court and Supreme Court, the Industrial Relations Court is not bound by the strict rules of evidence in civil or criminal proceedings, the main object of the Court being to do substantial justice between the parties.³⁷ The Court has the exclusive jurisdiction to resolve any ambiguity in any collective or recognition agreement brought to its notice by any of the parties concerned.³⁸

³⁵ Id. n 31 above, s.85.

³⁶ Id. n 31 above, s.85 (4). See the case of *Zambia Consolidated Copper Mines Limited v James Matale* (1996) Selected Judgments of Zambia (SC) (unreported), where the Supreme Court ruled that there was nothing in the language of s.85 (4) to suggest that certain genuine complaints of any particular kind or category may not be litigated, such as wrongful, unjust or unfair dismissal.

³⁷ Id. n 31 above, s.85 (5). See the case of *Zambia Consolidated Copper Mines Limited v. Richard Kangwa and Others*. SCZ Judgment No. 25 of 2000 (unreported), where the Supreme Court held that the Industrial Relations Court is a court mandated to do substantial justice, unfettered by legal niceties. See also the case of *Barclays Bank (Z) Limited v. Chola and Mubanga* (1995 – 1997) ZR. 212 (SC), where the Supreme Court gave a similar ruling.

³⁸ Id. n 31 above, s.85 (7).

(iii) Practice and Procedure

Practice and procedure in the Court is governed by the Industrial Relations Court Rules. The Rules deal with issues such as applications to the Court; complaints to the Court; appeals to the Court; reference of collective disputes to the Court, evidence and procedure in Court; filing of applications, appeals, complaints, references, statements of claim, answers, etc.

5.2.4 High Court

(i) Establishment and Composition

The High Court of Zambia as constituted by the Constitution³⁹ is established as the High Court of Judicature for Zambia by Section 3 of the High Court Act.⁴⁰ The law provides for twenty Puisne judges of the Court.⁴¹

(ii) Jurisdiction and law

The High Court is a Superior Court of Record, which in addition to any other jurisdiction conferred by the Constitution or any other law, possesses and exercises the entire jurisdiction, powers and authorities vested in the High Court of Justice in England. It has original and unlimited jurisdiction in all civil and criminal matters.⁴² The jurisdiction includes the judicial hearing and determining of matters in difference. It also includes the administration or control of property of persons and the power to appoint or control guardians of infants and their

³⁹ Chapter 1 of the Laws of Zambia.

⁴⁰ No. 41 of 1960, Chapter 27 of the Laws of Zambia.

⁴¹ Supreme Court and High Court (Number of Judges) Act, No.21 of 1988, Chapter 26 of the Laws of Zambia.

⁴² In the case of *Zambia National Holdings Limited and United National Independence Party v. The Attorney General* (1993 – 1994) ZR 115 (SC), it was held that the jurisdiction of the High Court is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law. As a general rule, no cause is beyond the competence and authority of the High Court and no restriction applies as to type of cause and other matters as would apply to the lesser courts. However, the High Court is not exempt from adjudicating in accordance with the law.

estates, keepers of the persons and estates of idiots, lunatics and persons of unsound mind who are unable to govern themselves and their estates.⁴³

In probate and matrimonial matters, the jurisdiction of the Court is exercised in substantial conformity with the law and practice for the time being in force in England, subject to the Act and rules of Court made in that behalf.⁴⁴

The Court administers law and equity concurrently. Where there is a conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity prevail.⁴⁵

(iii) Practice and Procedure

The jurisdiction vested in the Court as regards practice and procedure is exercised in the manner provided by the High Court Act and the Criminal Procedure Code.⁴⁶ Additionally, by any other written law or any rules, orders or directions of the Court as may be made under the High Court Act or the Criminal Procedure Code or other written law. In default thereof, the jurisdiction must be exercised in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.⁴⁷ However, the Civil Court Practice 1999⁴⁸ of England or any other civil court practice rules issued after 1999 in England do not apply to Zambia unless they relate to matrimonial matters.⁴⁹

⁴³ Id. n 40 above, s.9 (2).

⁴⁴ Id. n 40 above, s.11 (1).

⁴⁵ Id. n 40 above, s.13.

⁴⁶ Id. n 26 above.

⁴⁷ (1). *Rahim Obaid v. The People* (2) *Nadehim Quasmi v. The People* (1977) ZR 119 (HC) where the High Court decided that the High Court is a creature of the Constitution of the Republic of Zambia. The Court also examined the practice and procedure followed by the Court in the exercise of its jurisdiction.

⁴⁸ Also known as the Green Book.

⁴⁹ Id. n 40 supra, s.10 and proviso thereto.

The Practice and procedure of the Court is found in the High Court Rules that are amended by statutory instrument as and when necessary. The Rules are divided into Fifty-two Orders covering every aspect of procedure.

5.2.5 Supreme Court

(i) Establishment and Composition

The Constitution of Zambia constitutes the Supreme Court of Zambia as a court. The full bench of the Court comprises of nine judges including the Chief Justice and the Deputy Chief Justice, all appointed by the President subject to ratification by Parliament.⁵⁰

(ii) Jurisdiction and Law

The Court has jurisdiction to hear and determine appeals in civil and criminal matters. It also has other appellate and original jurisdiction as conferred by or under the Constitution or any other law.⁵¹

In civil matters an appeal lies to the Court from any judgment of the High Court.⁵² However, this right is subject to the following exceptions and restrictions, namely, no appeal lies to the Supreme Court from an order for extension of time for appealing from a judgment or from an order of a Judge giving unconditional leave to defend an action. Further, no appeal lies to the Supreme Court from a judgment given by the High Court in the exercise of its appellate or revisional jurisdiction without leave of the High Court or when such leave is refused, without leave of a Judge of the Supreme Court. No appeal lies to the Supreme Court from an order of the High Court or any Judge of the High

⁵⁰ Art.93 (1) and (2) of the Constitution.

⁵¹ For example, the Supreme Court has original jurisdiction under the Electoral Act in cases of petitions challenging presidential election results.

⁵² The Court also hears appeals from the Industrial Relations Court and some Tribunals such as the Lands Tribunal. In civil cases, appeals only lie to the Supreme Court on points of law or mixed fact and law. No appeal lies on lower courts' findings of fact. See the cases of *Zambia Consolidated Copper Mines Limited v. Richard Kangwa and Others* SCZ Judgment No. 25 of 2000 (unreported) and *Lawrence Chimpwena Chanda v. Dunlop Zambia Limited*. SCZ Appeal No. 2 of 2002 (unreported).

Court made with the consent of the parties. Additionally, no appeal lies to the Supreme Court from an order as to costs only which by law is left to the discretion of the Court, without leave of the Court or of the Judge who made the order or without leave of a Judge of the Supreme Court. An appeal will not be entertained from an order made in chambers by a Judge of the High Court or from an interlocutory judgment made or given by a Judge of the High Court, without the leave of the Judge of the Court or the leave of a Judge of the Supreme Court. Further, no appeal lies to the Supreme Court from an order absolute for the dissolution or nullity of marriage made by a Judge in favour of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree.⁵³ An order refusing conditional leave to defend an action is not deemed to be an interlocutory order or interlocutory judgment.⁵⁴

There are, however, exceptions to the preceding provisions. Thus the Supreme Court will entertain appeals in the following instances: -

- (i) Where the liberty of the subject or custody of an infant is concerned;
- (ii) Where an injunction or the appointment of a receiver is granted or refused;
- (iii) In the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Act;⁵⁵
- (iv) In the case of a decree nisi in a matrimonial cause or a judgment or order in any Admiralty action determining liability; and
- (v) In the case of an order on a special case stated under any law relating to arbitration.⁵⁶

⁵³ S.24 (1) of the Supreme Court Act, No. 41 of 1973, Chapter 25 of the Laws of Zambia.

⁵⁴ S.24 (2).

⁵⁵ No. 26 of 1994, Chapter 388 of the Laws of Zambia.

⁵⁶ See generally s.24 of the Supreme Court Act.

An appeal lies to the Supreme Court in any civil proceedings upon application for *habeas Corpus* against an order for the release of the person restrained as well as against the refusal of such an order.⁵⁷

On the hearing of an appeal in a civil matter, the Supreme Court may confirm, vary, amend or set aside the judgment appealed from or give such judgment as the case may require. The Supreme Court also has the power, if it appears to it that a new trial should be held, to set aside the judgment appealed against and order that a new trial be held.⁵⁸

(iii) Practice and Procedure

Section 8 of the Supreme Court Act provides that the jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by the Act and Rules of Court. If the Act or Rules of Court do not make provision for any particular point of practice and procedure, then the practice and procedure shall, in relation to civil matters, as nearly as maybe, be in accordance with the law and practice for the time being observed in the Court of Appeal in England,⁵⁹ subject to the demands of our own local conditions. The Supreme Court Rules were formulated pursuant to section 8 of the Supreme Court Act to provide for procedure and practice for the Supreme Court. Where our own Act and Rules do not make any provision in respect of some aspect of practice or procedure, the Court has recourse to the Supreme Court Practice of England.⁶⁰

⁵⁷ Id. n 53 above, s.24 A.

⁵⁸ Id. n 53 above, s.25.

⁵⁹ Id. n 53 above, s.8.

⁶⁰ Also known as the White Book.

5.3 Commissions

5.3.1 The Commission for Investigations

The office of Ombudsman has become an integral part of public institutions in a number of countries. It constitutes an office which independently receives and investigates allegations of maladministration. In Zambia the Ombudsman acts as a neutral or impartial mediator between the aggrieved person and the government. She receives complaints from members of the public and investigates them if they fall within the Ombudsman's competence. The Ombudsman in Zambia is known as the Commission for Investigations. The Commission for Investigations is an institution designed to strengthen the protection of the citizens from arbitrary exercises of authority by people holding public offices.⁶¹ The institution of Ombudsman was unknown in Zambia until 1972, as the country moved from a multi-party political dispensation to one-party rule. It emerged as one of the recommendations of the Commission appointed in 1972 to determine the constitutional framework for a one-party system of government.⁶² A substantial number of the people who appeared before the Commission called for the establishment of the office of the Ombudsman with authority to investigate abuse of power, in particular, corruption in all its forms in the country. The petitioners were concerned in that some political leaders and those with connections to public officers had accumulated considerable wealth through dubious means and in so short a time after independence.⁶³ The proposal was accepted by the Constitution Commission which came to the conclusion that there was need to establish such an office to investigate allegations of corruption and abuse of power. The establishment of such an institution would have a number of benefits. The Ombudsman would be independent and impartial; complaints would be presented informally and

⁶¹ Prime Minister, Mr. Mainza Chona, moving that the Commission for Investigations Bill, 1974 be read for a second time – Parliamentary Debates 23rd July - 2nd August, 1974 column 180.

⁶² Ibid.

⁶³ Ibid.

without any cost. Further, the Ombudsman would have flexibility in investigating complaints⁶⁴ and she would informally advise, remind and reprove public officers or institutions found wanting. The very fact that a complaint against a public officer or institution could be considered by the Ombudsman was a significant restraint on public officers.⁶⁵

All the recommendations of the Commission were accepted by the government. When the Constitution came into force in 1973, it provided for the Ombudsman in the form of a Commission for Investigations⁶⁶ and the Investigator General⁶⁷ who was chairman of the Commission. In 1974, Parliament enacted the Commission for Investigations Act which provided for the powers, privileges and immunities of the Commission.⁶⁸ In 1990, Zambia reverted to the multi-party political arrangement and a new Constitution was enacted in 1991 which, unlike the 1973 Constitution, only provided for the existence of the Investigator General appointed by the President in consultation with the Judicial Service Commission.⁶⁹ A new Act, the Commission for Investigations Act was enacted in 1991.⁷⁰ It provided in section 4 for the establishment of the Commission for Investigations and had no provision for the Investigator General whose existence was provided for by the 1991 Constitution.

Presently the Commission consists of the Investigator General and three Commissioners appointed by the President.⁷¹ The Commission has jurisdiction to inquire into the conduct of any person to whom the Act applies in the exercise of his office or authority or in abuse thereof whenever so directed by the President. Unless the President otherwise directs, in any case in which it considers that an

⁶⁴ Not a hallmark of courts of law.

⁶⁵ Id. n 61 above.

⁶⁶ Article 117 of the 1973 Constitution.

⁶⁷ Appointed by the President, Article 118 of the 1973 Constitution.

⁶⁸ Act No. 3 of 1974. The Act came into force on 16 August, 1974.

⁶⁹ Article 90 of the 1991 Constitution, Act No. 1 of 1991.

⁷⁰ No. 20 of 1991, Chapter 39 of the Laws of Zambia, which came into effect on 6 September 1991.

⁷¹ S. 4 (1) of the Commission for Investigations Act, No. 20 of 1991.

allegation of maladministration or abuse of office or authority by such person ought to be investigated, the Commission will carry out investigations.⁷²

The Commission for Investigations Act applies to any civil servant in the service of the Republic, members of local authorities and to members and persons in any institution or organisation in which the Government holds a majority of shares or exercises financial or administrative control. The Act also applies to members and persons in the service of any commission established by or under the Constitution or any Act of Parliament but does not apply to the President.⁷³ The Commission has no power to question or review any decision of any court or of any judicial officer in the exercise of his judicial functions, or any decision of a tribunal established by law for the performance of judicial functions in the exercise of such functions or any matter relating to the exercise of the prerogative of mercy.⁷⁴

The Commission will not conduct an investigation into any allegation or complaint if the complainant had the opportunity to seek redress by means of an application or representation to any executive authority; or had an opportunity by means of an application, appeal, reference or review to or before a tribunal established by or under any law; or by means of proceedings in a court of law.⁷⁵ However, the Commission may conduct an investigation if it is satisfied that in the particular circumstances of the case, it would be unreasonable to expect the complainant to resort or to have resorted to the above without fear, or undue hardships, expense or delay.⁷⁶

⁷² S.8 of the Act.

⁷³ Id. n 71 above, s.3 (1).

⁷⁴ Id. n 71 above, s.3 (2).

⁷⁵ Id n 701above, s. 10

⁷⁶ Proviso to s.10

The Commission is empowered to exercise jurisdiction and powers notwithstanding any provision in any written law to the effect that an act or omission is final, or that no appeal lies in respect thereof, or that no proceedings or decision shall be challenged, reviewed, quashed or called in question.⁷⁷ *Prima facie*, these are far-reaching powers.

The Commission submits a report of every investigation to the President who may take such decision in respect of the matter investigated, as he thinks fit.⁷⁸

No investigation, proceeding, process or report of the Commission can be held bad for any error or irregularity of form or be challenged, reviewed or quashed or called in question in any court except on the grounds of lack of jurisdiction.⁷⁹

The Commission's Annual Report for 2000⁸⁰ shows that a total of 2,830 complaints were handled in 2000.⁸¹ 240 complaints were declined; 696 completed and 42 withdrawn or abandoned.⁸² 506 complaints were justified while 116 were unjustified.⁸³ 74 complaints were discontinued and 1,852 were pending at the close of the year and carried over to 2001.⁸⁴ According to the Report, complaints rose from 647 in 1996 to 1,324 in 2000 following an awareness campaign undertaken by the Commission.⁸⁵ The complaints received by the Commission were, among others, abuse of office; maladministration at work places; victimisation over sale of institutional houses; non-payment of terminal benefits; personnel management disputes; non-payment of pensions;

⁷⁷ Id. n 71 above, s.11.

⁷⁸ Id. n 71 above, ss. 20 and 21.

⁷⁹ Id. n 71 above, s23.

⁸⁰ This was the latest Annual Report the author could access as of October, 2006. According to information from the Commission, the later reports up to 2005, had been prepared but were in draft form. The Commission was waiting for funding in order for it to take the drafts to the printers for printing. This is testimony to the insufficiency of funding provided to the Commission.

⁸¹ Of this number, cases received in 2000 were 1,324 and the rest were carried over from 1999.

⁸² Commission for Investigations Annual Report, 2000. p.2.

⁸³ Table on p.52 of the Annual Report.

⁸⁴ Ibid.

⁸⁵ Id. n 82 above, at p.2.

non-payment of leave benefits; non-payment of travel benefits; unfair and forced termination of service; practice of tribalism at places of work; unfair dismissal from employment non-payment of salaries and allowances; and compensation.⁸⁶

5.3.2 The Permanent Human Rights Commission

Zambia's transition from a one-party state to plural politics in 1991 generated an expectation for a new political dispensation based on the rule of law and respect for human rights.⁸⁷ The Permanent Human Rights Commission grew out of a Commission of Inquiry formed by the former President Frederick Chiluba in May, 1993 to investigate human rights violations by past governments. The Commission of Inquiry recommended that a permanent human rights commission be established. The government accordingly amended the Constitution to provide for the establishment of a Permanent Human Rights Commission as an autonomous body and not subject to the direction and control of any person or authority in the performance of its duties⁸⁸. The Zambian Parliament enacted the Human Rights Commission Act⁸⁹ on 13th March 1997. The Commission consists of the Chairperson, the Vice-Chairperson and not more than five other Commissioners, all appointed by the President, subject to ratification by the National Assembly.⁹⁰ The mandate of the Commission is fairly broad. According to section 9(a)–(f) of the Human Rights Commission Act, the Commission's functions are to investigate human rights violations, investigate any maladministration of justice and propose effective measures to prevent

⁸⁶ Id. n 82 above, at p. 52. The scope of complaints within the Commission's jurisdiction is wide. In 1975, one year after the establishment of the Commission, the Investigator General wrote "The abuse of authority or maladministration...may take various forms, for example, corruption, favouritism, bribes, tribalism, harshness, misleading a member of the public as to his or her rights, failing to give reasons when under a duty to do so, using powers for the wrong reasons, failing to reply to correspondence and causing unreasonable delay in doing desired public acts." See the Commission for Investigations Annual Report, 1975 at p.3.

⁸⁷ Human Rights Watch, 2001.

⁸⁸ Article 125 of the Constitution and s.3 of the Human Rights Commission Act, No. 39 of 1996, Chapter 48 of the Laws of Zambia

⁸⁹ No. 39 of 1996, Chapter 48 of the Laws of Zambia.

⁹⁰ Id. n 89 above, s.5.

human rights abuse. The Commission's investigative powers include the power to investigate any rights abuses on its own initiative or on receipt of a complaint. The Commission also has the power to recommend the release of a person from detention, payment of compensation to a victim of human rights abuse or to his family or that an aggrieved person seeks redress in a court of law.⁹¹ The Commission has no power to enforce its findings, apart from making the findings public. It can only make recommendations to the appropriate authority, which may act upon the recommendations or choose to ignore them.⁹²

Pursuant to Section 10 (1) of the Act, the Permanent Human Rights Commission is empowered to investigate any human rights abuses on its own initiative or on receipt of a complaint or allegation. The Commission began the year 2004⁹³ with 1,815 complaints brought forward from 2003.⁹⁴ During the year, 468 complaints were received, bringing the total number of complaints to 2,283. The Commission considered and concluded 834 complaints and 1,449 were pending as at 31 December 2004.⁹⁵ Employment and labour related complaints accounted for the highest number of complaints. This category of complaints included complaints of unpaid salaries, repatriation allowances, leave benefits, terminal benefits and pensions. Some complainants alleged wrongful termination of contract, unlawful dismissal and prolonged temporal or casual employment.⁹⁶ The number of delayed justice was 33 with complaints of cases pending before courts for more than five years without judgments being delivered. The Commission received 14 complaints of child abuse during the year and 31 complaints of unlawful detention and torture.⁹⁷

⁹¹ Id. n 89 supra, s.10 (4).

⁹² Id. n 89 supra, s.13 (1) (b).

⁹³ By September, 2006, the latest available Annual Report was for the year 2004, hence the reference to 2004.

⁹⁴ Human Rights Commission Annual Report 2004, p. 4.

⁹⁵ Ibid.

⁹⁶ Id. n 94 above, at p. 6.

⁹⁷ Ibid. According to the Report, during its visit of prisons and police cells in June, 2004, the Commission came across a number of complaints of torture and inhuman treatment.

The 2004 Annual Report notes that the operations of the Commission were hampered by insufficient budgetary allocations received from the Treasury.⁹⁸ While the Commission needed Zambian Kwacha Twelve point Nine billion (ZK12.9 billion) in order to discharge its mandate effectively, only Zambian Kwacha One point Two billion (ZK1.2 billion) was provided. The Report further states that the staffing situation at the Commission remained below the approved levels during 2004. From an establishment of 130, there were only 43 members of staff.⁹⁹ To compound an already difficult situation, the Commission continued to experience a critical shortage of transport during the year. This seriously hampered the Commission's ability to undertake investigations into alleged human rights violations and to conduct country-wide visits and sensitisation activities. The Commission's aged motor vehicles were constantly breaking down.¹⁰⁰

5.4 The Informal Institutions

5.4.1 The Family

A study conducted by WLSA Zambia in 1997¹⁰¹ brought forth the finding that the family is usually the first place where disputes among members within it are taken. When disputes are not resolved at family level, they are referred to other dispute resolution fora such as the church, headmen and chiefs' courts and non-governmental organisations. Recourse to the formal court system is usually the last resort. Thus, the family plays a notable role in dispute resolution in Zambia.

⁹⁸ Id. n 94 above, at p. 33.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ WLSA Zambia Trust (1997). *The Changing Family in Zambia*.

5.4.2 The Church

The church in Zambia plays an important role in dispute resolution among its members.¹⁰² The majority of people in Zambia profess to be Christians.¹⁰³ Most Christians respect decisions of their superiors and will usually follow decisions given by their leaders in the church regarding disputes. In the event of the church failing to resolve their disputes, some people take their matters to non-governmental organisations or courts of law. The WLSA Study on justice in Zambia¹⁰⁴ also included the church as a recognised dispute resolution institution. Two of the churches covered in the Study were the Roman Catholic Church and the United Church of Zambia.¹⁰⁵ According to this Study, the Roman Catholic Church works through a structure of small Christian communities which are comprised of groups of members living in one area¹⁰⁶. These constitute the grassroots structure of the church.¹⁰⁷ Most disputes are settled at this level. If a dispute is not settled at this level, it is referred to the Parish Council. Parish priests also do handle some cases. The next level in the hierarchy is the Diocese Court. After this level, in the case of annulment of marriages, the next and final appellate institution is the Vatican whose Council has the mandate to examine and decide on such cases.

The United Church of Zambia is organised in such a way that each congregation is arranged into sections according to residential areas.¹⁰⁸ Each section has elders. Disputes can be brought to church elders or at section level, to the church Minister. The church elders and Minister in charge of a congregation constitute a Pastoral Committee one of whose duties is to ensure discipline in the

¹⁰² The reader should note that the church follows Canon Law, which is the Church's own brand of law.

¹⁰³ In fact the former Republican President Frederick Chiluba declared Zambia to be a Christian State soon after ascending to power in 1991. This declaration had a Constitutional backing. The Constitution declared in the Preamble that Zambia was a Christian nation while upholding the right of every person to enjoy that person's freedom of conscience or religion.

¹⁰⁴ WLSA (1999), id. n 3 above.

¹⁰⁵ Id. n 3 above, at p.36.

¹⁰⁶ At this level there are counselors who attend to people's problems.

¹⁰⁷ Id. n 3 above, at p.87.

¹⁰⁸ Id n 3 above, at p.40

congregation.¹⁰⁹ The Pastoral committee reports to the Congregational Council which is responsible for the local church. Several congregations form a Consistory and several Consistories form a Presbytery. The Synod is at the top of the hierarchy.¹¹⁰

It is clear from the above discussion on the two churches that they have elaborate dispute resolution and appellate structures. The church's mode of dispute resolution mainly involves counseling. This way of dispute resolution is appealing to members of the church because it is not adversarial and relationships are maintained. A pastor at Northmead Assembly of God Church in Lusaka explained why the church's way of resolving disputes is appealing to the members. He said: "our way of resolving disputes do not have winners or losers, whereas the court system which is adversarial means that relationships are lost".¹¹¹

5.4.3 Headmen and Chiefs' Courts

Headmen and chiefs' courts have existed in Zambia from the pre-colonial period. Even though headmen and chiefs' courts are not *de jure* part of the formal judicial system, *de facto* they are. Kakula¹¹² notes that village headmen play a critical role in dispute settlement and that without them the local courts would not be able to handle the caseloads. Yet another study by WLSA Zambia¹¹³ found that headmen and chiefs courts do exist and are a phenomenon of the rural areas. In Monze in the Southern Province of Zambia, courts constitute a headman sitting alone, while a group of headmen constitute the chief's court. In Mongu in the Western Province of Zambia there is an elaborate traditional court structure from the headman to the king. At the lowest level there is the *Situngu*

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ In an interview with WLSA members. Reported in WLSA (1999), id. n 3 supra, at p.41.

¹¹² Liyoka Kakula (1982). 'The Law of Marriage and Divorce among the Malozi of Western Zambia.' Unpublished LLM. Thesis.

¹¹³ (1992) *Maintenance in Zambia*.

that is presided over by the headman who hears all cases except criminal cases. The *Silalo* is the next level and is presided over by the area chief. Appeals lie from the *Situngu* to the *Silalo*. Next on the appellate hierarchy is the District Court followed by the *Saa Sikalo*, which is the final court on the traditional court hierarchy of the area.

In the study on women and justice in Zambia, WLSA Zambia found that there is passive tolerance of the chiefs and headmen's courts.¹¹⁴ This was so because while on the one hand the courts are considered 'illegal' because of the requirement that in order for a court to exist there must be a warrant signed by the Minister and these courts are not established by warrant, on the other hand, their existence is recognised. This is evidenced by the state's recognition of these courts' role especially in land matters where they allocate land to their subjects.¹¹⁵ The Study further found that people are drawn to traditional courts because they are cheaper to access than courts in the formal structure. They can be assessed anytime and there are shared values of what constitutes justice between the people and traditional courts.

5.5 Non-governmental Organisations

Non-Governmental Organisations¹¹⁶ play an important role in dispute resolution, as the discussion that follows on two NGO's shows. The two NGO's that have been chosen for discussion here represent NGO's formed specifically to address apparent gaps in the justice delivery system.

¹¹⁴ Id. n 3 above, at p.33.

¹¹⁵ Ibid.

¹¹⁶ Hereinafter referred to as 'NGO's.'

5.5.1 The Legal Resources Foundation

The Legal Resources Foundation is the brainchild of two lawyers, Robert Simeza and John Sangwa¹¹⁷. It was conceived in 1991, at the height of demands for an end to one-party rule. From the legal point of view, reform of the existing laws and institutions, supportive of one-party rule, was indispensable if they were to uphold the emerging political order. Secondly, people's participation in the governance of the country was equally imperative but they had to be equipped with knowledge to guide them in making informed judgment on the affairs of the country.¹¹⁸ It was out of these two major concerns that the formation of the Foundation was conceived. The Foundation is committed to two broad objectives. These are, to campaign for the reform of existing laws and institutions and introduction of new laws and institutions, where necessary, aimed at securing an open, accountable democratic society. Once laws have been introduced or reformed, the Foundation is committed to their enforcement. Enforcement of the law is secured through the provision of legal aid services to those who cannot afford to retain the services of lawyers. These are usually at grass root level. The Foundation has introduced programmes which greatly assist the poor to access justice. They do this through the provision of legal services to the underprivileged in society. The second goal is the promotion of, and respect for human rights. In order to achieve the above objectives, the Foundation undertakes the following activities among others, namely, provision of legal advice to people with legal problems and provision of legal representation. The Foundation also provides paralegal training, undertakes prison visits, conducts legal mobile clinics and publishes newsletters, which investigate and report on human rights violations. It also assists in bringing violators to justice. During the year 2005, the Foundation provided legal advice in a total of 25, 273 cases.¹¹⁹ This figure represents all statistics from the nine

¹¹⁷ The two lawyers are partners in private practice in Lusaka.

¹¹⁸ Legal Resources Foundation Leaflet, 2006.

¹¹⁹ Legal Resources Foundation Annual Report 2005, p.4.

provincial legal advice centres including mobile clinics, prisons and police stations visits. According to the 2005 Annual Report, the Foundation concluded 53 cases both in and out of court. Through various legal interventions spearheaded by lawyers and paralegals at its various advice centres, the Foundation managed to resolve most matters through alternative dispute resolution mechanisms such as negotiation and mediation which resulted in the receipt of a total sum of Zambian Kwacha Eight Hundred and Twenty million, Two hundred and Fifteen thousand, One hundred and seventy-one (ZK820, 215,171.00) on behalf of clients in civil matters.¹²⁰ The most complained about cases were labour disputes with a total of 5,542 complaints, followed by breach of contract cases with 2,030 cases; debt recovery with 2,025 cases, matrimonial disputes with 1,970 cases; terminal benefits/pensions with 1,732; personal injuries claims with 1,698; intestate succession with 1,528; criminal trials with 1,364 and maintenance with 1,334 cases.¹²¹ Legal advice was generally offered to the poor and vulnerable persons who on account of their financial incapacity were unable to access justice.¹²² Most court cases involving the state were settled through negotiated terms as the state consented to compensating victims of police brutality and unlawful detentions. It is common practice for the Attorney General to resolve cases involving police misconduct through consent judgments.¹²³ It is apparent from the above statistics that the foundation has demonstrated its ability to complement the courts in promoting access to justice.

5.5.2 National Legal Aid Clinic for Women

The National Legal Aid Clinic for Women, a project of the Women's Rights Committee of the Law Association of Zambia, was started with the aim of

¹²⁰ Ibid. Paralegals handled and dealt with most of the matters brought to the Foundation. They concluded 20,191 cases through legal advisory approach. About 335 matters found to be too complex for paralegals were referred to lawyers for further legal opinion and commencement of court process where appropriate. See 2005 Annual Report, p.5.

¹²¹ Id. n 119 above, Annex E.

¹²² Id n 119above, at p 5.

¹²³ Id n 119 above at p. 6.

assisting the underprivileged citizens.¹²⁴ It first started operating as a Citizen Advice Bureau but with the increase in women's rights awareness, the Clinic was established to assist disadvantaged women. The Clinic became operational in 1990 and provides full legal services to women and children who cannot afford the charges charged by private legal practitioners.¹²⁵

The Clinic is mandated to develop law as an instrument of social justice, encourage lawyers to serve the people, deal with legal aid and representation for the disadvantaged and promote law reform.¹²⁶ The main function of the Clinic has been to provide legal services to underprivileged women and children by meeting their demands for legal advice and representation in mostly family law. It promotes the rights of women and children through legal education and other awareness campaigns.¹²⁷ The other objectives of the Clinic are to promote outreach activities through provision of litigation, counseling and paralegal services. There are presently three branches of the Clinic, in Lusaka, Ndola and Livingstone.¹²⁸

Complaints filed with the Clinic are, *inter alia*, divorce, domestic violence, property settlement after divorce, maintenance, inheritance/succession, land matters and labour disputes.¹²⁹ In 2002, the Clinic opened 3,237 cases. Topping the list at 561 were inheritance/succession cases. Legal advice was given in 506 cases. 458 divorce cases were handled by the Clinic and 257 property settlement cases. Maintenance cases numbered 242 and counseling 232. In 2003, the total number of cases opened rose to 8,187 out of which 1,204 were

¹²⁴ National Legal Aid Clinic for Women End of Project Report for contract Period 2003 – 2005, at p.1.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *ibid*

¹²⁸ *Id.* n 124 above.

¹²⁹ *Id.* n 124 above, at pp. 3 - 5. However, the Clinic deals mainly with matrimonial and inheritance matters.

inheritance/succession; 1,144 legal advice; 1,202 divorce, 559 industrial relations cases; 358 conveyancing; 221 criminal cases.¹³⁰

During the period January to June, 2006, the work of the National Legal Aid Clinic for Women has involved offering non-contentious legal advice, litigation and outreach programmes. Its aim has been to provide access to justice through the provision of legal aid services to underprivileged women and children.¹³¹ The Clinic has offered legal advice in all its three centres. The figures are: 1, 712 for Lusaka; 214 for Ndola and 51 for Livingstone, bringing the total to 1,977.¹³² A total of 894 cases were opened in all three centres, the breakdown being as follows: 543 for Lusaka; 200 for Ndola and 151 for Livingstone. A good number of other types of matters were handled. Overall totals in all the centres were as follows: Lusaka had 2, 255 cases; Ndola 414 cases and Livingstone 202. The grand total was 2,871.¹³³ It is obvious from these statistics that by the end of 2006, the figures would have gone up significantly. Each office or centre has a legal clerk who is also a trained paralegal. Lawyers are available to attend to clients by way of offering legal advice and representation. Litigation is the core activity of the Clinic. However, mediation conducted through a series of meetings with the parties, marital counseling and psycho-social counseling are some of the methods used to resolve disputes.¹³⁴ In the absence of lawyers, the paralegals advise clients on various issues of law. Additionally, there is a Victim Support Unit (VSU) Officer from the Zambia Police at the Lusaka office who attends to some clients. The common feature of most people seeking legal assistance from the clinic is that they are indigent people with low or no income at all. According to the Report, some legal advice seekers have high

¹³⁰ Data from the National Legal Aid Clinic for Women as provided on 13/11/2004.

¹³¹ National Legal Aid Clinic for Women, Mid-term Report for the Period January to June, 2006. p1.

¹³² Mid-term Report Id. n. 131 above, Appendix 3.

¹³³ Ibid.

¹³⁴ Id. n 131 above, at p.2.

expectations to have their matters taken to court at all costs, but are encouraged to resolve their disputes outside court due to the lengthy court process.¹³⁵

¹³⁵ Id. n 131 above at p.3.

CHAPTER SIX

AN EVALUATION OF THE PERFORMANCE OF TRADITIONAL JUSTICE DELIVERY INSTITUTIONS IN ZAMBIA

In the preceding chapter an examination of some major institutions of justice delivery in Zambia was undertaken. A historical approach was followed from the outset to trace the evolution of the Zambian judicial system to contemporary times. Being part and parcel of the justice delivery system of Zambia, the Commission for Investigations and Permanent Human Rights Commission were also brought into the discussion. Further, some informal structures that also play important roles in justice delivery in Zambia, namely, the family, the church, headmen and chiefs' courts, were also examined. To complete the discussion, some selected non-governmental organisations were also looked at. This was in recognition of the important roles they play in the country's justice delivery system.

This chapter is devoted to the evaluation of the performance of traditional justice delivery institutions in Zambia. Courts of law receive special attention in the evaluation because they are the main institutions of justice delivery in Zambia and are perceived as the fountain of justice. The evaluation is meant to lay the essential groundwork for Chapter Seven which deals with the development of ADR in Zambia, legal and institutional frameworks.

6.1 The Judiciary

As indicated in Chapter Five, local courts are found in most parts of the country. They are at the bottom of the judicial hierarchy but handle most of the civil cases arising out of simple contracts, torts, and land disputes involving customary law. Evidently local courts have scored relatively more successes than the higher

courts in Zambia for a number of reasons. Firstly, being found in most parts of the country, they are more easily accessible to the majority of the people. Secondly, their procedures are simpler than those of higher courts. Thirdly, it is much cheaper to commence proceedings in local courts than in the higher courts.¹ Fourthly, local courts dispense justice relatively faster than the higher courts and hence dispose off more cases than the higher courts.

The comparatively positive attributes outlined above notwithstanding, local courts have had their share of shortcomings. The WLSA Zambia study undertaken in both urban and rural areas of Zambia in 1999², in which the author took part as a member of the research team, showed that local courts in Zambia face a number of constraints. Even though found in most parts of the country, most local courts³ are located far from population centres and because of the long distances involved some people who would like to use such courts are discouraged from using them. Further, the heavy caseloads of the local courts mean that local court justices are overworked and this has led to suspicion regarding the quality of judgments passed by these courts⁴. There is a serious shortage of courtrooms and most local court buildings are in a dilapidated state. Lack of stationery is a common problem in local courts that often leads to adjournments⁵. Further constraints of local courts are poor salaries and

¹For this reason local courts have been made courts of choice by most disadvantaged members of the society who are in the majority. In a Paper written by Legal Resources Foundation Legal Counsel, Geoffrey Mulenga entitled 'The Experiences of the Legal Resources Foundation in Accessing the Justice Delivery System in Zambia' presented at a Workshop of the Women and Law in Southern Africa Research Project (WLSA) on 2nd September, 1997, Mr. Mulenga alluded to the fact that many disadvantaged people in our communities are bringing applications before local courts due to the considerably lower costs involved in bringing such applications before these courts. However, from the WLSA research findings, it would appear that most people who frequent these courts still regard the fees as being on the high side.

² WLSA (1999). *Women and Justice: Myth or Reality in Zambia*.

³ Particularly in rural areas.

⁴ At one court WLSA researchers found that the local court justices dealt with an average of 27 cases per day instead of the ideal 5 cases per day. See WLSA id. n 2 above at p. 81.

⁵ The WLSA Study found that local courts sometimes do not have items such as diaries, which are essential to the courts as they are needed for setting of dates of hearing.

conditions of service;⁶ lack of residential accommodation; inadequate staffing;⁷ lack of resources to enable court personnel to attend training sessions and seminars; lack of library facilities and pieces of essential legislation and legal books. Lack of transport is also one of the problems that local courts face. As a result, most local court justices have to use public transport to get to work. This puts the lives of the justices in danger from some people who might not be happy with some judgments delivered by the justices. Further, local courts employ principles of customary law, which vary widely throughout the country, and as such there is no uniform customary law that applies to the whole country. Lawyers are barred from appearing in proceedings in local courts.⁸ Whereas this could be justified on the ground that there are very few formal rules of procedure and therefore there is no need for the presence of lawyers, it could also work to the disadvantage of those litigants who would like to utilise the services of lawyers. According to Mr. Mulenga, the procedures in local courts are so informal and so dependent on the local court justices' subjective propensities that it creates wide latitude for the dispensation of dubious justice.⁹ To compound matters, there is no formal training of local court justices. Thus, in an environment already fraught with suspicion as to the reliability and justness of

⁶ Arguably this state of affairs makes local court personnel susceptible to corruption—a situation that has led to an apparent lack of confidence in the judgments of local court justices who have time and again been accused of corrupt practices. According to Mr. Mulenga of the Legal Resources Foundation, the emoluments of local court justices are so paltry that it is difficult to imagine that a justice would resist the temptation to take a bribe. Some local court justices have been known to use delaying tactics, apparently after receiving a bribe, calculated to forestall what would obviously be a successful appeal or to occasion so much frustration on the applicant that he or she is resigned to abandon the action. On March 30, 2003, Magistrates and local court justices went on a strike for nearly two weeks to demand for better pay and conditions of service. On July 9, 2003 judicial workers again walked off their jobs in cities and towns throughout the country demanding government payment of housing allowances. See generally *Zambia: Country Reports on Human Rights Practices*, 2003. Department of State, Bureau of Democracy, Human Rights and Labor, Released February 25, 2004. Admittedly, Mr. Mulenga's statement does seem sweeping but the local press has time and again reported of corrupt practices by local court justices whose remuneration and general conditions of service leave much to be desired.

⁷ GRZ, *Governance – National Capacity Building Programme for Good Governance* [31st March, 2000]. A document produced after a study of the constraints facing government institutions, including the judiciary. The study identified the constraints being faced by a number of organisations and included recommendations on possible solutions.

⁸ Commission on Human Rights, Department of State Human Rights Reports for 2000 – Zambia, at p. 10.

⁹ In his Paper, id. n 1 supra.

local court judgments, this adds to the general perception that local court justices dispense their own brand of justice which is not in accordance with that prevailing in the higher courts.

Lawyers have a right of audience in Magistrates Courts unlike in the Local Courts. The problems that have been highlighted above that affect the operations of local courts, *inter alia*, high case loads, lack of stationery, poor salaries and conditions of service, lack of transport and residential accommodation, and lack of library facilities, also affect these courts. According to Alfred Chanda, the result of the poor conditions of service has been the inability by the judiciary to recruit sufficient staff.¹⁰ A serious shortage of courtrooms countrywide has also affected the times and durations that magistrates can sit to determine cases. The shortage of courtrooms has been such that magistrates have had to wait for colleagues to complete their business in the few courtrooms available before they too can use them. This has led to inevitable delays in the dispensation of justice. Practicing lawyers have often complained of going to court sometimes as early as 08:00 hours and waiting until mid-day or much later for their cases to be called out only to have the cases adjourned to later dates at the instance of the magistrate. Thankfully, shortage of court rooms in Lusaka at the magisterial level is now a thing of the past with the erection of a new magistrates' court building near the Lusaka Central Prison which is now operational.¹¹

According to a lawyer in private practice and current President of the Zambia Association of Arbitrators,¹² there's chaos in the Magistrates' Courts because magistrates are unsupervised.¹³ It is the author's considered view that views

¹⁰ National Integrity Systems Country Study Report – Zambia (2003), p.28.

¹¹ The new Magistrates' Court Building was officially opened on 20 October, 2005 by the President of Zambia, Mr. Patrick Levy Mwanawasa. This has dramatically eased the shortage of courtrooms for magistrates in Lusaka.

¹² Mr. Nigel Mutuna.

¹³ In an interview with the author of 29th July 2004 in Mr. Mutuna's office in Lusaka.

such as those expressed Mr. Mutuna offer a better insight into the reasons for the general belief that corruption exists among magistrates and other members of staff in the courts particularly in the registries.¹⁴ Arguably, this has led to some people losing their confidence in the judgments of most magistrates as it appears to them that justice can be bought and those without money cannot expect to receive justice in these courts.

The Industrial Relations Court, High Court and the Supreme Court of Zambia have not been spared from the constraints that have affected the performance of courts as institutions of justice delivery in Zambia. The High Court was built during the colonial times for a very small population that has since grown by over 500% while the court infrastructure has remained the same.¹⁵ This has resulted in serious congestion in the Court. The number of judges is too small for the large number of cases filed in the High Court on a daily basis. Further, the high fees charged in the High Court have seemingly made the Court and indeed justice inaccessible to the poor in society, as they cannot afford to commence proceedings in that Court.¹⁶ This consideration also applies to the Industrial Relations Court and is compounded by the fact that this Court is only found in Lusaka and Ndola, thus making it not easily accessible to most of the people living outside the two cities.

Inordinate delays in disposing of cases have been cited as a major shortcoming of the High Court¹⁷ and indeed the Industrial Relations Court. These delays have

¹⁴ The Post, June 26, 1996: "Lucy carpets magistrate...and accuses him of corruption."

¹⁵ WLSA id. n 2 above, at p.101.

¹⁶ The Post of 21 July 1997, reported that the Law Association of Zambia had rejected the newly introduced court fees and the Chairman of the Association was quoted as having said: "The new fees introduced by the judiciary are on the high side and should therefore be reduced to equitable levels so as to ensure wide access to justice."

¹⁷ This view was expressed by the Hon. Judges of the High Court Messrs Justices Phillip Musonda and Charles Kajimanga in separate interviews with the author on 27th July, 2004 and 30th July 2004, respectively, in their chambers at the High Court in Lusaka and also by Mr. Nigel Mutuna during the interview on 29th July, 2004. Mr. Mulenga of the Legal Resources Foundation in the Paper presented to a WLSA Workshop in Lusaka on 2 September, 1997, gave an example of some five prisoners who were in

led to the creation of a backlog of cases and have been attributed to a shortage of judges, stationery and sometimes in criminal cases, to the police who fail to bring suspects to court citing lack of transport or fuel as the reasons. Sometimes delays in criminal cases are caused by the shortage of State Advocates, a situation caused by the failure by the Directorate of Public Prosecutions to retain lawyers due to poor conditions of service.¹⁸ According to Mr. Mutuna, with the exception of the Supreme Court, courts do not keep time.¹⁹ He further stated that they are slow and congested and that slowness leads to costs. It is evident that most litigants are not aware of the alternatives to litigation and legal practitioners have done little to sensitise their clients about the existence of alternatives to litigation. Mr. Mutuna further bemoaned the fact that judges are unsupervised and can deliver judgments any time. He was of the view that there must be a mechanism to check on the laxity of judges if courts are to perform as expected. Mr. Mutuna further believes that the court system is too rigid and not user friendly especially in the Commercial List Registry. According to Mr. Mutuna, even the dressing in the High Court is still archaic and intimidating to clients and lawyers alike. High Court Judge Musonda was of the view that the present court system is lawyer-driven despite the perception that it is judge-driven.²⁰ He pointed out that some lawyers have a tendency to write to court seeking an adjournment a day before the date of hearing. The judge observed that this is most frustrating to the bench as it is difficult to adjust the diary in the eleventh hour. He proposed the introduction of a Practice Direction to the effect that if a date is not suitable to a lawyer he must revert to the court without undue delay to enable the court set another date of hearing. The Judge was of the further view that cries over delays in the delivery of judgments were

detention without trial for over three years. *Habeas Corpus* applications for orders that they may be brought for trial before a court of competent jurisdiction were brought two months before the WLSA Workshop but they had not been heard at the time of the Workshop. The ostensible reason for the delay was the paucity of judges.

¹⁸This is Judge Phillip Musonda's view.

¹⁹ During the interview with the author.

²⁰ As indicated to the author during the interview.

justified. He informed the author that some judges do not have any research background and have problems with writing judgments and that some are computer and cyber-illiterate and thus cannot use the Internet to do their research. The judge bemoaned the lack of consultation among judges due to the unfounded fear that other judges might know their limitations. He also expressed his unhappiness with some lawyers who do not do their work as they make the work of judges all the more difficult.

The reader should take note that the judiciary has taken a major step to address the problem of inordinate delays and reduce the backlog of cases which dates back to years. This is the introduction of the Commercial List in the High Court. This was done through an amendment to the High Court Rules. The High Court (Amendment) Rules, 1999²¹ which came into operation on 1 March 1999, amended the High Court rules by inserting Order LIII which introduced commercial actions. A commercial action is any cause arising out of any transaction relating to commerce, trade, industry or any action of a business nature.²² Commercial actions are entered in a Commercial List which is kept in the Commercial Registry. The Chief Justice has designated a judge in charge of the Commercial List and other judges who handle the commercial actions.²³ These judges have received specialist training. Rules which apply to commercial actions are designed to expedite the proceedings and are different from rules which apply to the ordinary actions as the following provisions show. Order XIX, Rule 1 (1) of the High Court (Amendment) Rules, 1998²⁴ which applies to civil cases other than commercial cases, provides that the court or trial judge must, not later than twenty-one days after appearance and defence have been filed, give directions with respect to reply and defence to counter-claim if any; discovery of documents; inspection of documents; admissions; interrogatories;

²¹ Statutory Instrument No. 29 of 1999.

²² Rule 1.

²³ Rule 4.

²⁴ Statutory Instrument No. 69 of 1998.

place and mode of trial. However, the court may extend the period for doing any of these things for sufficient reason. Further, Order XXXI of the principal rules stipulates that in order to set a matter down for trial, the party setting it down must deliver to the court a request for the matter to be set down for trial. Order XXXI rule 1 (1) provides that an order for directions determines the place and mode of trial but such an order may be varied by a subsequent order of the court or judge. Sub-rule (2) states that different questions whether of fact or law may be ordered to be tried at different places or by different modes of trial and one or more questions may be ordered to be tried before the others. Clearly such rules do not encourage expeditious disposition of matters.

On the other hand, the following rules are clearly meant to encourage quick disposal of cases. Under Rule 6 (1) of the High Court (Amendment) Rules, 1999, which apply to commercial actions, a judge must summon the parties to what is known as a scheduling conference within fourteen days after filing of the memorandum of appearance and defence by the parties. At the scheduling conference the judge prepares a chart or schedule of events of the case in consultation with the parties²⁵ and may refer the parties to arbitration or mediation, as the judge sees fit.²⁶ If the matter is not referred to arbitration or mediation, the judge issues directions for the exchange of bundles of pleadings and documents, discovery, deposition and testimony according to the scheduling conference.²⁷ Thereafter, the judge may summon the parties to a compliance or status conference to review the status of the case and make any order, including an order as to costs against any party.²⁸ After the exchange of the documents, the judge is under obligation to fix the date of hearing.²⁹ A judge will not grant an application for an adjournment except in compelling and exceptional

²⁵ Rule 6 (2) of the Rules.

²⁶ Rule 7.

²⁷ Rule 8 (1).

²⁸ Rule 6 (3).

²⁹ Rule 8 (2).

circumstances.³⁰ Determination of what constitutes compelling and exceptional circumstances is left to the discretion of the presiding judge.

At the scheduling conference, parties are required to give the judge an estimate of the time the hearing will take and the judge allocates such time to the matter. The presiding judge is at liberty to grant an adjournment to any party even if the judge is of the opinion that the grounds are not very firm but may award the opposing party costs and condemn the party requesting for the adjournment to a hearing fee to be paid before the matter proceeds.³¹ If an application is struck off for non-attendance by the applicant, the application to restore is charged higher fees than normally charged.³² Any party that neglects to serve process which results in an adjournment, is condemned to pay hearing fees before the matter proceeds.³³

In an interlocutory application, the applicant must file, together with the application, skeleton arguments of his/her case stating the facts relied upon, the law and citing any authorities relied upon with copies of such authorities wherever possible. The respondent does the same, *mutatis mutandis*, when filing his/her affidavit in opposition to the application. This practice also applies to applications for assessment of damages.³⁴ If sixty days elapse without any progress in the case, the matter is taken to the judge for dismissal.³⁵ In the unlikely event of a party desiring to vary a date of hearing, he/she makes an application by notice at least ten days before the date of hearing.³⁶

³⁰ Rule 9.

³¹ Practice Direction No.5.

³² Practice Direction No. 6.

³³ Practice Direction No. 10.

³⁴ Practice Direction No. 11.

³⁵ Practice Direction No. 12.

³⁶ Practice Direction No. 13.

It is clear that the rules which apply to commercial actions above were designed with the aim of speeding up proceedings. Judges dealing with commercial actions have been known to strictly apply the rules. With such an attitude from the judges, the Commercial List is bound to ensure speedier delivery of justice and help decongest the High Court.

Library facilities in the higher courts, though better than in the lower courts, are still insufficient and need updating. Salaries and conditions of service for the High Court, Industrial Relations Court and Supreme Court judges are better than those obtaining in the lower courts but they are still low when compared to those obtaining in the region. In addition to the dissatisfaction with salaries and other conditions of service, the Supreme Court has also found itself with a much bigger workload due to the many appeals coming before it.³⁷ This could be attributed to the increase in awareness of human rights by members of the society and the fact that they can pursue their cases up to Supreme Court level.

The Constitution of Zambia and other laws such as the Judicature Administration Act³⁸ and the Judicial (Code of Conduct) Act³⁹ guarantee independence of the courts in Zambia. Thus, Article 91 (2) of the Constitution provides that the judges, magistrates and justices, as the case may be, of the courts "shall be independent, impartial and subject to this Constitution and the Law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament." Section 3 of the Judicial (Code of Conduct) Act requires every judicial officer to "uphold the integrity, independence and impartiality of the judicature in accordance with the Constitution, this Act or any other law."

An independent judiciary is a critical element of any democratic society and an independent and honourable judiciary is indispensable to justice in any society

³⁷ According to Judge Musonda during the interview.

³⁸ No. 42 of 1994, Chapter 24 of the Laws of Zambia.

³⁹ No. 13 of 1999.

that believes in the rule of law such as Zambia professes to be. However, it is difficult for the judiciary to be independent and impartial when it is faced with so many serious constraints. Judges and other judicial personnel do not operate in a vacuum. Like other members of society, they are also shaped by the society they live in. As William W. Schwarzer put it:

...even under optimum conditions, political and societal pressures will exert some influence on judges. Popular sentiment, government policies, political debate, media activity, and social conditions, such as poverty, discrimination, disease, all shape the environment in which judges work and live.⁴⁰

It is clear from the above that the judiciary has been operating under very difficult conditions. One lawyer is on record as having said that if the judiciary were a private company it would have gone into liquidation.⁴¹ It has been contended that the result of the poor funding, uncompetitive conditions of service and severe shortage of well-trained staff has been the undermining of judicial independence.⁴² The Inter-African Network for Human Rights and Development (Afronet) reported in the Zambia Human Rights Report of 2002 that inadequate funding of the judiciary was one of the most serious ways in which the independence of the judiciary was undermined. During the year under review, (2002), the judiciary's estimated budget was Zambian Kwacha Thirty-Three Billion, One Hundred and Ninety-Two Million, Ninety-Five Thousand, Two Hundred and Eighty-Seven (ZK33, 192, 095, 287.00) but only Zambian Kwacha Eighteen Billion, One Hundred and Fifty-Three Million, Six Hundred and Thirty-Six Thousand, One Hundred and Ninety- Nine (ZK18, 153, 636,199.00 was approved).⁴³

⁴⁰ Director, U.S. Federal Judicial Center in an article entitled "Judicial Independence and Judicial Training" Jan. 1991.

⁴¹ In'utu Etambuyu Suba (1997). 'Problems Facing the Justice Delivery System in Zambia.' Paper presented to the Stake Holders Meeting on the Justice Delivery System held at Hotel Musi-O-Tunya Intercontinental, Livingstone, Zambia on 14th October, 1997.

⁴² The Weekly Post, January 24-30, 1992, 'Independent Judiciary Needs Strengthening'.

⁴³ p.24. As of November 2004, this translated to US\$6, 843,730 and US\$3, 743, 017 respectively, at the Bank of Zambia exchange rate of US \$1 = Zambian Kwacha 4850. In most of 2002 the exchange rate was more or less the same as the exchange rate ruling towards the end of 2004.

Another aspect of financing in which the independence of the judiciary is undermined is through the control of resources. The executive branch of government ultimately determines personal emoluments for judicial officers.⁴⁴ The Judicial Service Commission proposes conditions of service for the lower levels of the judiciary but they have to be approved by the executive branch of government. The Republican President determines the conditions of service of High Court and Supreme Court judges through a statutory instrument.⁴⁵ It has been argued that this state of affairs enables the President to influence judges. Credence has been given to this contention by events that have happened in the past. Thus, for example, in 1996 when President Chiluba's election as President was being challenged by the opposition in the Supreme Court he awarded two salary increments exceeding 320 per cent to the judges within a period of nine months.⁴⁶ At the same time, magistrates and local court justices were denied the increment and resorted to a strike. In 2002, President Levy Mwanawasa who was facing petitions challenging his election as President in the Supreme Court, awarded big salary increments to judges of the High Court and Supreme Court and left out other judicial officers.

The reader should take note of the fact that a new Constitution has been drafted and is awaiting ratification by Parliament. If the proposed Constitution comes into effect with Articles 198 and 199 as they presently are, the above problems regarding judicial emoluments would be a thing of the past. Article 198 (1) of the proposed Constitution provides that the judiciary in both its judicial and administrative functions, including financial administration, will be subject only to the Constitution and the Laws and not subject to the control or direction of any person or authority. Sub-article (2) of the same Article provides that the

⁴⁴ Zambia Human Rights Report 2002 at p.26.

⁴⁵ See the Judges (Conditions of Service) Act No. 14 of 1996.

⁴⁶ Rodger Chongwe, SC., in an article entitled: 'Corrupt Practices' reported in The Post, July 5, 2002.

executive, legislature or any other person shall not interfere with the judges, judicial officers or other persons in the performance of their functions, while sub-article (3) states that all other state organs and institutions shall accord to the courts the assistance that may be required by the courts to protect the independence, dignity and effectiveness of the courts. Article 199 (1) has provision for the judiciary to annually prepare and submit its budget estimates to the Minister of Finance who will be obliged to determine the budget of the judiciary taking into consideration equitable sharing of resources. Sub-article (2) of this Article requires that the approved budget for the judiciary be released in full directly to the judiciary which shall not be under funded in any financial year. Sub-article (3) provides that the emoluments payable to or in respect of a member of the judiciary shall not be varied to the disadvantage of the member and sub-article (4) indicates that the operative and administrative expenses of the judiciary, including emoluments to members of the judiciary shall be charged on the Consolidated Fund.

Allegations of corruption in the judiciary, favouritism in favour of the ruling party in cases of a political nature, political interference with and intimidation of the judiciary, have and continue to dog the judiciary in Zambia.⁴⁷ It is a well-known fact in Zambia that political intimidation of the judiciary goes back to the Kenneth Kaunda era. In one incident, the Court of Appeal quashed sentences imposed on two Portuguese soldiers by the lower court.⁴⁸ The President of the Republic, then Dr. Kenneth David Kaunda openly denounced the decision, the chambers of the Chief Justice (a white man) was ransacked by youths accusing the Chief Justice of being racist. As a result the Chief Justice and two other white judges resigned and left the country. During the reign of former President Frederick Chiluba, the Supreme Court passed a judgment in the case of

⁴⁷ The former Chief Justice of Zambia Mr. Matthew Ngulube was forced to resign after revelations that he had since 1997 been receiving improper payments from the former President Chiluba amounting to US\$168, 000.

⁴⁸ In the case of *Silva and Freitas v. The People (1969) Z.R. 121*.

Mulundika and Others v. The People,⁴⁹ in which sections 5 and 7 of the Public Order Act were struck off as being unconstitutional. The Legislature led by the leader of the House, the Vice-President Brigadier General Godfrey Miyanda, launched a virulent attack on the Chief Justice and other members of the Court from the floor of the House. Cabinet Ministers, the Inspector General of Police and high-ranking MMD⁵⁰ officials also attacked the Supreme Court judges.⁵¹ The government of the day incited its party functionaries to demonstrate against the Court. Subsequently, vicious attacks on the Chief Justice's integrity were carried out in a private newspaper,⁵² which were linked to the President and high-ranking MMD and government officials. The Chief Justice was falsely accused of having raped a cleaner in his chambers,⁵³ the apparent motive for this attack being to intimidate the judiciary.⁵⁴ More recently in 1999, in a treason trial, a number of people including the former President Dr. Kenneth Kaunda, Zambia Democratic Congress President Dean Mung'omba and many others were detained and charged as being conspirators in the *coup d'etat* attempt of October 27, 1997 only to have the charge dropped. One would be justified to conclude from the facts in this case, that the government of the day was trying to use the courts to settle political scores.

With so much political intimidation it is doubtful if the judiciary in Zambia is truly free to pass judgments without fear, favour or undue influence, in keeping with genuine judicial independence. However, some quarters believe that despite political intimidation and interference in the operations of the judiciary, courts have continued to act independently and at times made judgments and rulings

⁴⁹ 1995/SCZ/25 (unreported).

⁵⁰ Acronym for the ruling Party, the Movement for Multiparty Democracy.

⁵¹ The Times of Zambia, January 20, 1996 reported this incident in an article entitled: "Miyanda fires salvo at Supreme Court Judges."

⁵² The Confidential.

⁵³ The Post, September 20, 1996 "FTJ linked to Rape Lies". Note that "FTJ" are the initials of the then President Frederick Titus Jacob Chiluba.

⁵⁴ Law Association of Zambia Press Release, dated 16th September 1996, published in The Post, September 20, 1996 entitled "Injurious Attacks on the Chief Justice."

critical of the government.⁵⁵ Thus, for example, on September 24, 2003, the Supreme Court nullified the 2001 electoral victory of MMD parliamentarian and Minister of Defence, Michael Mabenga and stripped him of his parliamentary seat and ministerial portfolio. The Court further recommended that Mabenga, who diverted money from the local Constituency Development Fund to finance his campaign, be charged criminally for theft of public funds during the 2001 campaign. On February 25, 2003 the former President Chiluba appeared in court charged with 59 counts of corruption. Later, 96 more charges were added. On December 9, 2003, Chiluba, former intelligence chief Xavier Chungu, and five other former government officials went on trial for “plundering the national economy.”⁵⁶

While acknowledging the fact that political and societal pressures exert some influence on judges, and despite the apparent political interference in the judiciary, it is important that judges try by all means to maintain their integrity and independence because deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges which are measured by the judges' ability to act without fear or favour.

The above scenario clearly demonstrates that the courts as the traditional justice delivery institutions and the perceived fountain of justice have not performed as well as expected of them due to the bottlenecks highlighted above. It is the author's contention that this scenario should help explain why attention has slowly but surely begun to shift from the courts to other dispute resolution mechanisms.

⁵⁵ Zambia – Country Reports on Human Rights Practices 2003, id. n 6 supra.

⁵⁶ Id. n 6 above.

6.2 Commissions

6.2.1 The Commission for Investigations.

The Commission for Investigations has been criticised as being toothless because it has no power to take corrective measures after carrying out investigations. It can only submit reports of investigations to the President who has the discretion to act in any manner he deems appropriate with respect to the Report.⁵⁷ Another drawback of the Commission is the fact that even if the Commission can legally investigate a complaint it will not be investigated if the complainant or aggrieved person has or had the opportunity of obtaining relief by way of representation to an executive authority. Further, the Commission does not hear a complaint where it is possible for the aggrieved person to obtain relief or redress by means of an application, appeal, reference or review to or before a tribunal established by or under any law. The Commission also does not hear a complaint where one has a chance of obtaining redress through courts of law.⁵⁸ Despite these restrictions, however, the Commission may investigate the complaint if it is satisfied that in the circumstances of the case it would be impractical to expect the complainant to obtain redress through application or representation to an executive authority, tribunal or through the courts.⁵⁹

It is the author's view that the provisions of section 10 defeat the whole purpose for establishing the Commission because the Commission is a specialised institution established to deal with complaints which cannot be entertained by the courts or any other institutions in the most expedient and inexpensive way. It gives individuals an opportunity, in addition to existing provisions such as parliament, the judiciary and internal complaints procedures, to place complaints about the practices of government before an independent body. Existence of an

⁵⁷ See ss.20 and 21 of the Commission for Investigations Act, No. 20 of 1991, Chapter 39 of the Laws of Zambia.

⁵⁸ S.10 (1) (c) of the Act.

⁵⁹ Proviso to s.10 of the Act.

opportunity by an individual to obtain relief by way of representation to an executive authority, or application, appeal, reference or review to or before a tribunal or courts of law should not, therefore, be a bar to the Commission entertaining the person's complaint if it falls within its jurisdiction.

Additional limitations of the Commission are that it can only deal with complaints by individuals against administrative acts, omissions and decisions of public officials in so far as they affect the ordinary man. The Commission cannot initiate investigations on its own motion but can only move either when directed by the President or when an allegation of abuse of authority has been made which the Commission feels ought to be investigated. It is apparent from the provisions of section 8 of the Commission for Investigations Act, that the President has the power to direct the Commission to drop any investigation. The section provides that unless the President otherwise directs, in any case in which the Commission considers that an allegation of maladministration or abuse of office or authority by a person ought to be investigated, it will carry out such investigation. However, the major weakness or drawback of the Commission lies in its lack of power to order remedial action once the allegation of abuse of authority has been proved. Once the Report has been presented to the President, he is under no legal obligation to act on the recommendations. He may choose to act or not to act on the recommendations at all. The lack of powers to institute investigations on its own motion and order remedial action is against modern trends among Ombudsmen. For example, the South African Ombudsman, the Public Protector, is considered one of those institutions necessary for the sustenance of constitutional democracy. Article 182 of the South African Constitution,⁶⁰ empowers the Public Protector to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in impropriety or prejudice; to

⁶⁰ No. 108 of 1996.

report on that conduct and to take appropriate remedial action. Article 182(5) provides that any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

In addition to the above shortcomings, it has been observed that the Commission lacks capacity to effectively disseminate information on its operations to the public and involve the community in the fight against maladministration.⁶¹ This has resulted in a situation where little is known by the public about its existence and operations. It is the author's view that a right to complain is not much of a right if the general population is unaware of it. This calls for education of the public through public awareness campaigns. However, this is not possible without adequate funding of the Commission. Unfortunately, the Commission has been grossly under funded over the years and has had to scale back its operations. The Commission does not have a full compliment of staff because it has failed to recruit qualified staff due to poor conditions of service. This is an unfortunate situation because the quality of staff is important for any institution, let alone the Ombudsman's office, to operate effectively and efficiently. Training of staff is thus essential for the Commission to improve on their quality, but that too needs financial resources. With all these constraints, it is little wonder that an impression has been created that the Commission's activities do not figure highly on the government's list of priorities.⁶²

A positive aspect of the Commission's operations is the fact that its proceedings are held in camera.⁶³ It has been argued that the confidentiality of the procedures gives the office the added advantage of providing a shield against

⁶¹ Good Governance Report, id. n 7 above, at p.64.

⁶² National Integrity Systems Report, id. n 10 above, at p.42.

⁶³ S.16 of the Commission for Investigations Act.

possible intimidation of informants.⁶⁴ Due to the nature of the complaints handled by the Commission, the author is in full agreement with these sentiments.

It has also been suggested that in order to strengthen the capacity of the Commission, there's need for the government to provide adequate, qualified, competent, skilled and experienced personnel that are adequately motivated and remunerated; state of the art office equipment; plant and equipment; adequate and appropriate funding for recurrent and capital costs and training and retraining of personnel, including investigative skills training.⁶⁵

6.2.2 The Permanent Human Rights Commission.

The Commission targets all victims of human rights violations and in this regard has made a number of countrywide tours, sensitising people and visiting detention places and prisons. Although the establishment of the Permanent Human Rights Commission has been widely welcomed, concern has been expressed on its apparent weaknesses. The greatest weakness being that the commission has no power to compel observance of its decisions.⁶⁶ Other weaknesses identified include the power of the President to appoint anyone without consultation, to be commissioner subject only to ratification by the National Assembly. It has been argued that this tends to undermine the independence of the persons so appointed as they might owe their loyalty to the appointing authority.⁶⁷ Another weakness cited is the lack of security of tenure for the commissioners. A commissioner may be removed from office for inability to perform the functions of the commissioner's office on the grounds of infirmity of body or mind, incompetence or for misbehaviour.⁶⁸ There are no guidelines on

⁶⁴ John Hatchard (1992). "The Office of the Ombudsman." In Hatchard, J. (Ed.). *National Human Rights Institutions in the Commonwealth*.

⁶⁵ GRZ Good Governance Report, op.cit. n 7 above, at p.64.

⁶⁶ Permanent Human Rights Commission National Plan of Action for Human Rights 1999 – 2009, p. 53.

⁶⁷ Ibid.

⁶⁸ s. 7 (2) of the Human Rights Commission act, 1996.

what constitutes incompetence or misbehaviour. Neither is there provision for an independent tribunal to investigate and make recommendations as is the case with judges. This leaves it to the discretion of the appointing authority to determine what constitutes incompetence or misbehaviour.⁶⁹ Further, the Commission does not have power to institute legal proceedings on behalf of complainants. The Commission depends on other organisations to do this and this affects the speed at which cases are disposed of. The Human Rights Act is silent on who qualifies to the office of commissioner except with respect to the Chairperson and Vice-Chairperson who are required to be persons qualified to hold high judicial office.⁷⁰ The meagre financial resources are another major weakness of the Commission.⁷¹ The major source of funding is the government treasury although the Commission can, with the President's approval, obtain funds from other sources. However, according to the National Plan of Action,⁷² the financial situation has hitherto not been impressive and the Commission has hardly had enough resources to operate efficiently since it was established whereas a steady financial base is crucial to the effectiveness of such an institution. As indicated in Chapter Five above, a shortage of skilled manpower to carry out its mandate and insufficient transport further constrain the operations of the Commission. Due to lack of resources, the Commission has only managed to carry out in-house training in human rights but has been unable to carry out training in human rights to members of the public to fulfill its objective of informing and rehabilitating victims of human rights abuse to enhance the respect for and protection of human rights. The Report on Good Governance referred to above, recommends that the Commission should be strengthened to effectively carry out its mandate.⁷³ Further, that the Commission be provided with qualified, competent, skilled and experienced support personnel

⁶⁹ Id. n 66 above, at p. 53.

⁷⁰ s. 5 (3) of the Act.

⁷¹ Id. n.66 above at p. 53.

⁷² Id n 66, above.

⁷³ Id. n 7 above, at p.63.

that are adequately motivated and remunerated in order to strengthen its capacity to investigate and report. The Report further recommends that the Commission be provided with adequate funding⁷⁴ and appropriate office accommodation and furniture in all provinces, with state of the art office equipment and plant, including motor vehicles.⁷⁵ The Report notes that it is important that the Commission's structure is strengthened and its linkages with other law enforcement institutions firmly established and maintained to fully undertake research programmes and information exchange in human rights matters.⁷⁶ However, all these recommendations are yet to be carried into effect.

6.3 The Informal Institutions

6.3.1 The Family

There is no doubt that the family was once a very important and powerful institution of justice delivery in the Zambian community. However, it is becoming increasingly apparent that the family no longer retains the same degree of importance it once used to enjoy in fostering social relationships and harmony. The reasons for this are not too difficult to discern. Firstly, society has become a lot more complex and impersonal in contemporary times.⁷⁷ Furthermore, as WLSA found out in its study,⁷⁸ in urban settings, the family presently is under tremendous stress caused by unemployment due to collapsing companies and retrenchments, a direct consequence of the liberalisation of the economy. WLSA further reports that in the wake of the HIV/AIDS pandemic, households have had to take on additional members of the family, further adding

⁷⁴ The National Plan of Action proposes that the Commission should be given greater autonomy in its finances instead of the present arrangement where the President must sanction every donation or grant to the Commission. The Commission must be self-accounting in financial matters. See National Plan of Action for Human Rights 1999 – 2009, Id. n 66 above, at p. 54.

⁷⁵ Id n 7 above, at p. 63.

⁷⁶ Ibid.

⁷⁷ Annel Musenga Silungwe (1990). 'Alternative Dispute Resolution.' Paper presented at the First Judicial and Law Association of Zambia Seminar held at Mulungushi International Conference Centre, Lusaka, Zambia 16 – 17th October, 1990.

⁷⁸WLSA id. n 2 above, at p.31.

pressure to households in terms of physical space and financial resources. Consequently, the effectiveness of the family as a dispute settlement mechanism has been eroded. In addition to this, the family's role in dispute resolution is somewhat limited to the matrimonial or family law sphere, petty criminal cases, contractual cases and disputes relating to customary land. Thus the main types of disputes handled by the family include adultery, divorces,⁷⁹ petty theft, land disputes, marriage payments, accusations of witchcraft, inheritance and sharing of resources.⁸⁰ Large commercial matters are beyond the scope of the family as a dispute resolution institution. The above notwithstanding, there is no doubt that in the traditional setup and in the poorer areas of urban communities, the family still plays a valuable role in dispute resolution.

6.3.2 The Church

The church has played a small but significant role in dispute resolution. The WLSA Study found that the church and other informal dispute resolution institutions are preferred by the lower classes of the society with women constituting the majority. The reasons for this were well captured by one Roman Catholic nun who had the following to say, "The informal system maintains the integrity, secrets and confidentiality while at the courts you feel exposed, embarrassed, stripped naked, people are there laughing, sometimes even your children are there"⁸¹

A pastor also gave an insight into the reasons for some people's preference for the church as a dispute settlement mechanism. The pastor informed WLSA researchers that the church resolves disputes through counseling and explained why their way of settling disputes appeals to their members when he said, "Our

⁷⁹ Under customary law.

⁸⁰ WLSA, id. n 2 above, at p.28.

⁸¹ WLSA, id, n 2 above at p.38. The nun was referring to the situation that obtains at most lower courts, which are normally packed to capacity with onlookers who go there in search of 'entertainment'. Such incidents have not been reported in higher courts like the High Court and Supreme Court.

way of resolving disputes does not have winners or losers, whereas the court system which is adversarial means that the relationships are lost.”⁸²

The above attributes notwithstanding, several constraints have somewhat hindered the church’s performance in the dispute resolution arena. Firstly, the types of disputes a church can handle are restricted mostly to matrimonial matters including property grabbing and quarrels between church members and in most instances, are limited to members of the particular church. Further, the church can only counsel the parties to the dispute and where that fails, occasionally advises its members to try other dispute resolution institutions, including courts.

6.3.3 Headmen and Chiefs’ Courts

As the names suggest, headmen and chiefs’ courts are a phenomenon of rural areas and peri-urban areas where villages are found. We learnt in Chapter Five that while these courts are considered illegal, their existence is recognised as evidenced by the state’s recognition of their role, especially in land matters where they are allowed to allocate land to their subjects. In most rural areas especially villages, the formal courts are too far from most people to be easily accessed by the people who would like to use them. However, headmen and chiefs’ courts are easily accessible, cheaper, faster and characterised by simple and informal procedures and are more for compensation rather than punishment. In these courts maintenance of harmonious relations to ensure peaceful co-existence is of paramount importance because there is a realisation that in the communal set-up that characterise these communities, peaceful co-existence is essential. For these reasons, these courts are popular in these areas and have contributed significantly to justice delivery.

⁸² Id. n 2 above at p.41.

Unfortunately, the position at the moment is that traditional courts are not officially recognised but passively tolerated. This is according to the 1999 WLSA Zambia Study⁸³ in which they found that there is passive tolerance of headmen and chiefs' courts in Zambia. This was so because while on the one hand the courts were considered illegal because they failed to meet the requirement that in order for a court to exist there must be a warrant signed by the Minister, on the other hand their existence was recognised. This, according to WLSA, was evidenced by the state's recognition of these courts' role especially in land matters where they allocate land to their subjects.

6.4 Non-Governmental Organisations

6.4.1 The Legal Resources Foundation

The objectives of the Legal Resources Foundation were indicated in Chapter Five as being to campaign for the reform of existing laws and institutions and introduction of new laws and institutions, where necessary, aimed at securing an open, accountable, democratic society. Once laws have been introduced or reformed, the Foundation is committed to their enforcement. Enforcement of the law is secured through the provision of legal services to those who cannot afford to retain the services of lawyers. To achieve the above, the Foundation provides legal advice, assistance and representation primarily to the financially disadvantaged members of the society. The statistics provided in Chapter Five point to the fact that the Foundation has contributed significantly to justice delivery in Zambia particularly as it relates to the poor. The Foundation has grown from being a Lusaka based organisation to that of a national institution with a presence in Zambia's nine provinces and employing by 2001, a staff of well over sixty.⁸⁴ However, the ever increasing demand for legal assistance and

⁸³ Id. n 2 above, at p.33.

⁸⁴ Legal Resources Foundation Annual Report, 2001. The Foundation dealt with 630 file queries and 341 cases were commenced in court in the same year.

the surge for new cases have placed a huge burden on the Foundation thereby enhancing the need for innovative approaches to meet the sheer volumes now being attended to. The statistics show that for an NGO that relies heavily on donor funding, the Foundation is performing reasonably well.

6.4.2 The National Legal Aid Clinic for Women

As indicated in Chapter Five, the National Legal Aid Clinic for Women was established in 1990 with the aim of assisting the disadvantaged women by providing full legal services to women (and children) who cannot afford the exorbitant legal fees charged by private legal practitioners. Like most NGOs, the Clinic is dependent on donors for its financial resources and that has proven to be a constraint in its operations. The major constraints facing the Clinic are inadequate funding; inadequate library facilities; shortage of transport and inadequate office space. However, despite these setbacks, the Clinic has achieved a lot during its existence and is now providing its services to a lot more disadvantaged women from both urban and rural areas. The statistics from the Clinic are proof that it too has made a significant contribution to justice delivery in Zambia. Despite the encouraging statistics, the growth in the number of clients is not matched by a corresponding growth in resources. That remains a challenge faced by the Clinic.

CHAPTER SEVEN

PARADIGMS OF ALTERNATIVE DISPUTE RESOLUTION IN ZAMBIA, LEGAL AND INSTITUTIONAL FRAMEWORKS

7.1 Development of Alternative Dispute Resolution in Zambia

Litigation has traditionally been the preferred method of dispute resolution in Zambia. To this day, litigation plays a central role in dispute resolution. However, developments on the international scene in relation to ADR have shown that it is rapidly becoming popular in a lot of countries. In this chapter, we deal with the paradigms of ADR in Zambia and the legal and institutional frameworks supporting them.

Some selected institutions of justice delivery were identified in Chapter Five and the supplementary but important roles they play in justice delivery in Zambia, noted. The evaluation of the performance of the traditional justice delivery institutions in Chapter Six revealed the constraints faced by these institutions in the performance of their functions and the effects of such constraints on their performance. Thus, for example, the inadequacies in both material and human resources which courts have had to deal with as highlighted in Chapter Six above, have led to long delays in the disposal of cases. At two seminars on ADR in Zambia held in 1998, in Lusaka and Ndola, Zambia¹ respectively, the participants were informed that commercial cases took up to five years to be heard in court and that this fact, especially in the context of an unstable currency

¹ Richard Martin (1998). 'The Potential for the Development of Arbitration and Alternative Dispute Resolution Systems in Zambia and Proposals for Implementation.' Report to the Law Association of Zambia Seminar on *Alternative Dispute Resolution Mechanisms with Special Emphasis on Commercial Arbitration* held on 7 – 9th September, 1998 in Lusaka and 10th - 11th September, 1998 in Ndola, Zambia.

was a major disincentive to investment in the country since investors sought prompt dispute resolution systems of integrity and quality.

In an effort to fulfil its mandate of ensuring speedy delivery of justice to all and also in an endeavour to contribute to the economic development of the country, the Law Association of Zambia (LAZ) in conjunction with the United States Agency for International Development (USAID) and with the assistance of the International Trade Centre (ITC) and the Foundation for International Commercial Arbitration (FICA), initiated the move to introduce ADR mechanisms with particular emphasis on arbitration in Zambia.² These seminars were follow-ups to a seminar held earlier by LAZ in conjunction with ITC. The main purpose of the visit by the foreign participants was to explore the possibility of establishing an alternative dispute resolution system in Zambia with emphasis on arbitration and to acquaint the Zambian people on alternative dispute resolution.³ LAZ took up the issue with vigour and established an Alternative Dispute Resolution Committee. The Zambia Association of Chambers of Commerce and Industry (ZACCI) also threw its weight behind the development of ADR. ZACCI also brought pressure to bear on the government to reform the judicial system. The pressure resulted in the introduction of the Commercial List in the High Court of Zambia in January, 1999⁴ handled by a specialised panel of judges trained for that purpose.

7.2 Alternative Dispute Resolution methods currently in use in Zambia

The discussion in Chapter Three has shown that alternative dispute resolution methods or techniques in use world-wide particularly in the United States of America are varied. However, in Zambia there are presently three main types of ADR techniques in use namely, negotiation, conciliation/mediation and

² (1998). Rapporteur's Report on the Law Association of Zambia Seminar on *Alternative Dispute Resolution* held in Lusaka, Zambia from 7 – 9th September, 1998 at page (i).

³ Rapporteur's Report, id. n. 2 above, at p.1.

⁴ Ibid.

arbitration. Of these three, mediation and arbitration are the most common forms of ADR in use. In the following section the three methods of ADR are examined more closely.

7.2 1 Negotiation

As indicated in Chapter Three, negotiation is as old as mankind and usually precedes all other forms of dispute resolution. Negotiation is the pre-eminent mode of dispute resolution and has the advantage of the parties negotiating between or among themselves to resolve the dispute or work out a compromise. It is the quickest way of resolving disputes, be they commercial or private. Negotiation is a dispute resolution method which is utilised by society as a whole beginning with the smallest unit of society, the family. Big institutions also utilise negotiation to settle their commercial or labour disputes. Some disputes end after the parties negotiate a settlement. Where a settlement cannot be reached by negotiation, other methods of dispute resolution, including litigation are resorted to.

Negotiation has been used in Zambia as a form of dispute resolution process from ancient times and continues to be used up to date. However, negotiation sometimes fails due to the belief on the part of many litigators that there is no middle course between negotiation and litigation.⁵ Such litigators believe that they are good negotiators and if they are unsuccessful in negotiating a particular case that means the case is only suitable for resolution by litigation. Lawyers may fail as negotiators because of a desire to stand shoulder to shoulder with their clients and to play the role of hired gun rather than that of objective advisor.⁶ The Centre for Dispute Resolution (CEDR) has identified some of the reasons for the failure of negotiation as follows:

⁵ Paul Newman (1999). *Alternative Dispute Resolution*, p.107.

⁶ Ibid.

- (i) poor negotiation skills;
- (ii) unrealistic expectations;
- (iii) emotional antagonism or personality clashes (not least between the lawyers);
- (iv) desire for revenge;
- (v) distrust;
- (vi) failure to communicate;
- (vii) inability to decide whether a particular offer is suitable or represents the maximum achievable;
- (viii) inability of parties to problem-solve;
- (ix) gamesmanship and brinkmanship;⁷
- (x) advisors lacking appropriate authority;
- (xi) the existence of litigation diverting attention from the negotiations; and
- (xii) disagreements that quite simply cannot be overcome.⁸

Negotiation has the advantage of being informal and allowing the parties to reach a mutually acceptable compromise. The dispute can also be resolved speedily with less cost. This helps in the maintenance of existing business or social relationships. Being the pre-eminent form of dispute resolution, negotiation is apparently used by society at large, beginning with the smallest unit of society, the family. Other methods of dispute resolution are normally resorted to when negotiation fails to resolve the dispute.

Whilst appreciating that a survey was not one of the intended research methods for this thesis, the author did a small random survey of ten Lusaka-based private practitioners to find out whether they advise their clients to attempt negotiation

⁷ 'Gamesmanship' is defined by Collins English Dictionary, Millennium Edition, as the art of winning games or defeating opponents by clever or cunning practices without actually cheating, while 'brinkmanship' is defined as the art or practice of pressing a dangerous situation, especially in international affairs, to the limit of safety and peace in order to win an advantage from a threatening or tenacious foe.

⁸ Id n 5 above, at p. 107.

and if so, at what point they give out this advice. All the lawyers, with the exception of one,⁹ told the author that they do advise their clients to attempt negotiation or other *ex curia* dispute resolution methods before resorting to litigation. These lawyers admitted that they do not always advise their clients to attempt negotiation first. According to the lawyers, the best time to offer this advice is when first approached by the client for legal advice or suit. However, depending on the facts of the case, advice can be given later as it may not be appropriate to give such advice initially.¹⁰ One lawyer informed the author that he advises clients to pursue *ex curia* settlement either after issuing a demand letter or after commencement of the suit. He has very rarely advised clients to that effect before taking the above steps.¹¹ Another lawyer told the author that where there is a possibility of settlement, he advises his clients to try an out of court settlement as "the first line of attack."¹² Yet another lawyer¹³ told the author that when approached by a would-be client, he finds out if the client has attempted to negotiate a settlement. If the client insists that the matter should be taken to court, a letter of demand is written. According to the lawyer, that is a further attempt to settle the matter *ex curia*. If that fails, litigation is commenced through the issue of appropriate process.¹⁴

One lawyer¹⁵ informed the author that as a matter of practice, she always encourages her clients to attempt an out of court settlement of any dispute, and where they are reluctant to do so, she weighs the options out for them and makes the alternative dispute resolution method look more attractive. She informs them of the long drawn-out court procedures, the overload of cases in courts and the

⁹ Former LAZ Chairman, Mr. Michael Musonda. A discussion on his views follows later in this part.

¹⁰ This is according to two senior lawyers, Marjorie Johnson Mwenda and Eness Chiyenge. Another lawyer, Gregory Cornhill informed the author that he always tries to resolve matters amicably from the beginning and only resorts to litigation when out of court settlement fails.

¹¹ Lastone Mwanabo.

¹² Charles Chanda.

¹³ Mumba Malila, who is also the current Chairperson of the Permanent Human Rights Commission.

¹⁴ In an interview with the author.

¹⁵ Nicola Sharpe-Phiri who is also the current Secretary of the Zambia Association of Arbitrators.

likely delays, expenses and costs. According to the lawyer, clients are often attracted to the alternative dispute resolution processes, especially arbitration after knowing that they can control the process. Before commencing any legal action, she gives the other side an opportunity to resolve the matter amicably with her client and even when she issues a demand on any case she ends the letter by informing the other party that they are amenable to an amicable resolution of the matter. She finds that this positive manner of ending the letters often works wonders and they are able to settle a number of disputes especially if the lawyers on the other side are exposed to ADR methods. More importantly, she encourages her clients to include arbitration clauses in their agreements so that in the event of a dispute, the matter can be referred to arbitration. Clients are always willing to include the arbitration clause when they become aware of party autonomy and the fact that the process will be less formal and intimidating than the courts.

The one lawyer who admitted that he hardly suggests to his clients to try negotiation as a mechanism for the resolution of their disputes, is a former LAZ Chairman in private practice in Lusaka.¹⁶ He told the author that he has often publicly expressed the view that lawyers have not been helpful towards the development of ADR and that often times, it is the lawyers' collective failure to encourage their clients to embrace ADR that is partly responsible for the clogging of the courts. He however, pointed out that lawyers are not entirely or exclusively to blame for this state of affairs. He was of the view that clients were also partly to blame in that they have traditionally looked to someone else to resolve their disputes.¹⁷ Mr. Musonda also reminded the author about the lawyers' ego: clients retain lawyers to sort out their problems. He points out: "under these circumstances, can such a lawyer (who, crucially, expects to be paid for his/her labours) shy away from 'doing his/her job' or litigating, in favour of leaving the client to his own devices?"

¹⁶ Mr. Michael Musonda.

¹⁷ This is particularly true of the village setting, which most people in Zambia identify with.

It would appear that while lawyers often advise their clients to try negotiation before resorting to litigation, not much serious effort goes into that, otherwise the problem of congestion in the courts would not be as pronounced as it is today. To that extent, the author is in agreement with Mr. Musonda's views above. However, this is not to suggest that lawyers are not doing anything to advise their clients to use ADR, but that more effort should be put in by lawyers to encourage their clients to attempt ADR first before they resort to the courts of law. Such initiatives could help decongest the courts.

7.2.2 Arbitration

Arbitration is increasingly becoming popular in Zambia particularly in construction, industrial and labour relations, commercial and consumer disputes. World wide, arbitration has been considered the most suitable method of resolving disputes between parties to domestic or international contracts. This perception has been augmented by the fact that there is already in place a system of international conventions, particularly the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which have well-established international rules and practice that provide a framework within which disputes can be resolved. In Zambia however, despite having a statute on arbitration since 1933,¹⁸ arbitration is a relatively new concept.

It has been observed that arbitration has taken time to develop to the current level in Zambia due to the type of training that lawyers have been receiving at Law School. The Law School has been preparing a 'boxer' who believes that dispute resolution is a win or lose affair. Winning implies more money and power which is befitting of lawyers. Worse still, parties have tended to ignore arbitration clauses in preference to taking their disputes to conventional courts.¹⁹ Other reasons that

¹⁸ Arbitration Act, 1933 since repealed and replaced by the Arbitration Act, 2000 Act No. 19 of 2000.

¹⁹ According to Mr. Vincent Malambo, S.C., Minister of Legal Affairs (now Justice) in a meeting with the ADR Steering Committee held on 8 September, 1998.

have led to the little use of arbitration in Zambia has been, until fairly recently, the limited pool of trained and experienced arbitrators; the outdated legal regime governing arbitration;²⁰ judges with little commercial experience; judges reluctance to enforce arbitration agreements and the closed door policy which Zambia pursued prior to liberalisation of the economy. Under the new arrangement which dates back to the year 2000 when the new Arbitration Act²¹ based on the United Nations Commission on International Trade Law (UNCITRAL) was enacted, a pool of arbitrators has been trained and the Zambia Centre for Dispute Resolution (ZCDR) Limited and the Zambia Association of Arbitrators (ZAA) have been incorporated and recognised as arbitral institutions to promote the practice of arbitration in Zambia.²² . The ZAA evolved from the LAZ ADR project and is registered under the provisions of section 7 of the Societies Act.²³ Membership consists of people from various professions such as accountants, lawyers, engineers, architects, doctors, surveyors and members of the business community. The functions or objects of the Association are found in article 2 of its constitution. These are, regulating the practice of arbitration by ensuring that members abide by the Judicial (Code of Conduct) Act; facilitation of arbitration by providing personnel to act as arbitrators; popularising arbitration by disseminating information on arbitration through seminars and workshops and contributing to law reform in the field of arbitration.

²⁰ Discussed later in this Chapter.

²¹ A discussion of this Act follows in the section on legal framework.

²² Under section 23 of the Arbitration Act, No. 19 of 2000, a professional body or organisation in Zambia or elsewhere may apply to the Minister for a recognition order declaring the body or organisation to be an arbitral institution for the purposes of the Act. 'Professional body or organisation' in the Act means a body or organisation which regulates the practice of a profession. This provision should be read in conjunction with Regulations 3, 4, 5, 6 and 7 of the Arbitration (Recognition of Arbitral Institutions) Regulations, S.I. No. 73 of 2001. The incorporation of the ZCDR as an arbitral institution was a positive development. However, statistics from the Centre show that few cases are referred to arbitration through the Centre. Thus, from the time the Centre became operational in 2002 to May, 2006, only about 46 cases have been submitted to arbitration through the Centre. Only 6 out of these have been concluded while the rest are still on-going. Source: ZCDR records for the period 2002 – May, 2006. Obviously, these statistics are a drop in the ocean compared to the number of cases being filed in the courts on a daily basis. It is possible that some cases are referred directly to the arbitrators by the courts, hence the limited numbers going to the Centre.

²³ No. 13 of 1994, Chapter 119 of the Laws of Zambia. See Gazette issue No. 599 of 23 November, 2001 for a Gazette Notice to that effect.

The growth of domestic and international trade and commerce over the years has led to an increase in the volume and types of disputes. Correspondingly, businessmen have increasingly demanded for quicker ways of resolving disputes. Arbitration has a number of advantages over litigation. For example, the parties have the opportunity to choose their own arbitrator or arbitral tribunal from people they consider to be experts in the field of the dispute. On the other hand, litigants cannot choose their own judge. Arbitration is conducted in private and has lesser formalities than a trial in court of law. There is also the advantage of relative speed and saving of expense depending on the will of the parties and arrangements they choose to put in place. On its part, the Zambian judiciary has recognised the important role of arbitration in dispute resolution and, according to one scholar, is now referring all cases with arbitration clauses to ZCDR for arbitration.²⁴ The liberalisation of the economy after 1992 greatly increased the potential for arbitration in resolving commercial disputes. With the legal framework for arbitration in Zambia in place, arbitration is set to become more and more a dispute resolution method of choice by businessmen.

7.2.3 Conciliation/Mediation

As already indicated in Chapter Three the word 'conciliation' is often used interchangeably with 'mediation', due to their similarities although conciliation refers to a less formal process. The conciliator's role is to help the parties to a dispute reconcile their differences by performing the role of a go-between, communicating each side's position and settlement options to the other. Conciliation is normally used in the context of labour relations when neutral

²⁴ This is according to Erasmus Masuwa; the Mediation Coordinator of the Court-annexed Mediation Programme at the High Court for Zambia on p.32 of his unpublished Directed Research Paper entitled 'Introduction of Mediation in the Zambian Court System.' Submitted to the University of Zambia Law School in partial fulfillment of the Degree of Bachelor of Laws, November, 2004. However, as stated earlier, the statistics on case referrals from courts to the ZCDR above indicate that only few find their way to the Centre. Therefore, the statement that courts are now referring all cases with arbitration clauses to the ZCDR is debatable.

intervention is used to break a stalemate.²⁵ It can be used as an alternative to a strike. If the parties resolve their differences before a law suit is filed or a strike is called, further conflict is avoided. However, as Patterson and Seabolt point out, even when trial is inevitable, ADR can be used to eliminate ancillary issues, resolve matters of evidence and procedure and generally reduce the tension between the parties.²⁶ Mediation is a more formal process in which the mediator helps the parties resolve their dispute. The mediator in non-court-annexed mediation is chosen by the parties to the dispute while in court-annexed mediation the mediator is chosen by the court.

Mediation in Zambia is mainly court-annexed.²⁷ Court-annexed mediation was introduced in Zambia with the help of USAID. Prior to this development, the country had no trained mediators. USAID contracted a global multi-national firm known as Chemonics International which has its head office in Washington DC to handle the Zambian court-annexed mediation programme.²⁸ Their duty was to implement mediation in the commercial and civil courts in Zambia's most populated jurisdictions of Lusaka, Ndola, Kitwe and Livingstone. Chemonics International initially sent a team of two trainers to Zambia in 1996. This followed a visit to the Columbia Superior Court in Washington DC of a team of

²⁵ Murray S.J.(1996). *Process of Dispute Resolution*, p.10. An example of a successful conciliation was that between management of Shoprite Checkers Zambia and workers which took place in July, 2005. The Board Chairman of the Conciliation Committee on the labour dispute between the parties, a former Deputy Minister in the Ministry of Labour, the late Newton Ng'uni, informed the nation through the media that the dispute between the parties had been resolved through conciliation. The dispute related to salary increments and the introduction of a pension scheme. After reaching a deadlock, the union wrote to Shoprite management stating the workers' demands and later a reconciliatory board was set up. The Board Chairman of the Conciliation Committee indicated that there was no loser or winner in this case but a give and take spirit prevailed.

²⁶ Patterson S. and Seabolt G. (Ed). (2001).*Essentials of Alternative Dispute Resolution*, p.1.

²⁷ This form of mediation exists where mediation services are incorporated into the court process and may either be ordered by the court or agreed to by the parties. The parties maintain their rights to proceed to trial if the mediation fails. Any settlement reached becomes the judgment of the court and may be enforced as such.

²⁸ Masuwa, id. n 24 above. Masuwa was engaged by Chemonics International as Local Project Coordinator to provide local project co-ordination including, assisting with the preparation and implementation of project activities.

Zambian judges in 1995, where they were introduced to that country's civil delay reduction programme.²⁹

The first mediation training in Zambia took place in 1996 conducted by the trainers provided from Chemonics International. A good number of lawyers and judges underwent this training. After the successful holding of the first mediation training, the Chief Justice of Zambia resolved to constitute a Judicial Mediation Development Committee headed by a Supreme Court Judge, Justice Irene Mambilima whose role was to spearhead the programme. Among her duties, Judge Mambilima was to facilitate appropriate legislation to provide for mediation.³⁰ Following a recommendation of this Committee, Statutory Instrument Number 71 of 1997, the High Court (Amendment) Rules, 1997 was passed.³¹ A Settlement Week³² was held from 24th to 28th April, 2000. Before that, the judiciary was tasked to select suitable cases for settlement during the week scheduled to be heard at the High Court building in Lusaka. High Court judges were tasked to select appropriate cases for Settlement Week with priority being given to the oldest cases; mortgage and debt cases; tort and contract cases.³³ Cases considered ineligible were those in which preliminary applications were pending; labour matters before the Industrial Relations Court; criminal matters or matters involving the liberty of an individual and constitutional cases. Thirty-three mediators were mentored during Settlement Week³⁴ and Settlement Week procedures were established and implemented. 207 cases were scheduled for mediation during Settlement Week and participants reinforced their newly acquired mediation skills through practical mediation experience during the

²⁹ Ibid.

³⁰ Masuwa, id. n 24 above at p.33.

³¹ The Rules are discussed later in the chapter under the section dealing with legal framework.

³² Settlement Week is a week set aside during the mediation course when trainee mediators are given real cases from court to settle as part of their training. This is an initiative designed to foster the resolution of disputes through the use of mediation. It offers legal and other professionals the opportunity to be trained in mediation as well as practice their mediation skills several times in one week with a variety of different matters.

³³ Masuwa id. n 24 above at, p.36.

³⁴ Masuwa, id. n 24 above at, p.37.

week. Since the first Settlement Week, a number of Settlement Weeks have been organised by the Judiciary over the years. This trend is likely to continue. Between 2002 and 2006, about 96 mediators have been trained and accredited in the country.³⁵

ADR has taken root and mediation popularised in Zambia.³⁶ The court-annexed mediation programme has been a major boost to mediation in Zambia. Simple, plain cases are usually referred to mediation. Delivery of justice has improved by having a large pool of trained mediators available and this has contributed to the reduction of the case loads in the courts. In the Industrial Relations Court, mediation has helped expedite legal proceedings. According to the Mediation Officer, before the introduction of court-annexed mediation, the Industrial Relations Court was hearing cases going back ten years down the line. The backlog could still be there but it is not as huge as it used to be.³⁷ In the words of the current Chairman of the Zambia Centre for Dispute Resolution (ZCDR), mediation has become integral in the practice of carrying on litigation and referrals are part of the contours of litigation.³⁸

However, despite the positive developments in mediation in Zambia highlighted above, certain shortcomings have been observed which have to be dealt with in order to improve the efficacy of court-annexed mediation. In terms of mediation rules, there are discrepancies between the Industrial Relations Court (Arbitration and Mediation Procedure) Rules, 2002 which apply to mediations involving cases

³⁵ Since 2000, a number of training sessions have been held. These are: 21 – 31 May 2002 in Livingstone where 30 mediators were accredited; 13 – 23 October 2003 in Lusaka where 20 mediators were accredited; 8 – 19 December 2003 in Kitwe where 23 mediators were accredited and 29 May – 9 June 2006 in Lusaka where 23 mediators were accredited. Source: Mediation Office Statistics, September, 2006.

³⁶ This is the view of Dr. Patrick Matibini, current Chairman of the Zambia Centre for Dispute Resolution and also trainer of mediators in Zambia. Dr. Matibini is also a lecturer in mediation and arbitration in the University of Zambia Law School. These views were expressed in an interview with the author held at his law offices in Lusaka on 7th September 2006.

³⁷ In an interview with the author at the Industrial Relations Court Mediation Office on 12 September, 2006.

³⁸ Dr. Matibini during the interview with the author.

commenced in the Industrial Relations Court and the High Court (Amendment) Rules, 1997 which apply to mediations of cases referred from the High Court.³⁹ One such discrepancy is the period within which the mediation process must be completed. Under Order XXXI Rule 7 of the High Court (Amendment) Rules, 1997, a mediator is required to complete the mediation process within sixty days from the date of collecting the record, whereas under Rule 15 (2) of the Industrial Relations Court (Arbitration and Mediation Procedure) Rules, 2002, the mediator is required to complete the mediation process within ninety days of collection of the suit, action or legal proceedings in respect of which the mediator has been appointed. Another major discrepancy is in relation to mediation fees chargeable under the Rules. Under Order XXXI, Rule 13 of the High Court (Amendment) Rules, 1997 as amended by the High Court (Amendment) Rules, 1998,⁴⁰ a one-off mediation fee in accordance with the scale prescribed by the Chief Justice is payable by the parties to the suit in equal proportion, while under Rule 28 of the Industrial Relations Court (Arbitration and Mediation Procedure) Rules, 2002, the fee is paid at every sitting. The author is of the view that this distinction is unjustified since mediators perform the same functions irrespective of which court the matter has been referred from. In addition, all the mediators come from the same pool of mediators.⁴¹ Fortunately, the distinction relating to mediation fees will soon be a thing of the past in light of a new statutory instrument which is in the process of enactment which will make the mediation fee payable only once for Industrial Relations Court mediations as well.⁴² This provision will be in line with the High Court Rules.

³⁹ An observation also made by Dr. Matibini during the interview.

⁴⁰ Statutory Instrument No. 69 of 1998.

⁴¹ Rule 13 (1) provides that a mediation officer shall keep a list of mediators who have been trained and certified to act in this capacity. Sub-rule (2) states further that the mediators to be listed under sub-rule (1) shall be those currently approved or certified by the Chief Justice in respect of High Court proceedings under the Rules of the High Court.

⁴² According to the Industrial Relations Court Mediation Officer.

Under Rule 26 of the Industrial Relations Court (Arbitration and Mediation Procedure) Rules, a mediator may postpone or adjourn a mediation hearing at any stage within the ninety day period, if considerations of justice so demand or if the adjournment is likely to facilitate a possible settlement. However, if a judge is of the opinion that the chances of settlement are still feasible after the ninety day period, the judge or Court may grant a further period on the request of the mediator, as may be thought reasonable by the mediator. The High Court Rules do not have such a provision. It is obvious that there is need for a review and consolidation of the High Court and Industrial Relations Court mediation rules.

The very administration of the mediation programme is apparently fraught with problems. Files are not closely monitored by the Mediation Office and some mediators keep files for an unduly long time.⁴³ Sometimes parties to disputes are not willing to attend mediation sessions and this leads to frustration among mediators.⁴⁴ While the High Court Rules stipulate that the mediation process should be completed within sixty days, some files are kept for periods of up to one year by some mediators due to problems of parties or their counsels failing to show up at mediation sessions. Some files have been returned to the court without mediation having been attempted.⁴⁵ Constant and regular adjournments of mediation proceedings have also led to delays in disposing of cases.⁴⁶ Dr. Patrick Matibini, the current Chairman of the ZDRC is of the view that the High

⁴³ According to Dr. Matibini. This view was shared by Mrs. Nicola Sharpe-Phiri, a lawyer in private practice in Lusaka and current Honorary Secretary of the Zambia Association of Arbitrators in an interview with the author in Mrs. Sharpe-Phiri's office in Lusaka on 7 September 2006. According to Mrs. Sharpe-Phiri, there is need for strict enforcement of the mediation rules.

⁴⁴ A view expressed by Mrs. Sharpe-Phiri during the interview. The author is of the view that a possible solution to this problem is the introduction of a penalty fee for parties who fail to attend mediation sessions for no good reason.

⁴⁵ According to Mrs. Sharpe-Phiri. Education of lawyers and the public would seem to be the solution to this problem.

⁴⁶ According to Dr. Matibini and Mrs. Nicola Sharpe-Phiri during their respective interviews with the author. The Mediation Officer at the Industrial Relations Court Mediation Office informed the author that parties sometimes ask the mediator for adjournments to try and negotiate a settlement. In such cases the mediators keep the files and wait for the parties to report back. This causes delays in disposing of matters.

Court administration should take a closer look at the management and movement of files. A further shortcoming with regards to mediation is the fact that there is no code of ethics for mediators as opposed to arbitrators who have adopted the Judicial Code of Conduct on an ad hoc basis.⁴⁷ In addition, mediators do not have to be licensed and as such, their accreditation is not renewable. Due to the absence of this requirement, mediators are under no pressure to act appropriately since they are assured of continuing with their practice irrespective of their behaviour. According to Dr. Matibini, ZAA should be given the mandate to regulate the conduct of mediators and arbitrators in the same manner that LAZ does with lawyers.⁴⁸

The Mediation Office at the High Court in Lusaka has observed a trend whereby the cases referred to mediation by the High Court be it from the Commercial List or General List have not been much with the exception of Settlement Week when the numbers suddenly rise. Thus for example, from January 2006 to early September, 2006 the referrals were as follows: January – 8 cases; February – 4 cases; March – 10 cases; April – 7 cases; May – 11 cases; June – 45 cases;⁴⁹ July – 14 cases; August – 4 cases and September – 3 cases. Statistics in the Industrial Relations Court Mediation Office for the period January to June 2006 show that a total of 111 cases were referred to mediation. Out of that number, 27 cases were fully settled; 43 cases were not settled; 3 cases were partially settled; 17 cases were not mediated and 21 cases were ongoing.⁵⁰ The Industrial Relations Court statistics show that of the cases referred to mediation between January and June 2006, fewer cases were fully settled than those which were not settled. Clearly this is not an ideal situation and goes to show that there is

⁴⁷ This was according to Dr. Matibini who was of the view that a code of ethics must be introduced for mediators.

⁴⁸ Views expressed to the author during the interview.

⁴⁹ The number shot up in June because there was a Settlement Week.

⁵⁰ Statistics obtained from the Mediation Office on 12 September, 2006.

need for increased awareness by members of the public on the advantages of mediation to improve settlement rates.

Complaints have been raised regarding the distances people have to travel from different parts of Zambia to either Lusaka or Ndola where the Industrial Relations Court sits. According to the Industrial Relations Court Mediation Officer, the introduction of circuit courts in provincial centres could alleviate the problems of traveling long distances to the Industrial Relations Court. A further problem associated with the court-annexed mediation programme is the fact that the Industrial Relations Court (Arbitration and Mediation Procedure) Rules, 2002 make it mandatory for parties to pay mediation fees. Some litigants are unemployed and find it difficult to find money to pay the fees. Further, it has been observed that most managers have very little knowledge of mediation. Hence, even where there is a possibility to settle, they would rather proceed to litigation for fear of setting precedents which could be taken advantage of by other employees. According to the Mediation Officer, training of senior managers on the advantages of mediation could help alleviate this problem.⁵¹

At the High Court in Lusaka, mediation sessions are held in the Robbing Room.⁵² The furniture in this room is an eyesore and does not make the room conducive to mediation. As a result, most mediators prefer to conduct mediation sessions at their places of work.⁵³ Currently members of staff in the Mediation Offices at both the High Court and the Industrial Relations Court are not trained in mediation. Thus, there's need to subject these officers to training in mediation to keep them abreast of any latest developments and as a way of motivating them. A fee payable by mediators towards the maintenance of the Mediation Offices could go a long way in alleviating the problems they face of shortage of

⁵¹ According to the Mediation Officer.

⁵² A room where Counsel adorn their court robes before appearing in court.

⁵³ According to the Mediation Officer.

stationery, office equipment and furniture that need replacing, etc. Evidently, most members of the public do not know much about mediation. This is reflected in the general lack of knowledge about mediation among the people whose cases are referred to mediation. The ZCDR could thus, play a part in sensitising the general public about mediation and its benefits by carrying out sensitisation workshops to members of the public.⁵⁴ This could help members of the public to positively embrace mediation.

Fundamentally, it should be noted that in mediation it is the parties who are empowered to decide upon the terms of the ensuing settlement and not the mediator whose role is to facilitate the negotiations between the parties to the dispute. The United States District Court for the Northern District of California had the following to say about the role of a mediator which, in the author's view, applies to the Zambian mediator as well, namely, structuring the mediation so as to maximise settlement prospects, improving communication by helping parties to articulate their interests and understand those of their opponent, probing the strengths and weaknesses of each party's legal positions, identifying areas of agreement and helping generate options for a mutually agreeable resolution to the dispute.⁵⁵ Mediation has the capacity to expand traditional settlement discussions and broaden resolution options, by taking into consideration the actual needs and interests of the disputants that may be formally independent of the legal issues in controversy.⁵⁶

It is obvious that mediation has a number of advantages over litigation. These advantages have been outlined in Chapter Three above. However, as regards court-annexed mediation, opinions are divided on its efficacy. It has been

⁵⁴ Views expressed by the Mediation Officer.

⁵⁵ US District Court for the Northern District of California – ADR Local Rules 6.1

⁵⁶ Ibid.

perceived as being paradoxical.⁵⁷ It is argued that mediation is premised on it being voluntary and that court-annexed mediation has some element of coercion. That being the case, it cannot be said to be voluntarily entered into. There have been questions on the efficacy of a procedure that forces parties to participate in a consensual decision-making process but does not require them to reach agreement.⁵⁸ According to one author,⁵⁹ cases that are mandated to mediation do not settle as readily as those that submit voluntarily. Perhaps the problem could be attributed to lack of participation in good faith. A compelled party may not participate in good faith and may go to the mediation without being ready and with no intention to settle, in which case the process would be doomed to fail. On the other side of the coin, those who are pro-court-annexed or court-attached systems of ADR are of the view that such systems serve to establish standards of competence which are monitored by the courts and which in due course, define the relationship between the courts and mediation. With such a system, it is argued, a legal framework based on concepts of good faith, independence and impartiality would evolve.⁶⁰

Some commentators believe that a bit of coercion does no harm and is necessary. Thus in a Lecture presented in the Sir Roy Goode Q.C. Lecture Series at Queen Mary College, University of London on 3 November 2004,⁶¹ Arthur Marriot argues that without the widespread use of ADR attached to formal adversarial processes, whether before courts or tribunals, no significant improvement in access to justice is to be expected. Marriot further gives an indication of the experiences in the United States, Canada and Australia where, according to him, the key to the effectiveness of ADR is that references are mandatory and experience shows the same level of satisfaction with the result by

⁵⁷ It is argued that it is a paradox to have mandatory mediation because mediation is meant to be consensual and a court order for mediation cannot be said to be consensual.

⁵⁸ Pirie, J.A. (2000). *ADR – Skills, Science and the Law*, p. 340.

⁵⁹ Marinari, M. (2000). 'ADR and the Role of Courts.' 72 *Arbitration International*, No.1 at p. 49.

⁶⁰ Brown and Marriot (1993). *ADR Principles and Practice*, at p. 409.

⁶¹ (2005). 'Mandatory ADR and Access to Justice.' 71 *Arbitration International*, No.4 at p.308.

the litigants whether they were compelled by the court or voluntarily agreed.⁶² Tamara Øyre⁶³ observes that while some believe that actively pushing parties to mediation, when the process is meant to be consensual, can never result in success, the opposite appears to be the case. Thus, according to Øyre, up to April 19, 2000 the Commercial Court made 241 ADR Orders, and only in 20 cases did ADR fail to resolve the dispute. This was an 83 per cent settlement rate.⁶⁴ Further, Øyre reports that between July 1996 and June 2000, the Lord Chancellor's Department carried out a study to assess the impact of ADR Orders issued by the Commercial Court on the progress and outcome of cases and explored reactions of practitioners to these orders. Øyre reports:

...During the first three years of the study, the annual number of ADR Orders was about 30. There was a substantial increase towards the end of the period, with 68 Orders in the final six months. This was as a result of one or two judges significantly increasing the number of Orders issued.⁶⁵

It is the author's view that for a country such as Zambia where ADR is still a new concept, court-annexed mediation should be seen as a necessary evil. While accepting that mediation is a consensual process, court involvement is needed to ensure guidance by the court and maintenance of acceptable levels of standards. In any event, as Tamara Øyre correctly states, ADR orders can have a positive effect in opening up communication between the parties and may avoid the fear of one side showing weakness by being the first to suggest settlement.

7.2 Legal and Institutional Frameworks

The main building blocks of the legal framework for arbitration in Zambia, according to Mwenda,⁶⁶ include public policy, creative problem-solving, legislation, and the common law, doctrines of equity, African Customary law and

⁶² Id. n 61 above, at p. 314.

⁶³ (2004). 'Civil Procedure and the Use of Mediation/ADR.' 70 *Arbitration International*, No. 1 at p.21

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Kenneth kaoma Mwenda, (2003). *Principles of Arbitration Law* at p. 24.

principles of public international law. This statement is also applicable to conciliation/mediation. Indeed, the common law, doctrines of equity and some English statutes are applicable in Zambia, subject to the Constitution of Zambia, by virtue of section 2 of the English Law (Extent of Application) Act.⁶⁷ This Act makes it possible for the English laws mentioned above to be part of the main building blocks for the legal framework for arbitration and conciliation/mediation in Zambia.

The following discussion on the legal and institutional frameworks of ADR in Zambia is restricted to arbitration and conciliation/mediation for the reason that they are the principal modes of dispute resolution that have been pursued and developed in Zambia to date.

7.3.1 Arbitration

The first statute on arbitration law to be enacted in Zambia was the Arbitration Act, 1933. It came into force on 5th April, 1933. Introduced during the colonial era, this statute was based on the English Arbitration Act, 1889. It was supplemented by the English Common Law which was applied in Zambia from the time of colonial rule. Under section 3 of the 1933 Act, a 'submission,' defined in the interpretation section as a written agreement⁶⁸ to submit present or future differences to arbitration, whether an arbitrator is named therein or not, was irrevocable except by leave of the High Court. The parties to a submission could appoint an arbitrator or arbitrators themselves or agree to let a third party named in the submission appoint an arbitrator or arbitrators.⁶⁹ A party to a submission was at liberty to apply to the High Court to stay the proceedings at any time after appearance, but before filing a written statement or taking any other steps in the proceedings. The court could make the order for stay if satisfied that there was

⁶⁷Chapter 11 of the Laws of Zambia.

⁶⁸ Oral submissions were not provided for under this Act.

⁶⁹ S. 5 of the Arbitration Act, 1933.

no sufficient reason why the matter could not be referred in accordance with the submission and that the applicant was ready and willing to do all things necessary to the proper conduct of the arbitration.⁷⁰ The court was empowered to appoint an arbitrator, umpire or third arbitrator in the following instances, namely, where the parties could not agree to the appointment of a single arbitrator; where an appointed arbitrator neglected or refused to act or was incapable of acting; or died, or was removed or where the parties were at liberty to appoint an umpire or third arbitrator but did not do so; or where an appointed umpire or third arbitrator refused to act, was incapable of acting, died or was removed.⁷¹ The arbitrator, umpire or third arbitrator so appointed, had the same powers as one appointed with the consent of all parties.

In the event of a submission providing that two arbitrators were to be appointed, one by each party and either of the appointed arbitrators refused to act, was incapable of acting, died or was removed, the party who appointed him could appoint a new arbitrator in his place. If a party failed to appoint an arbitrator either originally or by way of substitution, the other party could appoint the arbitrator he appointed as the sole arbitrator and his award bound both parties as if he had been appointed by consent.⁷² However, the court could set aside an appointment made in the latter circumstances on application by either party. Where the submission provided for the appointment of three arbitrators-one each to be appointed by the parties and the third to be appointed by the two arbitrators appointed by the parties, if one party failed to appoint an arbitrator, the other party could appoint his appointee as sole arbitrator. The court was at liberty upon application by either party to the submission to appoint the third arbitrator in the event of the two arbitrators failing to appoint the third arbitrator. In the event of an arbitrator or arbitrators appointed by the parties, arbitrators or

⁷⁰ S. 6.

⁷¹ S. 7.

⁷² S. 8.

the court refusing to act, was incapable of acting or died, a new arbitrator could be appointed in his place by the party, arbitrators or the court, as the case was. However, the court had the power to set aside the appointment of a person to act as arbitrator made in the above circumstances.⁷³

An arbitrator or umpire appointed under any submission could administer oaths to the parties and witnesses, state a special case for the opinion of the court on any question of law involved and correct in an award any clerical mistake or error arising from any accidental slip or omission.⁷⁴ Arbitrators were under a duty to sign awards and on the request of any party to the submission, were obliged to file the award in court.⁷⁵ The court was empowered to remove an arbitrator for misconduct⁷⁶ and to set aside an improperly procured arbitration or award, or where an arbitrator had misconducted himself.⁷⁷

A foreign award was enforceable under the Act provided it was made in pursuance of an agreement for arbitration which was valid under the law by which it was governed; been made by the tribunal provided for in the agreement or constituted in a manner agreed upon by the parties; been made in conformity with the law governing the arbitration procedure; became final in the country in which it was made; been in respect of a matter which could lawfully be referred to arbitration under the law of Zambia and the enforcement thereof not contrary to the public policy or the laws of Zambia.⁷⁸

A critical analysis of the provisions of the Arbitration Act, 1933 outlined above, shows that the Act had a number of shortcomings. In the first place, the 1933 Act was silent on the question whether parties to a submission could give the

⁷³ S. 9.

⁷⁴ S. 10.

⁷⁵ S. 11.

⁷⁶ S. 17.

⁷⁷ S. 15.

⁷⁸ S. 28.

power to an individual or body corporate to appoint an arbitrator or whether any body corporate or individual could be granted the power to appoint an arbitrator.⁷⁹ Further, according to Mwenda, the Act did not even spell out qualifications of persons eligible to appoint or be appointed as an arbitrator. He asks whether an undischarged bankrupt or a mentally unfit person could appoint an arbitrator or be appointed an arbitrator. He further asks whether a body corporate could be appointed as an arbitrator, and if so, which officer(s) of the body corporate would represent the corporation as arbitrator.⁸⁰

Paragraph 2 of the Third Schedule to the Act provided for the arbitral procedure, including the constitution of the arbitral tribunal to be governed by the will of the parties and by the law of the country in whose territory the arbitration took place. According to Mwenda, to leave the adoption of the arbitral procedure and indeed the constitution of the arbitral tribunal to the will of the parties was a serious oversight on the part of the draftsman which opened up the provision to potential misinterpretation and confusion. He poses a question on the extent to which the doctrines of sanctity of contract and freedom of contract could be upheld where the parties to a dispute agreed to appoint a mentally deranged person or an infant as an arbitrator.⁸¹ He wonders if a person with a criminal record of convictions for fraudulent crimes and felonies could serve as an arbitrator.

However, Matibini has different views from Mwenda. He believes that conceptually, anybody can be an arbitrator,⁸² but that it is advisable to appoint a person trained to be an arbitrator. Matibini believes that parties should not be constrained in the appointment of arbitrator but should have the freedom to

⁷⁹ Mwenda, *id.* n 66 *supra* at p. 25.

⁸⁰ *Id.* n 66 *supra* at p. 26.

⁸¹ *Ibid.*

⁸² Views expressed during an interview with the author held in Matibini's law offices in Lusaka on 7th September, 2006.

appoint whoever they want. In his view, the parties must, however, be prepared to face the consequences of their choice. This is in line with the concept of party autonomy. Parties should have unbridled freedom to choose arbitrators of their choice but live with the consequences of their choice.⁸³ It is the author's considered view that whereas one can appreciate Mwenda's concerns regarding the absence of qualifications for appointment of arbitrators in the 1933 Act, Matibini has a valid argument regarding the concept of party autonomy. A party should be free to appoint any person as arbitrator but should be prepared to live with the consequences of his choice.

According to Mwenda,⁸⁴ section 7 of the 1933 Arbitration Act was further testimony of the problems of interpretation which could result from the failure by the draftsman to carefully consider the difficulties which could arise from improperly worded provisions. The section talked about a situation where an arbitrator was incapable of acting without clearly indicating the particular circumstances when an arbitrator would be deemed to be incapable of acting. Further, the Act did not spell out the specific grounds upon which an arbitrator could be removed from office apart from a case of death. Another shortcoming of the Act was that it did not provide any penalties on persons purporting to hold office of arbitrator when they had not been legally appointed to do so, or when their mandate as arbitrators had expired or been withdrawn.⁸⁵ While the Act empowered the court to set aside any appointment made in pursuance of

⁸³ Views expressed during the interview with the author.

⁸⁴ Mwenda, *Id.* n 66. at p.30.

⁸⁵ *Ibid.*

Section 8 (b),⁸⁶ it was silent on the grounds upon which the court could intervene and on the party or parties that could petition the court to intervene.⁸⁷ The author is of the view that considerations of Mwenda's arguments above clearly show that he has a valid point when he bemoans the problems of interpretation that can result from failure by drafters to carefully consider the possible difficulties of improperly worded provisions.

The above discussion has highlighted some of the shortcomings identified in the drafting of the Arbitration Act, 1933. Thankfully, in the year 2000, 67 years after the Arbitration Act, 1933 was enacted, it was repealed and replaced by the Arbitration Act, 2000.⁸⁸

The 2000 Act has given the arbitration practice in Zambia a new lease of life and has certainly improved the legal framework of arbitration in Zambia. The coming into force of this Act has made provision for both domestic and international arbitration through the adoption, with modification, of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (the UNCITRAL) on June 21, 1985.⁸⁹ The objectives

⁸⁶ Section 8 provided as follows: "Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed therein – (a)...; (b) if, on such reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent."

⁸⁷ Mwenda Id. n 66 at. p.31.

⁸⁸ Act No. 19 of 2000, s. 33 (1).

⁸⁹ Preamble to the Act. Adopted by UNCITRAL on 21 June 1985, the Model Law is designed to assist States in reforming and modernising their laws on arbitral procedure with a view of taking into account particular features and needs of international commercial arbitration. The Model Law covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. Having been accepted by States of all regions and the different legal or economic systems of the world, it reflects worldwide consensus on key aspects of international arbitration practice. This Law, together with the UNCITRAL Arbitration Rules and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, make a significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations. See General Assembly Resolution 40/72 passed at its 40th Session, p.308.

of the Act are, amongst others, to provide for an arbitral procedure which is fair, efficient and capable of meeting the specific needs of each arbitration; to redefine the supervisory role of the courts in the arbitral process; to preserve the legal recognition and enforcement of foreign arbitral awards under the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927; to, provide for the recognition and enforcement of foreign arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958; and to provide for matters connected with or incidental to the foregoing.

The Act applies to all arbitration agreements and arbitral awards whether made before or after the commencement of the Act.⁹⁰ Under this Act an arbitration agreement may be in writing or oral, unlike under the provisions of the repealed Arbitration Act, 1933 which did not envisage oral arbitration agreements. The agreement may take the form of an arbitration clause in a contract or a separate arbitration agreement. Any dispute between parties which the parties have agreed to take to arbitration may be determined by arbitration except disputes in respect of an agreement that is contrary to public policy; a dispute which may not, in terms of any law, be determined by arbitration; a criminal matter unless permitted by a written law or with leave of court; a matrimonial cause; a matter incidental to a matrimonial cause unless with leave of court; the determination of paternity, maternity or parentage of a person; or a matter affecting the interests of a minor or an individual under a legal incapacity, unless the minor or individual is represented by a competent person.⁹¹ The death of a party to an arbitration agreement does not discharge the agreement unless otherwise agreed by the parties as it may be enforced by or against the personal representative of the deceased party.⁹² The UNCITRAL Model Law applies to any

⁹⁰ S. 3 of the Arbitration Act, 2000.

⁹¹ S. 6 of the Act.

⁹² S. 7(1) of the Act.

arbitration which stipulates the place of arbitration as Zambia, but with the necessary modifications, in accordance with section 8 (1) of the Act.

Whereas under the Arbitration Act, 1933, the court could order a stay of proceedings after appearance but before filing a written statement or taking any further steps in the case, under the 2000 Act,⁹³ the court can stay the proceedings at any stage upon request by a party to the proceedings, unless the court finds the agreement to be null and void, inoperative or incapable of being performed.⁹⁴ An example of a case where an application for stay of proceedings was made is that of *International Trades Crystal Society Anonyme v. Northern Minerals Zambia Limited*.⁹⁵ However, in that case the Supreme Court refused to stay the proceedings or refer the matter to arbitration. The applicant had, *inter alia*, applied to stay proceedings so as to enable an arbitration to take place. The court dismissed the application for stay of proceedings on the basis that there was no dispute relevant to the contract which could be referred to arbitration. Ngulube, DCJ, as he then was, said, "In relation to the application for a stay of proceedings on the ground that the contract between the parties provided for arbitration, we are satisfied, on the evidence on record, that there was in fact no dispute relevant to the contract..."⁹⁶

Similarly, in the case of *Townap Textiles Zambia Limited and Chhaganlal Distributors Limited v. Tata Zambia Limited*,⁹⁷ the Supreme Court refused to allow a case to go for arbitration. In that case which involved the management of a company, the court was urged under a clause in the articles of a company to make an order to allow arbitration. The trial Judge had found that the respondent had been completely removed from management and there was a complete breakdown of trust and confidence and total deadlock between the

⁹³ S. 10 (1).

⁹⁴ *Ibid.*

⁹⁵ (1985) ZR.27.

⁹⁶ *Id n 95* above, at p.28.

⁹⁷ (1988-1989) ZR 93.

parties. It was held that where a petitioner is effectively prevented from taking part in the management of the affairs of a company, through representation on the board of directors and this being contrary to the spirit of the joint ventures between the parties, which had been completely destroyed, arbitration proceedings could serve no useful purpose. The court instead made a winding up order.

An arbitration agreement or clause in a contract has very special significance. It is an agreement within an agreement. It is treated as a separate and independent agreement which generally survives the termination of the underlying contract. This is known as the doctrine of separability. This doctrine was aptly expressed by Lord Macmillan in the case of *Heyman v. Darwins Limited*⁹⁸ when he observed as follows:

...an arbitration clause in a contract... is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other...but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties, that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution...What is commonly called repudiation or total breach of a contract... does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligation which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, although all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.⁹⁹

Zambian courts, like courts in other jurisdictions, also enforce arbitration clauses. Section 10 (1) of the Arbitration Act, 2000 places an obligation on the court to stay proceedings on the request of either party to the proceedings and refer the

⁹⁸ (1942) 1 All E R 337.

⁹⁹ Id. at pp. 347 – 348.

parties to arbitration at any stage of the proceedings and notwithstanding any written law, unless it finds that the agreement is null and void, inoperative or incapable of being performed. Thus courts refer matters with arbitration clauses to arbitration either on their own motion or on the parties' motion. One such case was that of *Yougo Limited v. Pegasus Energy Limited*.¹⁰⁰ In that case, one of the parties to a contract containing an arbitration clause commenced an action in the High Court for breach of the said contract. The breach involved the non-payment of money in connection with construction works done on the defendant's property by the plaintiff. Counsel for the defendant applied to the court by way of a preliminary issue that the matter was wrongly before the court as the parties had agreed to have any dispute arising from the contract to be settled by arbitration. The ruling of the court on the preliminary issue was given on 12 November 2004 by Judge Hilda Chibomba who ruled that the matter was wrongly before the court and referred it to arbitration. The court stated in its ruling that the only situation under which the court will not refer the matter to arbitration is where it finds that the agreement is null and void, inoperative or incapable of being performed. By referring the matter to arbitration, the court gave effect to the intention of the parties as agreed in their contract and enhanced the principle of freedom of contract. According to the president of the ZAA in a Press Release dated 2 June 2005, the reasoning by the court in this case was on firm grounds with the provisions of the Act and gave efficacy to the cardinal principle of arbitration of party autonomy.

The above decision clearly is sound and well reasoned and is in line with the provisions of the Arbitration Act. Unfortunately the Supreme Court, whose decisions are binding on the lower courts, has subsequent to the enactment of the Arbitration Act in 2000, made certain decisions which appear to have deviated from the spirit of the Act. Two such cases are *Lake Kariba Inns*

¹⁰⁰ 2004/HCP/0299 (unreported).

*Limited, Patricia Anne Townsend, Andre Hadjipetrous v. John Sweatman, Sandra Sweatman and Kariba Marina Limited*¹⁰¹ and *Gateway Service Station v. Engen Petroleum (Z) Limited*.¹⁰² In the former case, the Supreme Court handed down a decision on 5 January, 2004. The Judge ruled that one of the options open to a person aggrieved with an award of an arbitral tribunal is an appeal. The Judge indicated that he had visited section 20 (1) of the Arbitration Act No. 19 of 2000 and that the subsection was subject to subsections (2) and (3). He observed that in subsection (2) a person not happy with the award had a right to challenge it by any available process, one of which is by way of appeal. Only when the final appellate court has made a decision against the appellant can the award be enforced against the appellant. It is the author's considered view that the Supreme Court's decision in this matter is not in accordance with the spirit of the Arbitration Act, especially section 20 thereof. Contrary to what the learned Judge observed, subsection (2) of section 20 does not provide appeal as an available process to a person aggrieved by an arbitral award. Section 20 of the Arbitration Act states as follows:

- (1) Subject to subsection (2) and (3), an award made by an arbitral tribunal pursuant to an arbitration agreement is **final and binding**¹⁰³ both on the parties and on any persons claiming through or under them.
- (2) Subsection (1) shall not affect the right of a person to challenge the award by any available process **provided for in this Act**.¹⁰⁴
- (3) Where the time for making an application to set aside an arbitration award has expired or where the application has been refused by a court, the award shall be deemed to be, and shall be enforceable in the same manner, as an order of court.

Subsection (2) above is talking about 'any available process provided for in the Act.' Appeals against arbitral awards are not part of the available processes provided for in the Act to a person aggrieved by an arbitral award. The only

¹⁰¹SCZ/8/232/2002(unreported).

¹⁰²SCZ/8/27/2003 (unreported).

¹⁰³ Emphasis, the author's.

¹⁰⁴ Emphasis, the author's.

available route to attack an arbitral award is an application to set it aside.¹⁰⁵ This application is returnable before the High Court.¹⁰⁶ According to the president of ZAA,¹⁰⁷ the Supreme Court's decision implies that arbitral proceedings are merely a step taken before one utilises the court system. However, this is not so because arbitral proceedings are in themselves a forum through which parties can settle disputes *extra curia*. They are, therefore, an alternative to the courts.

In the case of *Gateway Service Station v. Engen Petroleum (Z) Limited*,¹⁰⁸ there was an application before a Judge of the Supreme Court for a stay of arbitral proceedings pending the hearing of an appeal against the decision of the High Court referring a matter to arbitration which had been commenced in the High Court in contravention of an agreement to arbitrate. The Judge, in a ruling dated 29 July, 2004 directed that the arbitral proceedings should be stayed pending the determination of the appeal. In arriving at his decision the Judge was of the view that a most undesirable situation had been created by the applicant through his indecisiveness on how to seek justice. According to the Judge, a situation where two processes, namely, arbitration and court proceedings went on simultaneously could not be allowed to continue since this could lead to an awkward position where two different conclusions were made. According to the Judge, this factor weighed heavily on his mind and in the interests of justice and to save on costs, he granted the application. It is not difficult to deduce the reasons for the Supreme Court Judge's decision in this case, namely, to prevent forum shopping by parties to disputes and the unfortunate and embarrassing situation which could arise from opposing decisions by the court and the arbitrator. However, there is no provision in the Arbitration Act and indeed in

¹⁰⁵ S.17 (1) of the Act states "Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3)."

¹⁰⁶ Rule 23 (1) of the Arbitration (Court Proceedings) Rules, 2001 which provides "An application, under section seventeen of the Act, to set aside an award shall be made by originating summons to a judge of the High Court.

¹⁰⁷ In the Press Release of 2 June, 2005.

¹⁰⁸ SCZ/8/27/2003 (unreported).

the Supreme Court Act, which empowers the Court to stay arbitral proceedings. To the contrary, section 10 of the Arbitration Act empowers the court to stay court proceedings (not arbitral proceedings), commenced in contravention of the Act. Section 10 of the Act provides:

- (1) A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if an party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where proceedings referred to in subsection (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

The High Court Judge in this case rightly stayed the court proceedings and referred the matter to arbitration. The aggrieved party appealed to the Supreme Court and the court unfortunately stayed the arbitral proceedings. As regards the existence of court proceedings and arbitral proceedings simultaneously, that situation is provided for by section 10 (2) of the Act referred to above. Therefore, there was nothing wrong with the two processes running parallel. The court had the power to stop the continuation of the court proceedings since arbitral proceedings had already been commenced in line with the parties' agreement to arbitrate.

United States courts have upheld ADR clauses which form part of the contract between the parties, as a necessary first step prior to any litigation or arbitration.¹⁰⁹ For example, the District Court of Oregon specifically approved the earlier decision in *Southland Corporation v. Keating*,¹¹⁰ in *Haertl Wolff Parker Inc. v. Howard S. Wright Construction Co.*¹¹¹ to the effect: "A contract providing for

¹⁰⁹ Paul Newman, Id. n 5 supra at. p.103.

¹¹⁰ (1984) 465 US 17.

¹¹¹ Civil No. 89-FR, 1989 U.S. DIST.LEXIS 14756.

alternative dispute resolution should be enforced and one party should not be allowed to evade the contract and resort prematurely to the courts."¹¹² Before the Arbitration Act of 1996, courts in the United Kingdom had, under section 4 the Arbitration Act of 1950, the discretion to stay judicial proceedings in respect of a domestic arbitration agreement but were obliged under section 1 of the Arbitration Act of 1975 to stay proceedings in respect of a non-domestic arbitration agreement. Section 9 (4) of the Arbitration Act of 1996 extended the obligation to stay proceedings to all arbitration agreements.

It is noteworthy that the 2000 Act of Zambia, has made provision to safeguard the interests of parties to a dispute under arbitration in terms of ordering the preservation, interim custody, sale or inspection of any goods which are the subject matter of the dispute; ordering the securing of the amount or the costs and expenses of the arbitral proceedings; making an interim injunction or other interim order and any other orders to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual.¹¹³ However, the court will not order an injunction except in the following circumstances, namely, where the matter is urgent and the arbitral tribunal is not yet appointed; the arbitral tribunal is incompetent to grant an order of injunction; or the urgency of the matter makes it impracticable to seek such an order from the arbitral tribunal. In the case of *Republic of Botswana, Ministry of Works, Transport and Communication, Rinceau Design Consultants v. Mitre Limited*,¹¹⁴ the Supreme Court of Zambia refused to grant an application for injunction pending arbitration because the arbitrator had already rendered an award. The late Supreme Court Judge Muzyamba had the following to say, *inter alia*:

...It is common cause that the interlocutory injunction was granted long after the arbitrator's award. An interim interlocutory injunction is by its nature and name a temporary order granted pending the determination of a matter or an issue and terminates upon such determination. In

¹¹² Ibid.

¹¹³ S. 11 of the Arbitration Act, 2000.

¹¹⁴ (1995 - 1997) ZR 113.

this case the respondent obtained an injunction pending arbitration proceedings. The proceedings concluded and an award made before the inter party hearing for an interlocutory injunction. That being the case, the court (below) ought not to have entertained the application let alone order continuation of the *ex parte* order. For this reason alone, we would allow this part of the appeal and dissolve the injunction.

An apparent shortcoming with the provision regarding the rare instances when the court will grant an injunction is that the meaning of 'urgency' is not explained as it is used in the Act. According to Mwenda,¹¹⁵ the construction of the word seems to be a matter of fact. He questions whether there is an objective legal standard for determining urgency or whether it is just a matter of construction and concludes that the lack of clarity on this respect has the potential to encourage frivolous applications for interim orders and injunctions. However, it is the author's view that despite the lack of clarity on the meaning of 'urgency', this provision is of vital importance in the country's endeavours to attract direct foreign investments in that investors are assured that in the event of a dispute being referred for arbitration in Zambia involving property in Zambia, that property will not be disposed of thereby rendering an award ineffectual.

Discrimination in the appointment of a person as an arbitrator on the basis of the person's nationality, gender, colour or creed, is prohibited by the Arbitration Act, 2000. However, just like the Arbitration Act, 1933, the current Act is also silent on the qualifications of a person to be appointed as arbitrator. In view of this apparent omission, Mwenda asks if a minor or mentally unfit person could be eligible for appointment as an arbitrator.¹¹⁶ However, it is well known that under most laws, a minor or mentally unfit person has no capacity to enter into legally binding agreements and that this should, as a matter of construction, be the case under this Act. In any case, the silence in the Act on the qualifications of a person to be appointed as arbitrator should not be seen as an omission because

¹¹⁵ Id. n 66 supra at p.68.

¹¹⁶ Ibid.

of the concept of party autonomy, which entails that parties be at liberty to select an arbitrator of their own choice. A party to a dispute who elects to choose a person who lacks capacity to enter into legally binding agreements would have to live with the consequences of her choice.

An arbitral award is final and binding and enforceable in the same manner as an order of the court¹¹⁷ and can only be set aside if the party making the application to set aside proves to the court either that a party to the arbitration agreement was under some incapacity or that the agreement was not valid under the law to which the parties have subjected it or under the laws of Zambia; that the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his case; that the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the Act or the law of the country where the arbitration took place or that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.¹¹⁸ In the case of *Indo-Zambia Bank Limited and Zakariya Patel (T/A Zymay Trades)*¹¹⁹ decided by High Court judge Elizabeth Muyovwe on 18 October 2002, Indo-Zambia Bank Limited made an application to set aside an arbitral award pursuant to section 17 of the Arbitration Act. This matter came before the court by way of appeal from the award of an arbitrator. Counsel for the respondent raised a preliminary issue that the matter was wrongly before the court as no appeal lay to the High Court or indeed any other court, against the award of an arbitrator.

¹¹⁷ S. 20 of the Act.

¹¹⁸ S. 17(2) (a) of the Act.

¹¹⁹ Cause No. 2002/HP/106 (unreported).

The court dismissed the appeal on the ground that it did not satisfy any of the requirements of this section. By so doing, the court reaffirmed that the only recourse open to an aggrieved party against an arbitral award is setting aside.

The court may also set aside an arbitral award if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia, or the award is in conflict with public policy or the making of the award was induced or effected by fraud, corruption or misrepresentation.¹²⁰ Irrespective of the country of origin, an arbitral award is binding and enforceable if it does not violate the provisions of the Zambian law.¹²¹ This provision is important in the country's endeavour to attract and retain direct foreign investment because it acts as an assurance to foreign investors that arbitral awards will be respected and enforced in Zambia. It is the author's contention that if anything, this fact contributes to making the investment climate more attractive to foreign investors.

It will be recalled from Chapter Three that one of the advantages that arbitration has over litigation is the confidentiality of the proceedings. In keeping with this attribute, Part IX of the Arbitration (Court Proceedings) Rules, 2001,¹²² has provisions which ensure the confidentiality of arbitration proceedings. Thus applications made to a court in relation to arbitral proceedings are required to be treated with utmost confidentiality,¹²³ and all records, registers and other documents relating to legal proceedings under the Arbitration Act are confidential, while in the custody of the court and are kept in a place of special security.¹²⁴ No document or order held by or lodged with the court in legal proceedings under the Arbitration Act is open to inspection or search by any

¹²⁰ S. 17 (2) (b) of the Act.

¹²¹ S. 18(1) of the Act.

¹²² Statutory Instrument No. 75 of 2001.

¹²³ Rule 25.

¹²⁴ Rule 26.

person, except the parties, their legal practitioners or representatives or if the said document or order is required or authorised by or under the Arbitration Act, or any law or rules or with leave of court. Further, no copy of any such document or order or of an extract from any such document or order shall be taken or issued to any person.¹²⁵ The Act further maintains the confidentiality of arbitration by providing that unless otherwise agreed by the parties, an arbitration agreement is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.¹²⁶ However, publication, disclosure or communication is permitted if the publication, disclosure or communication is required under any law or the disclosure is to a professional or other advisor of any of the parties; or by an arbitral institution or person authorised in writing by an arbitral institution but in such a manner as to maintain the anonymity of the parties.¹²⁷ It should be obvious to the discerning reader that the qualification in section 27 (2) was included to prevent parties from abusing the non-disclosure clause to defeat the ends of justice. The inclusion of this provision was thus meant to serve the interests of the parties as well as the public. To cap it all, all legal proceedings under the Rules are held in camera.¹²⁸ Any person who contravenes the provisions of this part by publishing, communicating or disclosing any information relating to proceedings under the Arbitration Act commits contempt of court and is liable on conviction to penalties provided for in the Penal Code.¹²⁹

It should be clear to the reader from the above discussion that confidentiality is the hallmark of ADR mechanisms such as arbitration.

¹²⁵ Rule 27(1).

¹²⁶ S. 27 of the Act.

¹²⁷ S. 27(2) of the Act.

¹²⁸ Rule 28.

¹²⁹ No. 152 of 1965, Chapter 87 of the Laws of Zambia.

The Arbitration (Court Proceedings) Rules, 2001 also provide rules that regulate court proceedings in relation to arbitration. It has rules relating to applications for stay of proceedings in arbitration matters, requests for interim measures of protection; applications to court for appointment of arbitrators; procedure for challenging the appointment of arbitrators and jurisdiction of arbitral tribunals; requests for executory assistance; procedures on enforcement of awards; setting aside of awards; provisions to ensure confidentiality of arbitration; service of process and conduct of proceedings.

Mwenda¹³⁰ gives some objectives of a modern arbitration statute as being respect for the principle of party autonomy; balanced powers of the court; adequate powers of an arbitral tribunal to conduct arbitral proceedings effectively, particularly where one party is failing to co-operate and the promotion of arbitration proceedings which are fair, cost-effective and reasonably expeditious. The review of the Arbitration Act 2000 above has revealed a fact succinctly stated by Mwenda,¹³¹ that the existing law in Zambia captures underpinning objectives of an efficient legal framework for arbitration

Apart from the Arbitration Act, 2000 there are other Acts of Parliament and rules of court that form part of the legal framework for arbitration in Zambia. One such Act is the Investment Dispute Convention Act,¹³² which was enacted to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of other States¹³³ to which Zambia is a signatory. The Act regulates the registration in the High Court of awards rendered through the arbitration process under the Convention. Sections 4 and 5 of the Act prescribe the procedure for registration of awards in the High Court and the effect of such registration. Section 6 has provision for rules of court to be made to facilitate

¹³⁰ Id. n 66 supra at p.57.

¹³¹ Id. n 66 supra at p.59.

¹³² No. 18 of 1970, Chapter 42 of the Laws of Zambia.

¹³³ Preamble to the Act.

such registration. Any person who seeks recognition or enforcement of an award is entitled to have the award registered in the High Court upon satisfying the requirements of the Act. If a document required to be produced in the High Court is in a foreign language, the applicant is under obligation to furnish a certified translation of the same. However, despite the existence of these provisions on registration of foreign arbitral awards, a search at the High Court Civil Registry in Lusaka revealed that there were very few foreign arbitral awards registered there, if any at all. Between January 2004, and November 2004, only four local arbitral awards were registered there.¹³⁴ No foreign arbitral award was registered there during this period. In the year 2005, only one foreign judgment, (not arbitral award), was registered in the High Court Civil Registry at Lusaka. This was on 21 December, 2005.¹³⁵ In January 2006, only two local arbitral awards were registered.¹³⁶ As of May 2006, only one foreign judgment (not arbitral award) was registered. This was on 12th April, 2006.¹³⁷

The Convention on the Settlement of investment Disputes between States and Nationals of other States further provides for the settlement of disputes by arbitration through an arbitral tribunal based at the International Centre for Settlement of Investment Disputes. The Centre provides facilities for conciliation and arbitration of investment disputes between contracting States and nationals of other contracting States in accordance with the provisions of the Convention. It maintains panels of conciliators and arbitrators.

¹³⁴ According to statistics provided to this author by the High Court Registry Staff. These were: *Africa Pay Proprietary Ltd. v. Cable and Satellites Ltd. And Two others*. 2004/HP/AR/001 registered on 27 January, 2004; *Panchal Construction Ltd. V. Attorney General*. 2004/HP/AR/002, registered on 20 February, 2004; *Cavmont Merchant Bank Ltd. V. Robinson C. Manase*. 2004/HP/AR/003, registered on 29 July, 2004 and *Axial Investment Ltd. V. Pangaea Emi Securities and others*. 2004/HP/AR/004, registered on 11 November, 2004.

¹³⁵ 2005/HP/FJ/0001, according to the Register.

¹³⁶ *ZUFIAW v. Rodtech*. 2006/HP/Arb/001, registered on 24 January, 2006 and *Nkhwazi Primary School and Teachers Association v. Lusaka Hindu Association Registered Trustees*. 2006/HP/Arb/002, registered on 25 January, 2006.

¹³⁷ 2006/HP/FJ/0001.

The Privatisation Act¹³⁸ provides in section 47 for any dispute that arises from the privatisation process to be settled by arbitration in accordance with the Arbitration Act. In addition to these statutory provisions, the Rules of the High Court also have provision for reference of some matters to arbitration. Order XLV (45) of the High Court Rules, Chapter 27, provides for the reference of matters to arbitration upon application by parties to a suit before the final judgment. The reader should take note of the fact that with the enactment of the Arbitration (Court Proceedings) Rules, 2001,¹³⁹ the High Court Rules on arbitration only apply when the 2001 Arbitration Rules do not provide for any particular matter or do not make sufficient provision enabling a court to dispose of a matter before it or to enable a party to prosecute its case. However, such rules of court should not be inconsistent with any of the provisions of the 2001 Rules.¹⁴⁰ By necessary implication, where there are such inconsistencies, the provisions of the 2001 Rules prevail.

Order XLIII (43) of the Subordinate Court Rules¹⁴¹ has provision concerning reference of cases to arbitration similar to those found in Order XLV (45) of the High Court Rules. Thus, at any stage of the proceedings before final judgment, matters in difference in a suit in the Subordinate Court may be referred to arbitration if the parties so desire.

7.3.2 Conciliation/Mediation

As indicated earlier in this chapter, mediation was formally introduced in Zambia on 28th May, 1997 by the enactment of Statutory Instrument Number 71 of 1997, the High Court (Amendment) Rules, 1997. These rules were a product of the High Court Rules Committee comprising of the Chief Justice, two High Court

¹³⁸ No. 21 of 1992, Chapter 386 of the Laws of Zambia.

¹³⁹ Statutory Instrument No. 75 of 2001.

¹⁴⁰ Rule 38 (1) of the Arbitration (Court Proceedings) Rules, 2001.

¹⁴¹ No. 4 of 1972, Chapter 28 of the Laws of Zambia.

Judges appointed by the Chief Justice and two legal practitioners nominated by the Council of the Law Association of Zambia. The amended rules came into effect after the expiry of six months from the date of publication of the rules on 28th May, 1997.

Under Order 31, Rule 4 of these Rules, a Judge of the High Court has the power to refer any case the Judge considers suitable to mediation and where that fails, the Judge is obliged to summon the parties to fix a hearing date. However, cases involving constitutional issues or the liberty of the individual or an injunction are not referable to mediation.

A list of mediators trained and certified by the court is kept by the mediation office. The list indicates the field or fields of bias or experience of the mediators who should be of not less than seven years working experience in their respective fields.¹⁴² The mediator is obliged to complete the mediation process within sixty days from the date of collecting the record.¹⁴³ Unrepresented parties appear in person at the mediation while those represented must be accompanied by their advocates. If a party is a corporation, partnership, governmental agency or entity, an officer or director of sufficient rank to settle the matter must attend.¹⁴⁴ The mediator is not required to keep a record of the mediation proceedings. Any document prepared by the mediator during the proceedings must be destroyed by the mediator in the presence of the parties where the mediation fails. Statements made during mediation are confidential and privileged and have no evidentiary value.¹⁴⁵ The mediator cannot communicate with any trial Judge with respect to the mediation.¹⁴⁶ In the event of mediation succeeding, a mediation settlement stipulating the terms of the settlement is

¹⁴² Order 31, Rule 5.

¹⁴³ Order 31, Rule 7.

¹⁴⁴ Order 31, Rule 8.

¹⁴⁵ Order 31, Rule 10

¹⁴⁶ Ibid.

signed. The settlement has the same force and effect for all purposes as a judgment, order or decision and is enforceable in a like manner.¹⁴⁷ No appeal lies against a registered mediated settlement,¹⁴⁸ thereby ensuring finality of the matter.

It is the author's considered view that the High Court Rules Committee excluded cases involving constitutional issues and the liberty of the individual from the list of matters suitable for mediation, for the reason that these are matters of public interest and therefore, unsuitable for mediation. It is also clear that the above provisions on confidentiality and privilege of statements made during mediation were included in the rules to ensure that mediation is entered into by the parties freely and without fear that the statements could be used against them in a trial should the mediation fail. That way, parties are free to negotiate and the chances for the mediation succeeding are thereby increased.

In the Industrial Relations Court, the Chairman of the court has been vested with power to make rules under Section 96 of the Industrial and Labour Relations Act.¹⁴⁹ By virtue of this provision the Chairman has promulgated a statutory instrument,¹⁵⁰ which gives the court or Judge the discretion to refer any action to mediation at any stage of the proceedings except in a case which involves an injunction or which the court or Judge considers unsuitable for reference to mediation or arbitration.¹⁵¹ While the High Court Rules provide that a mediator should complete the mediation process within sixty days, Rule 15 (2) of the Industrial Relations Court (Arbitration and Mediation Procedure) Rules, 2002, provides for the mediator to complete the process of mediation within ninety days from the date of collection of the suit, action or legal proceedings. This is

¹⁴⁷ Order 31, Rule 12.

¹⁴⁸ Order 31, Rule 14.

¹⁴⁹ No. 27 of 1993, Chapter 269 of the Law of Zambia.

¹⁵⁰ The Industrial Relations Court (Arbitration and Mediation Procedure) Rules, 2002.

¹⁵¹ Id n 150 above, Rule 12(1).

one example of the apparent discrepancies between the High Court and Industrial Relations Court Rules which should be removed and the Rules harmonised.

Matibini¹⁵² asserts, and this author wholly agrees with this assertion, that mediation in Zambia is compulsory to the extent that parties may be ordered to proceed to mediation but that it is at the same time voluntary because the parties are not compelled to settle the matter during the mediation session. The mediation envisioned by the above rules is court-annexed mediation. Disputants are, however, at liberty to refer their dispute to private mediation.

Conciliation is the form of dispute resolution envisaged by the Industrial and Labour Relations Act,¹⁵³ when a collective dispute arises between an employer and employees who are not engaged in the provision of essential services. Section 107 (10) of the Act defines essential service as any service relating to the generation, supply and distribution of electricity; any hospital or medical service; any service relating to the supply and distribution of water; any sewerage service; any fire brigade; any service for the maintenance of safe and sound conditions in a mine of underground drainage, shafts and shaft installations or machinery and plant and such other service which the Minister of Labour in consultation with the Tripartite Consultative Labour Council, may prescribe by statutory instrument as an essential service. Generally, essential service is any service whose disruption is likely to cause an injury in one form or another, to the whole or part of the population. As soon as the dispute is settled, the conciliator or chairman of the board of conciliation causes a memorandum of the terms of settlement to be prepared. The memorandum is signed by the parties to it and witnessed by the conciliator or chairman and each member of the board of

¹⁵² (1998). 'Enhancing Knowledge for Effective Justice Delivery.' Paper presented to the Judges Seminar at Fairmount Hotel, Livingstone, Zambia on Thursday, 23rd July, 1998.

¹⁵³ S.76.

conciliation, as the case may be. Within seven days of the settlement of a collective dispute by conciliation, the conciliator or chairman of the board of conciliation submits authenticated copies of the memorandum to the Registrar. The Registrar refers the memorandum as soon as possible, to the Industrial Relations Court, which is obliged to approve the settlement embodied in the memorandum if the settlement is not contrary to any written law. In the event that conciliation fails, the parties may refer the dispute to the court or conduct a ballot to settle the dispute by a strike or lockout. If the dispute is referred to court, the decision of the court is binding upon the parties subject to the right of appeal to the Supreme Court.

In the following section some cases chosen at random between 2000 and 2005, which were referred to mediation, are presented as a sample of cases referred to mediation in the High Court of Zambia. Some of the cases were mediated and settled successfully, while others were not and the court records returned to court as per the requirement of the law.

The case of *Theresa M. Simambo and Aongola Batunda v. National Housing Authority and Local Authorities Superannuation Fund*,¹⁵⁴ was based on employment law principles. In that case both plaintiffs were former employees of the first defendant and sued the defendants for their benefits which they had been contributing to the second defendant by way of pension. According to the plaintiffs, the benefits should have been paid to them upon termination of their employment. The plaintiffs claimed from the defendants their benefits plus damages for breach of the conditions of employment for failing to pay them their terminal benefits and interest. Apparently, the first defendant did not submit any defence to the claims and the second defendant placed all the blame on the first defendant who it alleged, had not submitted all the contributions to it. It alleged

¹⁵⁴ 2000/HP/1012 (Unreported).

that it was not indebted to the plaintiffs at all but the first defendant which was supposed to fund the benefits of the plaintiffs since it curtailed the employment of the plaintiffs by declaring them redundant. As a pension fund, the second defendant was only prepared to pay the plaintiffs at pensionable age at which time it would have been under a duty to pay.

When the matter finally went for disposition before the court in 2005¹⁵⁵, the Judge informed the court that the parties had asked for a mediation order through the court marshal and the Judge accordingly gave an order to that effect.

As per Order 31, Rule 9 of the High Court Rules, the mediator in this case made the parties sign the statement of understanding the role of the mediator. This statement by the mediator informs the parties that his role as mediator is to act as a neutral party to help them resolve their dispute and that he will not act as an advocate for any party. The statement also indicates that the mediation is strictly confidential and that no party is bound by anything said or done in mediation unless a settlement is reached, in which case the agreement is reduced to writing and when signed, becomes binding upon all parties to it. In the statement each party agrees neither to request the mediator to testify against the other party nor ask the other party to testify regarding statements made in mediation. All parties are then made to sign and acknowledge that they have understood the statement.

Unfortunately, in this case the matter was mediated but not settled due to non-appearance of counsel for the defendants after the first appearance despite many

¹⁵⁵ The reader will note that this case was filed in court in 2000 but only heard in 2005. It is not clear from the record what caused the delay but whatever the cause of the delay, this case serves as one example of the length of time it takes to dispose of some cases in Zambian courts.

appointments with the mediator. Consequently, the matter was returned to court.

The plaintiff's claim in the case of *Richard Makungu v. Galaunia Farms Limited*¹⁵⁶ was based on the employment law principle of unlawful dismissal. The plaintiff was an employee of the defendant until 5th March, 2001 when the defendant gave a notice of termination of employment to the plaintiff purporting to give three months' notice pursuant to paragraph 2 (a) of the employment agreement, while the plaintiff was in effect told to stop work immediately without payment of the three months' pay in lieu of notice. The plaintiff had not been paid his terminal benefits at the time of commencement of the suit. The plaintiff's claim was for damages for unlawful dismissal or in the alternative an order that the dismissal was null and void; payment of inducement allowance, outstanding leave dues, repatriation and interest. Further, that the plaintiff be deemed redundant or retired. The defendant's defence was that it had lawfully terminated the plaintiff's employment in accordance with his contract of employment and due to his unsatisfactory performance and that he had been duly paid his terminal benefits in full. The defendant had a counterclaim for unreturned company furniture. At the hearing, the defendant's advocate informed the court that the defendant was applying for the case to be referred to mediation. However, the plaintiff's advocate suggested that the parties try to negotiate a settlement before the matter went for mediation. The court ordered that the parties attempt an *ex curia* settlement within ten working days and thereafter, if need be, the matter be referred to mediation. It would appear that negotiation failed because the matter ultimately went for mediation and was successfully mediated and settled. The consent settlement order was to the following effect, namely, that the defendant agreed to pay the plaintiff the sum of US\$12,500 in full and final settlement of the plaintiff's claim. Such payment was to be paid in monthly

¹⁵⁶ 2001/HP/0829 (Unreported).

instalments of US\$2,000 on or before the 15th day of each month. In the event of default in payment for more than five days from the due date of 15th of the month, the whole amount was to become payable.

In a contract-based claim, *Kenya Airways Limited v. Colwyn Travel Limited*,¹⁵⁷ the plaintiff sued a travel agency for the sum of US\$ 3, 772.94 and ZK11, 965,736.50 being outstanding amounts on credit ticket sales to the defendant by the plaintiff. The plaintiff also claimed interest and costs. The defendant denied the plaintiff's claim and indicated that during the period of the purported transactions the defendant was operating on cash basis and could not therefore have accrued the alleged debt. At the scheduling conference, the presiding judge suggested that the matter be referred to mediation. Counsel for both parties had no objection to the court's suggestion and an order to that effect was accordingly made. The matter came up for mediation and was mediated and fully settled.

In another contract-based claim, *United Refinery Limited v. Sherbourne International Trading Limited*,¹⁵⁸ the plaintiff was a limited liability company registered in Zimbabwe, while the defendant was a limited liability company incorporated in Zambia. In November, 2001 the two companies entered into a contract whereby the plaintiff agreed to consign various types of soaps and cooking oil to the defendant which would then act as agent of the plaintiff and sell the consigned products. According to the plaintiff, it supplied cooking oil and soap products worth US\$ 294, 116 to the defendant for sale as agents between February, 2002 and May, 2002. At the time of the suit, there was an outstanding balance of US\$ 73,176. The plaintiff sued for the outstanding amount and interest.

¹⁵⁷ 2002/HPC/0091 (unreported).

¹⁵⁸ 2004/HP/149 (Unreported).

The defendant denied the plaintiff's claim and alleged that it had paid all monies realised from the sale of the consigned soaps and cooking oil. The defendant also claimed that in October 2002, the plaintiff's Marketing and Country Manager carried out a comprehensive sales and stocks audit of the defendant's account in consequence of which the plaintiff issued a statement of affairs dated 30th October, 2002 which confirmed that as of that date the defendant owed the plaintiff the sum of US\$ 6, 543.00 which was duly settled on condition that it was a full and final settlement of the plaintiff's claims against the defendant. The defendant alleged that its letter to this effect was duly acknowledged by the plaintiff. The defendant counterclaimed the sum of US\$ 4, 000.00 and interest for accommodating the plaintiff's country manager at its guest house in Kitwe from September, 2002 to October 2002, at the rate of US\$50.00 per night, totaling US\$ 4, 000.00.

By consent of the parties, the court referred the matter to mediation. The matter was mediated and fully settled as follows:

1. The defendant agreed to pay the plaintiff US\$ 20,000.00 by 12th May 2005, at the latest and the plaintiff would cease to have any further claim on the defendant; and
2. The plaintiff would lay no further claim on the defendant regarding remittance, collection and payment of debts. The plaintiff was to continue to pursue recovery of outstanding debts, without any recourse whatsoever to the defendant.

It is interesting to note that in this case both parties gave up something in order to reach a settlement of their case. The plaintiff was demanding an alleged outstanding balance of US \$ 73, 176. 00, while the defendant claimed that it owed the plaintiff only the sum of US \$ 6,543.00, which had allegedly been duly settled on condition that it was a full and final settlement of the plaintiff's claims against the defendant. The defendant had a counterclaim of US \$ 4, 000.00 for

allegedly accommodating the plaintiff's country manager at its guest house in Kitwe.¹⁵⁹ The expected give and take attitude essential in mediation led to this 'win-win' settlement by the parties.

*Kabolwe Investment Limited v. Danatrac Limited*¹⁶⁰ was another contract-based claim. In this case, the plaintiff sued the defendant for breach of contract for failing to deliver an agricultural tractor on time leading to loss on the part of the plaintiff. The plaintiff's claim was for the sum of ZK 288, 000, 000.00 being the amount which the plaintiff would allegedly have earned from the sixty hectares of maize crop which the plaintiff did not cultivate due to late delivery of the tractor by the defendant. The plaintiff also claimed for the sum of US\$9, 625.00 which the plaintiff would have earned from the ten hectares of Soya bean crop which the plaintiff did not cultivate owing to the late delivery of the tractor and the sum of ZK 912, 000.00 penalty fees for non-presentation on time of letters of credit and interest.

The defendant denied the plaintiff's claims and claimed that the arrangement for financing the purchase of the tractor was solely the responsibility of the plaintiff and that planning for the farming season was entirely up to the plaintiff. The defendant further averred that if there was delay in cultivating the plaintiff's fields it did not lie with the defendant, but that the delay was due to the plaintiff's negligence in not processing the purchase of the tractor and seed drill as well as planning for the farming season such that the equipment arrived in good time for the farming season. The defendant denied that the plaintiff was entitled to damages for loss of income or to a claim of ZK 912, 000.00 penalty fees for alleged non-presentation of letters of credit on time. In the alternative, the defendant pleaded notice of disclaimer for liability for any damages or losses arising out of non-delivery of orders within stated periods.

¹⁵⁹ A city in the Copperbelt Province of Zambia.

¹⁶⁰ 2004/HPC/0211 (Unreported).

At the scheduling conference, by consent of the parties, the Court ordered the matter to go to mediation for possible settlement. On 28th February 2005, the matter came up for mediation but no mediation took place and the mediation was rescheduled to March 8 2005. On that date the mediation took place and the matter was settled. The consent settlement order was to the effect that the plaintiff would no longer pursue the claim in the writ and would pay five percent of the defendant's incurred costs. All other claims in the matter were foregone and the matter fully settled. Here again the give and take attitude of the parties to this case made possible the speedy settlement of the matter. Thus, unnecessary delay and costs were avoided.

In the case of *Valentine Chitambala and Oscar Chimbweta Chiinga v. Joseph Simbeye and Dennis Muchanka*,¹⁶¹ yet another contract-based claim, the plaintiffs sued the defendants for the sum of US\$ 25,000.00 or alternatively, damages for breach of an oral agreement, interest and costs for diamonds allegedly sold by the defendants to a third party and whose proceeds were unaccounted for to the plaintiffs. The first defendant denied having any previous interaction with the plaintiffs and owing the money, let alone knowing the plaintiffs. The second defendant on the other hand, admitted that they sold the diamonds to a third party but disagreed with the plaintiffs on the number of carats and the value of the diamonds. He also denied neglecting to settle the claim and stated that they had not been approached by the plaintiffs for a legitimate claim.

At the hearing the parties informed the court that they had agreed to attempt mediation but should it fail, then the matter would be brought back to court. By consent of the parties, the court ordered that the matter be referred to mediation. On 1st December 2004, the matter came before a mediator and was

¹⁶¹ 2004/HPC/0151 (Unreported).

adjourned to 11th January 2005, for continued mediation. On that date, no further mediation took place because of the non-appearance of the defendants and their counsel. The plaintiffs later applied for a default judgment before the High Court Deputy Registrar. The matter was thus returned to court.

The claim in the case of *Kennedy Choba v. Felix Kambwala and Paul Mwansa*,¹⁶² was tort-based. In that case the plaintiff, a district health information officer, sued the first defendant, a clinical officer and the second defendant, a medical doctor, for general damages for slander, punitive and exemplary damages for mental shock and anguish. This was following his arrest for allegedly assaulting the first defendant. The second defendant allegedly accused the plaintiff of reporting him to the Central Board of Health that he was misusing the Board's vehicles and was lax in dealing with a cholera outbreak in the district. Further, that the second defendant informed the plaintiff that he would do everything in his power to assist the first defendant have the plaintiff convicted, these sentiments having allegedly been expressed in the presence of the human resources officer. The case against the plaintiff was later dropped by the state.

The civil case by the plaintiff came up for hearing and was referred to mediation by the court. It came up before the mediator on 22nd February, 2005. The consent settlement order was to the effect that the matter be resolved administratively within ninety days. In default thereof, the matter was to be returned to court for resolution.

The claim in the case that follows was based on a tortuous claim of medical malpractice. This is the case of *David Loomis v. Care For Business Limited*.¹⁶³ In this case the plaintiff, a seventeen year old American boy resident in Zambia, sued the defendant, a limited company operating as a medical institution for

¹⁶² 2004/HP/1087 (Unreported).

¹⁶³ 2004/HP/0502 (Unreported).

negligence. The facts which gave rise to this suit were that a doctor in the employ of the defendant carried out an operation on the plaintiff to remove an ingrown toe nail from the big toe of the plaintiff. However, complications developed on the operated toe which gave rise to gangrene and the toe had to be amputated. The plaintiff claimed that the care he received from the defendant fell short of the standard of care ordinarily expected from persons professing to be doctors. As a consequence of the defendant's actions or inactions, the plaintiff had to be evacuated to Milpark Hospital in South Africa for specialist treatment and had to endure much pain and suffering and suffered damage. The plaintiff claimed that as a result of this, he was unable to engage in sports activities and other social activities which involved running. The plaintiff thus claimed damages for negligence, pain and suffering and loss of amenities in life, interest and costs.

The defendant denied any negligence on its part and averred that the operation was carried out on the plaintiff's toe with the necessary skill and care and that correct post-operation care instructions were given to the father of the plaintiff. The defendant further denied that the evacuation was as a consequence of the defendant's or its servants or agents actions or inactions, and that the plaintiff had to be evacuated to South Africa at all. The case was referred to mediation by court order and came up for hearing before the mediator on 4th April, 2005. The consent settlement order stipulated that the defendant was to pay the plaintiff the sum of US\$ 12,500.00 and the defendant's costs as full and final settlement of the matter.

In the case of *John Banda, Steven Sakala, John S. Mambo and Phillimon Msamba v. Bible Gospel Church in Africa (BIGOCA)*,¹⁶⁴ an employment law based claim, the plaintiffs sued the defendant for a declaration that the dismissal of a pastor

¹⁶⁴ 2004/HP/0787 (Unreported).

was wrongful, illegal and unjustified and thus null and void *ab initio*; a declaration that the pastor was the legitimate pastor for Bible Gospel Church in Africa Chawama Assembly; an order of injunction restraining the defendant, its servants, agents or otherwise from interfering with the pastor, preventing him from having access to the Chawama Assembly and carrying out pastoral duties thereat and from imposing another pastor of the defendant's choice to oversee the said Assembly; a declaration that Plot D/12/8/2344 Chawama, Lusaka, Zambia belongs to Bible Gospel Church in Africa Chawama Assembly members, and costs. This case was referred to mediation and came up for hearing before the mediator on 6th April, 2005. A consent settlement order was reached to the following effect:

1. The plaintiffs to be allowed continued access and occupation of the premises presently used by the Chawama Congregation and the National executive Committee to effect transfer to them in due course.
2. The stationery and books in the name of BIGOCA to be surrendered back to the National Executive Committee through the advocates by Wednesday 4th May 2005.
3. The cash in the bank as at date of separation (5th September, 2004) to be shared equally.
4. The plaintiff's new Church not to hold itself out as BIGOCA in any way.
5. Each party to bear its own legal costs.

In the case of *Bedson Mubagwe v. Light steel Roof Company Limited*,¹⁶⁵ a contract-based claim, by an agreement dated 23rd January 2004, between the parties, the defendant agreed to supply and install roofing sheets on the

¹⁶⁵ 2005/HPC/0084 (Unreported).

plaintiff's house and supply and install a steel gate at the same premises, the work to be completed by 30th April, 2004. Consideration for this was the sum of ZK 26, 000, 000. 00. The plaintiff claimed that in breach of the conditions, the defendant failed, omitted or neglected to perform the contract and that as a consequence, the plaintiff suffered loss and damages. The plaintiff therefore, claimed damages for breach of contract, interest and costs. The defendant admitted entering into a contract with the plaintiff and stated that a steel structure had been fabricated but not yet fitted due to insecurity of the plaintiff's premises and that they were prepared to fix the steel structure when the plaintiff provided security; that the gate had been made and installed and that as such, the plaintiff had no cause of action.

At the scheduling conference, counsel for both parties agreed to refer the matter to mediation and the court gave a consent order to that effect. The matter came up for mediation on 27th May, 2005 and the following consent settlement order was made:

1. The total works as contracted by the parties to be completed on or before the 31st July, 2005.
2. The plaintiff to be at liberty to appoint an agent to ensure that the work is done in a workmanlike manner.
3. The plaintiff to make available the bricklayer and caretaker on or before the 10th June, 2005.
4. The plaintiff not to claim costs if work was completed as agreed, but in the event of default, the plaintiff to be entitled to claim costs.

This was yet another case where mediation ensured a speedy and satisfactory outcome for both parties.

In the case of *Zambezi Source Investments Limited v. Northwestern Co-operative Union Limited*,¹⁶⁶ the plaintiff sued the defendant for damages for breach of a covenant in a lease by wrongfully and in breach terminating the one year lease, which through clause 4 provided that it could be terminated by either party giving not less than three months' notice in writing of the intention to terminate.

The defendant denied any breach on its part and claimed that the plaintiff was in breach for failure to maintain the property in a tenantable condition and making alterations to the premises without any notification to or permission from the defendant; going beyond the demised area of the shed where he could sell at wholesale only, beers and soft drinks and instead took the large yard outside the demised area and used it for parking trucks and buses thereby putting the defendant at risk from thieves and robbers; making illegal reconnections of electricity without the knowledge or authority of the defendant or the provider. According to the defendant, these occurrences constituted a breach of the tenancy agreement and the defendant was therefore entitled to rescind the contract. Further, according to the defendant, the plaintiffs were in breach of clause 1 of the tenancy agreement by not paying rentals on due dates. The defendant counter claimed damages for breach of contract, unpaid rentals and mesne profits, vacant possession of the demised premises and interest.

At the scheduling conference the court suggested that counsel for both parties attempt mediation first. Both parties had no objection and the court made an order to that effect. The mediation was successful and the following consent settlement order was reached:

1. Within two months the plaintiffs to pay to the defendant the sum of ZK4, 400,000.00.

¹⁶⁶ 2005/HPC/228 (Unreported).

2. Plaintiff to put up the wire fence and steel poles in consultation with the defendant within the said period of two months from the date of the agreement.
3. Both parties to meet legal costs of respective counsel.
4. Both parties at liberty to execute.

It is clear from the cases presented above that even though done by court order at the instance of either the court or the parties, reference of the cases to mediation brought about much speedier resolution of the cases than would have been the case had they remained in court for resolution. As such, both parties to the cases benefited from speedier resolution of their cases and reduced expenses resulting in more user satisfaction. Since parties play a more active role in the resolution of their cases through mediation, user satisfaction and a sense of achievement are more pronounced in mediated settlements. In addition, since such settlements are binding on the parties and are not subject to appeal, finality of the proceedings is invariably guaranteed.

The above cases referred to mediation show that the court-annexed mediation programme is underway in Zambia. Some cases referred to mediation are settled while others fail and are returned to courts. However, as one author correctly observed while speaking of mediation in the United Kingdom,¹⁶⁷ there are certain perceptions held by parties which are difficult to change despite the increasing popularity. She says:

One is that, if one agrees to mediation then, as a claimant, one is willing to compromise to some extent, or, as defendant, one is willing to pay. As a party, it is often difficult, tactically, in such a culture, to be the first to suggest alternative dispute resolution (ADR) for fear that this will give the impression that one is not confident about one's case. Sometimes, as a result, the possibility of ADR is left to arise naturally during the course of the litigation rather than any party seizing

¹⁶⁷ Tamara Øyre (2004) id. n 63 above, at p.19.

upon what can often prove to be a perfect opportunity for an early resolution and costs savings.¹⁶⁸

The author wholly agrees with the above sentiments and avers that the same can be said about similar perceptions held by parties in Zambia which are difficult to change. Such perceptions can only be changed over time through education of the public in ADR. The author hopes that as more and more people learn about ADR and its benefits, a different culture of taking the initiative in suggesting the use of alternatives will emerge in Zambia.

It is pleasing that the School of Law at the University of Zambia has introduced mediation and arbitration in the curriculum of the School. This development was also welcomed by the Chief Justice of Zambia, His Lordship Chief Justice Ernest Sakala who expressed his sentiments when he addressed newly accredited court-annexed mediators at the Supreme Court foyer in Lusaka on Tuesday, 20th June, 2006.¹⁶⁹ A total of 24 mediators, 16 non-lawyers and 8 lawyers completed a two-week mediation course organised by the ZCDR. It is the author's view that the introduction of the two courses in the School of Law is a demonstration of the seriousness with which the legal profession has embraced the idea of ADR in Zambia. It is an encouraging development. However, this is only the beginning and more should be done to ensure that ADR becomes an integral part of learning in institutions of learning, including schools.

¹⁶⁸ Ibid.

¹⁶⁹ The Post Newspaper, 21 June, 2006, 'Chief Justice Warns Mediators'

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

8.1 SUMMARY OF FINDINGS

The concepts of dispute and justice were discussed in Chapter Two. With regards to the former, a conceptual distinction was made between conflicts and disputes. A conflict exists where there is an incompatibility of interests¹ and conflicts are not necessarily amenable to resolution by dispute resolution processes.² Disputes on the other hand, are a class of conflicts which manifest themselves in distinct, justiciable issues.³ They involve disagreement over issues capable of resolution by negotiation, mediation or any other dispute resolution process involving a neutral third party. A dispute, therefore involves a disagreement over issues that can be resolved through the use of any dispute resolution mechanism.

Disputes are a normal part of human interaction and will exist as long as people continue to interact. The conceptual distinction between conflicts and disputes is important in the ADR discourse because of the differences in approaches which need to be taken in their resolution and the limitations of dispute resolution processes in relation to behavioural conflicts. ADR is concerned more with resolution of disputes, rather than conflicts, hence the acronym ADR.⁴ Since disputes vary in nature and range, the type of processes suitable for resolution of dispute necessarily vary. Hence, there is no single dispute resolution process which is suitable for all types of disputes.

¹ Brown and Marriot (1993). *ADR Principles and Practice*, p.5.

² Id. at p. 6.

³ Ibid.

⁴ Otherwise we would be talking about 'ACR' for Alternative Conflict Resolution.

The discussion on justice showed that it is a difficult concept to define and that principles of justice are generally vague. There's no one universally agreed definition of justice and attempts to concretise the concept have not been entirely successful. However, as Munalula correctly observes, conceptions of justice like that of John Rawls, provide a valuable framework for a critique of institutions and procedures at both domestic and international levels. It serves as a useful starting point at the abstract level, for regulating power and maximising justice in an institution or system.⁵

The concept of justice is vital to ADR processes and indeed the traditional justice delivery institutions because ultimately, the pursuit of the greater ends of justice is behind the existence of the traditional justice delivery institutions and the development of the ADR processes. In the context of ADR, this concept entails the empowerment of disputants to play an active role in the resolution of their disputes, to exercise some degree of control over the outcome of their disputes and to voluntarily arrive at settlements of disputes that take into account their interests. The degree to which these ideals are achieved depends on the type of process utilised. Ideally justice must be delivered with speed and efficiency and minimum costs, but practical considerations have proved otherwise. The problems that disputants have encountered in the courts in their pursuit of justice have raised doubts among the people regarding the capacity of courts to deliver justice to litigants in a meaningful and acceptable manner. This study has shown that ADR has contributed immensely to disputants' pursuit of justice in the jurisdictions under study and that there are positive indications that ADR is increasingly contributing to disputants' pursuit of justice in Zambia.

At the present stage of development of ADR processes in Zambia, the 'alternative'/'appropriate' dispute resolution debate should not be of much

⁵ Munalula, M.M. (2001). 'The Legitimacy of Sovereign Debt: A Case Study of Zambia.' Unpublished SJD Thesis, p.12.

concern to the country. What should be of concern is the development of ADR to a state where it would truly offer an alternative to litigation. Knowledge of the conceptual frameworks of ADR is important in the Zambian context because it would assist the people grasp the conceptual differences between conflicts and disputes. Consequently, they would be able to know which differences amount to conflicts and which ones are disputes and thus amenable to resolution by ADR processes. As Brown and Marriot⁶ correctly state, the question whether or not a dispute exists can be highly relevant, for example, in a case where an arbitration clause in a contract provides that disputes are to be referred to arbitration or other process. If no dispute exists, then a party wishing to enforce any aspect of the contract may do so through the courts, but if a dispute exists, then the specified process must be followed.

It was established in Chapter Two that there is no consensus on which ADR approach represents the 'true spirit' of ADR. However, it was pointed out that an examination of the objectives of ADR could help ascertain whether and to what extent, there is an ADR philosophy. Some major underlying objectives of ADR were identified as being:

- (i) The principle of co-operative problem solving;
- (ii) Empowerment of individuals;
- (iii) Reduction of delays and costs associated with litigation;
- (iv) Production of better outcomes;
- (v) Preservation and enhancement of personal and business relationships;
- (vi) Simplification of procedures; and
- (vii) Relative informality.⁷

The above objectives clearly embody much of the essence of ADR and offer enough justification for its development and use.

⁶ Id n 1 above, p.6.

⁷ Ibid.

Emerging from Chapter Three is the fact that ADR is not a new concept in the countries discussed there. In fact, according to one commentator, informal dispute resolution dates back to 12th Century in China, England and America.⁸ ADR has grown rapidly in the United States of America since the social activism of the 1960's which brought about an increase in lawsuits filed and a consequent overload of the court system, resulting in long delays and sometimes, procedural errors.⁹

The modern form of ADR was developed in the United States in response to the direction litigation was taking and the manner in which it was being fought. It developed to provide individuals and businesses with a means to obtain final resolution of their disputes without going to court.¹⁰ The ADR movement came with increased use of arbitration, as well as mediation, conciliation, facilitation, mini-trials, summary jury trials, expert fact-finding, early neutral evaluation and variations thereof.¹¹ A study of the development of ADR in the United States is essential to a study on ADR because many of the ADR forms originated and have been scientifically developed there. A study of the development of ADR in the United States thus provides a useful source of information and experience when analysing the concept.

From the time ADR was introduced in the United States, it has spread far and wide to countries such as Canada, Australia, Hong Kong, the UK, New Zealand, South Africa and many more, including Zambia. The development of ADR in the

⁸ Reddy, Jayachandra K. (1997). 'Alternative Dispute Resolution.' In Rao, P.C. and Sheffield, W. (Ed.). *Alternative Dispute Resolution: What it is and how it works*, p.79.

⁹ Goldberg, S.B., Green, E.D., and Sander, F.E.A. (1985). *Dispute Resolution*, p. 3.

¹⁰ Lieberman, J.K., and Henry, J.F. (1986). 'Lessons from the Alternative Dispute Resolution Movement.' 53 *University of Chicago Law Review*, p. 424.

¹¹ Freyer, D.H. (1997). 'The American Experience in the Field of ADR'. In Rao, P.C. and Sheffield, W. (Ed.). I. n. 8 above, p.109.

United States and elsewhere has its origins in the dissatisfaction of many people with the way in which disputes are traditionally resolved.

Much of ADR's value lies in the notion of a broad spectrum of dispute resolution mechanisms with alternatives adding to and enhancing litigation. A wide variety of ADR processes or techniques have been developed over the years due to unprecedented growth in international trade as well as the endless search for quicker and cheaper alternatives to litigation. Some of these processes are, negotiation; conciliation/mediation; arbitration; adjudication; med-arb; mini-trial; private judging ('rent-a-judge'); summary jury trial; early neutral evaluation (ENE); neutral fact finding expert; last offer arbitration; and mediation and last offer arbitration (MEDALOA).

Whereas litigation is public, ADR processes generally enable the parties to preserve their privacy. Each ADR technique can be tailored to suit a particular case. Hybrid processes can be created by a neutral practitioner, having regard to the special requirements of the case or circumstances of the parties. This is a testimony to the flexibility of ADR. Being free from the constraints of conventional litigational rules and procedures, and its capability of ranging between quite formal and structured procedures to very informal ad hoc processes, the practitioner is able to create a hybrid process for an individual case.¹²

We further learnt from Chapter Three that different ADR mechanisms have their own unique qualities and particular advantages in relation to traditional litigation and further, that the benefits of ADR accrue in varying degrees from procedure to procedure. For this reason, we concluded that every case may not be right for all forms of ADR and therefore, each case must be evaluated on its own merit

¹² Brown and Marriot (1993). *Id.* n 1 above, p. 273.

and a suitable ADR mechanism identified in order to obtain maximum benefits from the procedures. Analysing each case and locating a particular form of ADR may save time and money needlessly spent on litigation. We also learnt that ADR is neither a panacea that can cure all ills nor is it a substitute for litigation. It is meant to complement litigation and as such should be seen as an integral part of the whole process of justice¹³.

Indeed, ADR is not and cannot provide a complete substitute for litigation. The following instances in which ADR is not appropriate elucidate the point that, and is proof that ADR is not a substitute for litigation. These are cases involving constitutional, civil, or fundamental rights; cases involving allegations of fraud or bad faith; cases where one party desires to be publicly vindicated; cases in which one party wants a binding precedent for the future; cases where one party lacks capacity; where one party feels that they have a clear-cut case; where one party feels that the other is being unreasonable; or where one party feels that the matter is one of principle. It is apparent from the discussion in Chapter Three that ADR should necessarily be an essential part of every lawyer's skills. Thus every lawyer should make ADR an integral part of her arsenal for the enhancement of service delivery.

One of the most significant developments arising out of the relationship between ADR procedures and the court system was the creation in the United States of America of Multidoor Courthouses. The author of the concept was Professor Frank E.A. Sander of Harvard University who proposed the notion of a multifaceted dispute resolution centre, in lieu of the then existing courthouse. What comes out from the chapter is that the Multidoor Courthouse concept has

¹³ In a Joint Statement by the Association of Law Societies and General Council of the Bar of South Africa made on 26 January, 1990, the following was stated, *inter alia* "ADR, however, can never provide a complete substitute for litigation. It should therefore be seen as an integral part of the whole process of justice and should form part and parcel of the skills upon which a lawyer can call in delivering legal services to his clients". See Pretorius, P. (1999). 'ADR: A Challenge to the Bar for the 1990's.' *Consultus* 3 No. 1, at p.41.

been tested in practice in several States, most notably, in the District of Columbia and the experience found to be favourable and encouraging.

Chapter Four traces the historical background to the development of dispute resolution in Zambia. This approach has been necessitated by the fact that the basic features of the Zambian judicial system can be traced back to an historical origin or can be accounted for as a latter-day attempt to be rid of some offensive aspect of colonial administration of the courts.¹⁴ Pre-colonial Zambia dispute resolution was based on indigenous or customary laws of the various ethnic groups. During this period, the maintenance of harmony within the family and village was of paramount importance. Dispute resolution mechanisms such as conciliation, mediation and arbitration were part and parcel of the justice delivery system of the time. Therefore, these methods of dispute resolution have a long history in Zambia.¹⁵ For example, at the family level, it was normal practice for a person in authority, like the father or husband, to intervene in a dispute and have the warring members of the family reconcile while giving them the opportunity to resolve the issue amicably. In the event of the strategy failing, the 'mediator' would hear the disputants and their witnesses and impose a solution on the parties. At this point, the neutral would in effect be playing the role of arbitrator. Therefore, even though there were no legal frameworks to regulate these dispute resolution methods like there are today, the methods did exist and were being used. In addition, traditional courts did exist where people took their disputes for resolution when all else failed. The main role of the court

¹⁴ Hoover, E., Piper, J.C., and Spalding, F.O. (1970). 'One Nation, One Judiciary: The Lower Courts of Zambia'. *Zambia Law Journal* 2. Nos. 1 and 2, at p.4.

¹⁵ It transpires from Chapter Three that ADR has a long history even in other parts of the world. Derek Roebuck writes in relation to England that the ways in which earlier societies dealt with disputes long before there were courts, or judges or lawyers or even written law, not only shows that they have always used mediation and arbitration, but that there is early evidence of assemblies where they met to deal with a wide range of business including disputes between individuals and groups. See Roebuck, D. (2006) 'The Prehistory of Dispute Resolution in England.' 72, No.2, *Arbitration International*, at p. 93. According to Rao, the concept of parties settling their disputes by reference to a second person or persons of their choice was well known in ancient India. See, Rao, P.C. (1997) 'Alternatives to Litigation in India.' In Rao, P.C., and Sheffield, W. (Ed.). *Alternative Dispute Resolution: What it is and how it works*, at p. 27.

at that time was to be reconciliatory. Traditional courts did not operate along the same lines as present day official courts which place emphasis on legal rights of litigants at the expense of future relations.

During colonial rule, the Royal Charter of Incorporation of 29 October 1889 gave its seal of approval to the differentiation between European settlers and native Africans. Northern Rhodesia had two different sets of laws, the received laws for the European Settlers and African Customary law for indigenous Africans. The received laws created an elaborate judicial system. Thus, two distinct systems of judicial administration developed¹⁶ and this marked the beginning of the dual legal system which has continued up to date. The dual system operated in urban areas with Europeans and some 'Westernised' Africans being subjected to Western law, and the majority of Africans, to customary law.

Chapter Five has brought to the fore some institutions of justice delivery in Zambia. The courts' role in justice delivery was identified. Two commissions, namely, the Commission for Investigations and the Permanent Human Rights Commission, were discussed because of the nature of their roles in justice delivery in the country. Two selected NGO's were also included in the discussion because of the special role they play in justice delivery. These are the Legal Resources Foundation (LRF) and the National Legal Aid Clinic for Women (NLACW). The informal institutions of justice delivery were identified as the family, the church and the headmen and chiefs' courts.

The evaluation of the traditional justice delivery institutions in Chapter Six has defined the roles that these institutions have played and continue to play in justice delivery in Zambia. It has shown that the institutions under review have played substantial roles in the delivery of justice. Further, the evaluation has

¹⁶ The official courts administering English Law and the tribal courts administering customary law. See Hoover, Piper and Spalding, *id n.* 14 above, at p 8.

brought out a salient point about these institutions which is the common thread running through all the institutions. This is that their performance has been hampered by a number of constraints prominently, the insufficient financial, material and human resources and in some cases, lack of capacity by the institutions concerned to handle some issues efficiently. Some have fared much better than others. However, there is still room for improvement if the institutions are to perform to optimum levels. We have also learnt that the situation with regards to scarcity of resources is unlikely to improve significantly in the foreseeable future due to the continuing economic constraints the country is facing. The Zambian government is obliged to weigh its priorities and provision of adequate resources to these institutions does not appear to rank high in terms of priority when there are other needy areas which require urgent attention in terms of resources, such as poverty alleviation, medical care and education.

The development of ADR in Zambia was outlined in chapter Seven. We learnt how LAZ in conjunction with co-operating partners, initiated the move to introduce ADR in Zambia with particular emphasis on arbitration. In Zambia there are presently three main types of ADR techniques in use, namely, negotiation, conciliation/mediation and arbitration. Despite its perceived advantages, negotiation has not been explored and encouraged in the way that it should be in Zambia as the responses of some lawyers in Chapter Seven regarding the use of negotiation revealed. However, with regards to mediation, even though it is mainly court-annexed and has a number of shortcomings as highlighted in the chapter, it seems to be headed for success, but only if certain measures as highlighted later in the recommendations section, are taken. The practice of arbitration seems to be slowly picking up too.

In spite of the above indications, however, it is clear from Chapter Seven that ADR in Zambia is still in its infancy compared to older and bigger jurisdictions such as the United States, India, Australia and many others. The legal and

institutional frameworks for mediation have been in existence for a relatively few years. In the case of arbitration, not many inroads were made into the practice of arbitration until the year 2000 even though it had been on the statute books since 1933. The 1933 Act had become obsolete in light of the developments on the international scene.

Court-annexed mediation was formally introduced in Zambia on 28th May 1997 with the enactment of Statutory Instrument No. 71 of 1997 the High Court (Amendment) Rules, 1997. Under Order XXXI (31) rule 4 of these Rules, a trial Judge has the power to refer any case the Judge considers suitable for mediation and where that fails the Judge is under a duty to summon the parties and fix a hearing date. The Industrial Relations Court also has the power to refer any action to mediation at any stage of the proceedings except in a case which involves an injunction or which the Court or Judge considers unsuitable for reference to mediation or arbitration.¹⁷ However, a shortcoming has been noticed with regard to the issue of referral of cases by courts to mediation. As one High Court Judge¹⁸ put it, the rules do not give proper guidelines on how the court should decide whether the case is suitable for mediation or not. The court is left with the discretion to decide on its own volition which case should be referred to mediation and which one should not.¹⁹ The author agrees with the Judge's sentiments and points out that the presence of such guidelines could assist Judges to exercise their discretion judiciously. However, it is the author's view that training of Judges in ADR²⁰ could obviate the need for such guidelines since with their acquired knowledge the Judges would be able to decide relatively easily, which cases would be suitable for mediation and which ones would not. It is the author's view that retention of Judges' discretion in this

¹⁷ Rule 12(1).

¹⁸ Judge Charles Kajimanga in an interview with the author on 30 July, 2004.

¹⁹ With the exception of cases involving constitutional issues or the liberty of an individual or an injunction. See Order XXXI (31), rule 4 of the High Court (Amendment) Rules, 1997.

²⁰ Not just in mediation.

regard is important for the court-annexed mediation programme to function smoothly and efficiently. This is so for the reason that a Judge is in the best position to make decisions regarding the suitability of cases or otherwise for mediation because a Judge has the benefit of first hand knowledge of the facts of cases that come before him and the particular circumstances surrounding them.

It is clear from Chapter Seven that before the introduction of court-annexed mediation the country had no trained mediators. The introduction of court-annexed mediation has brought about a number of developments in the area of mediation in Zambia. Judges have been sent for training in mediation and for some, in arbitration too. Legal practitioners as well as professionals from other professions like engineering, architecture, accountancy, medicine etc. have also been trained and continue to be trained as mediators and arbitrators. However, mediation is a leading form of ADR in Zambia primarily because it is court-annexed. Very little mediation is conducted outside the court realm. With few mediations taking place outside the courts, it is too early to decide whether court ordered mediation with its attendant compulsion on the parties is more effective than private mediation. Given that a large number of law suits are filed in Zambian courts daily²¹, clearly very few cases are being referred to mediation.²² However, we cannot begrudge the fact that tremendous strides have been made

²¹ A fact borne out by the findings in Chapter Six above in the section on the evaluation of the performance of courts in Zambia.

²² A state of affairs confirmed by the statistics on court referrals to mediation in Chapter Seven. Thus, according to the statistics provided by the Mediation Office, between January and June 2006, a total of 106 cases were referred to mediation by High Court Judges. 8 cases were referred in January; 4 in February; 10 in March; 7 in April; 11 in May; 45 in June (a month when there was a Settlement Week); 14 in July; 4 in August and 3 in September. In the Industrial Relations Court, a total of 111 cases were referred to mediation between January and June 2006. Out of this number, 27 were fully settled; 3 were partly settled; 43 were not settled; 17 were not mediated and 21 were ongoing. Incidentally, the higher number of cases not settled in the case of the Industrial Relations Court referrals raises questions about the settlement rate and its implications. Could one of the reasons for this be that most disputants go to mediation with no intention to settle or could it be because these mediations are by court order? The author is of the view that both reasons could to some extent account for this state of affairs but at the present stage in the development of court-annexed mediation, it is too early to give a conclusive answer.

in the area of mediation in Zambia and some successes have been scored since the introduction of court-annexed mediation. The very fact that the programme has been embarked upon is a laudable achievement, but court-annexed mediation is yet to make a significant impact on the reduction of caseloads in courts of law and contribute to dispute resolution in Zambia.

The Law Association of Zambia has been instrumental in the training of arbitrators in Zambia starting from the time the association, in conjunction with the United States Agency for International Development (USAID) and assistance of the International Trade Centre (ITC) and the Foundation for International Commercial Arbitration (FICA), initiated the move to introduce ADR mechanisms with particular emphasis on arbitration in Zambia. This function has since been taken over by the ZCDR. Records at the ZCDR Secretariat show that as of October 2006, there were 160 qualified arbitrators in Zambia.²³ It is clear from the above that the legal and institutional frameworks have been laid for successful ADR implementation in Zambia. With time and experience, ADR might come to truly help decongest the courts and contribute effectively towards justice delivery.

8.2 RECOMMENDATIONS

In this section, conclusions and recommendations in terms of institutional and legal frameworks for successful management of ADR in Zambia are made. These are based on the findings from the study. The recommendations are divided into short-term and long-term ones. Short-term recommendations are those which, in the author's considered view, could be implemented fairly expeditiously without need for injection of significant financial resources. Long-term recommendations on the other hand, would require the injection or

²³ ZCDR records accessed on 5 October 2006.

sourcing of substantial financial resources, hence the need for more time for implementation.

8.2.1 SHORT-TERM RECOMMENDATIONS

(i) Review and Consolidation of Mediation Rules

Discrepancies in the mediation rules between the High Court and the Industrial Relations Court in terms of duration of the mediation process and mediation fees, among others, were highlighted in Chapter Seven. The discrepancies were that while in the former court the mediation process is supposed to be completed within sixty days of the collection of the court record, in the latter court the period is ninety days from the date of collection of the record. Further, mediation fees are payable on a one-off basis under the High Court Rules²⁴, whereas under the Industrial Relations Court Rules²⁵ as they presently are, a mediation fee is payable at every sitting. There are no valid reasons for these discrepancies and therefore, they must be removed and the mediation rules reviewed and consolidated. Such a step would enhance the legal framework for mediation and at the same time, improve the climate for mediation in Zambia. Fortunately, information from the Mediation Office at the Industrial Relations Court indicates that a statutory instrument which will make mediation fees payable only once at the Court as well is in the offing. This will harmonise this aspect of the mediation rules.

(ii) Amendment of Mediation Rules in relation to Mediation Fees

To address the complaints from some members of the public about their inability to afford the mediation fees, as highlighted in Chapter Seven above, it is recommended that the mediation rules be amended to include a provision whereby payment of mediation fees is dispensed with in deserving cases. A

²⁴ High Court (Amendment) Rules, 1997.

²⁵ Industrial Relations Court (Arbitration and Mediation Practice) Rules, 2002.

similar provision exists under Order XLVII of the High Court Rules where the Registrar may dispense with payment of any fees on account of the poverty of any party or for other sufficient reasons. Such a move would greatly facilitate access of the poor to court-annexed mediation.

(iii) Introduction of Code of Ethics for Mediators

It was observed in Chapter Seven that there is no code of conduct for mediators.²⁶ As such, mediators have the leeway to engage in unprofessional conduct. Thus, the proposal by the chairman of ZCDR that the ZAA be given the mandate to regulate the conduct of mediators and arbitrators, in the same manner LAZ does with lawyers, should be given effect. This would ensure that mediators conduct themselves with honour and dignity. It is thus recommended that a code of ethics for mediators be enacted forthwith and the ZAA be mandated to regulate the conduct of arbitrators and mediators to promote ethics and professionalism in the practices of arbitration and mediation in Zambia.

(iv) Introduction of Mechanisms to Check on Laxity by Judges

Cries of delays by judges in delivering judgments are genuine, as High Court Judge Musonda and current president of ZAA, Mr. Mutuna indicated during separate interviews with the author. Laxity by High Court Judges could be addressed through the introduction of mechanisms to check this. Closer supervision of Judges by the Chief Justice without infringing on judges' independence could be introduced. This could take the form of periodic progress reports on cases by Judges to the Chief Justice and the introduction of Practice Directions in this regard. The problem of lawyers asking for adjournments in the eleventh hour could also be curtailed or minimised by the introduction by the Chief Justice of a Practice Direction prescribing the required notice of adjournments and the penalty for non-adherence thereto.

²⁶ Arbitrators currently apply the Judicial Code of Conduct.

(v) Introduction of Computer Courses for Judicial Officers

It is recommended that it be made compulsory for all Judges, High Court Registrars, Magistrates, Local Court Justices and other judicial officers to attend computer and internet courses to be provided by the judiciary or co-operating partners to enable them to become computer and cyber-literate. This would facilitate their access to the vast resources provided by the internet and enable them to learn from latest legal developments in other jurisdictions. Ultimately, their performance in justice delivery would be enhanced.

(vi) Introduction of Courses/Seminars for Company Executives

To address the concerns expressed by the Mediation Officer at the Industrial Relations Court regarding the lack of knowledge by managers about ADR and its advantages, it is recommended that short courses/seminars on ADR targeted at companies, particularly management, be introduced by the ZCDR. Apart from raising awareness on ADR, these courses/seminars could provide supplementary income for the ZCDR.

(vii) Increase of Case Referrals to Mediation

The statistics on the number of cases being referred to mediation by the courts²⁷ clearly show that very few cases are referred except for Settlement Week.²⁸ It is important for courts to refer more cases to mediation if it is to significantly contribute to the reduction in the case loads. Statistics reflect that the number of cases referred to mediation are negligible compared to the number of cases filed in courts daily. In order for court-annexed mediation to meaningfully reduce the case loads in courts, it is recommended that the courts refer more cases to mediation. This is not to suggest that courts should refer cases to mediation without due regard to the suitability of the cases for resolution through

²⁷ See footnote 22 above.

²⁸ Ibid.

mediation. Bearing in mind the fact that a substantial number of cases are filed in Zambian courts daily, it is the author's view that courts could refer more cases than they presently do to mediation.

Zambia is in the fortunate position of having a judiciary, at least *prima facie*, which has embraced ADR. The fact that the courts have a role to play in the ADR mechanisms presently in use in Zambia, could be behind this positive attitude by the courts in that it could have removed any fears that the judiciary might have had with regard to the role ADR should play in Zambia. It is also clear from the findings of this study that the judiciary has also realised that ADR has an important role to play in justice delivery in Zambia and that with continued referrals of suitable cases to mediation, caseloads in the courts will steadily be eased. This state of affairs is likely to engender the success of ADR in the long run.

(viii) Referral of Arbitration Cases through the ZCDR

It will be recalled from Chapter Seven that not many cases are referred to arbitration through the ZCDR. As a result, the ZCDR is slowly becoming a white elephant. It is recommended that to justify the existence of the ZCDR, courts refer more of the court cases with arbitration clauses to the Centre. The ZCDR has a list of all qualified arbitrators from whom parties to disputes can choose from. The reference of disputes with arbitration clauses to the dispute resolution centre would not take away the rights of the parties to decide to choose arbitrators of their own choice even away from the list.

8.2.2 LONG-TERM RECOMMENDATIONS

(i) Policy on Promotion of Use of ADR

Evident from the discussion in Chapter Three is the fact that the development of ADR has its origins in the dissatisfaction of many people with the way disputes

are traditionally resolved and in a quest for quicker and cheaper alternatives to litigation. We've learnt that informal dispute resolution in Zambia goes back to ancient times and that such dispute resolution methods promoted and sustained relationships. Present day Zambia could benefit from emulating pre-colonial Zambia in this regard. To this end, there's need for a deliberate policy of promoting the use of ADR²⁹ in Zambia. It is therefore, recommended that a deliberate policy aimed at promoting the use of ADR in Zambia be put in place to encourage the use of ADR by society as the dispute resolution method of choice.

(ii) Encouragement of Prospective Litigants to Use ADR

Encouragement of prospective litigants to use ADR at the earliest possible stage in order to avoid litigation could go a long way in reducing the backlog of cases in courts. Rule 39 of the Legal Practitioners' Practice Rules, 2002 already places an obligation on a practitioner to encourage clients to reach a solution by settlement outside court rather than start legal proceedings. It states "A practitioner shall encourage clients to reach a solution by settlement outside court rather than start legal proceedings." It is therefore recommended that legal practitioners be mindful of this legal duty and perform it. Lawyers have a duty towards their clients, who arguably, are accustomed to the courts and the legal protections assured them, to remove their natural distrust of unfamiliar processes. Arguably, clients are more comfortable with taking their disputes to courts rather than to ADR. Therefore, to change this attitude, there is need for lawyers to take deliberate and positive steps to popularise ADR by explaining to their clients before instituting legal proceedings the benefits of ADR and how user-friendly it is as opposed to litigation.

²⁹ Some known benefits of ADR include the promotion and sustenance of existing social and business relationships.

(iii) Encouragement of Lawyers to Attend Arbitration and Mediation Courses/Workshops offered by ZCDR

The findings in Chapter Seven show that most lawyers in Zambia are only now becoming conversant with ADR mechanisms. Unfortunately, even where lawyers are aware of the existence of ADR mechanisms and their advantages, most of them are reluctant, for a number of reasons, to suggest their use to clients. As indicated in Chapter Seven, traditional legal education was premised on an adversarial approach to dispute resolution. The Law School produced a lawyer who believed that dispute resolution is a win and lose affair. Winning implied more money and power which was befitting of lawyers. With the adversarial background of lawyers in Zambia, most lawyers dare not think of suggesting alternatives to their clients because that could be taken as a sign of weakness, as fearing litigation. Such a perception could, unfortunately, adversely affect the lawyer's negotiating position.

Diminished roles and status is another reason for most lawyers' failure to wholeheartedly embrace ADR. Most ADR mechanisms place emphasis on client control and make lawyers facilitators whose role is to enable the parties to reach the best possible settlement. There are also some psychological factors that discourage an enthusiastic acceptance of alternative processes by lawyers. Indeed Goldberg *et al*/succinctly state these as follows:

Like most professionals, lawyers frequently exert considerable control over their clients, deriving from lawyers' ability to utilise a complex set of technical rules. This dominance is jeopardised by the use of dispute resolution methods like negotiation and mediation that place greater emphasis on client control over the outcome.³⁰

Financial considerations could also constitute an impediment to the wholehearted acceptance of alternatives by lawyers. Quick resolution of cases means less money for a lawyer who earns his fees by the hour. Further, since most ADR

³⁰ Id. n 9 above, p. 487.

mechanisms preserve future relationships, future disputes are deterred with the result that people do not have to go to lawyers often. Given this scenario, lawyers are bound to wrongly, perceive ADR as disadvantageous to their economic interests. District Judge Monty Trent³¹ aptly summarised the position thus, "...regrettably, many practitioners in the County Court believe that ADR stands for an alarming drop in revenue!" This state of affairs might be true regarding county courts in England but the same could also be said for legal practitioners generally in Zambia.

Given this background, the challenge is how the traditionally conservative lawyers can overcome these impediments to learn the ADR way of doing things and appreciate their new roles in ADR as facilitators. That is a challenge that could be addressed through education of lawyers in ADR. That way, they could come to appreciate the perceived advantages of ADR for their clients and indeed themselves. It is therefore, recommended that more efforts should be made by LAZ and the ZCDR to encourage more lawyers to attend arbitration and mediation courses and workshops organised by the ZCDR. That would result in an increase in knowledge of ADR and hopefully, acceptance of ADR among the legal fraternity in Zambia.

(iv) Improvement of Conditions of Service for Judicial Officers

We have learnt that inadequate funding undermines the independence of the judiciary. Therefore, it is imperative for government, despite its limited resources, to ensure that the judiciary is always provided with sufficient financial resources. It goes without saying that Judges and other judicial officers who are well paid and enjoy good and competitive conditions of service would be less prone to temptations and corrupt practices. In this regard, it is recommended that conditions of service of all judicial officers be improved to compare

³¹ Reported at p. 26 of Øyre, T. (2004). 'Civil Procedure Rules and the Use of Mediation/ADR.' 70, No.1 Arbitration International.

favourably with those obtaining in the region. Improved conditions of service in the judiciary would without doubt, attract more qualified people to the bench.

(v) Guarantee of Judicial Autonomy and Independence

Presently the executive arm of government ultimately determines personal emoluments of judicial officers in that the President determines conditions of service for High Court and Supreme Court Judges through the Judges (Conditions of Service) Act, No. 14 of 1996. Section 3 of this Act provides, "There shall be paid to a Judge such emoluments as the President, may by statutory instrument, prescribe." Independence of the judiciary should be guaranteed by ensuring that the executive arm of government is not in any way involved in determining the emoluments and other conditions of service of the judiciary. To this end, if the proposed Constitution came into effect with Articles 198 and 199 retained in their present form, this ideal would be a reality and the independence of the judiciary would undoubtedly be enhanced.

Article 198 (1) of the proposed Constitution provides that the judiciary in both its judicial and administrative functions, including financial administration, will be subject only to the Constitution and the Laws and not subject to the control or direction of any person or authority. Sub-article (2) of the same Article states that the executive, legislature or any other person shall not interfere with the Judges, judicial officers or other persons in the performance of their functions, while sub-article (3) provides that all other state organs and institutions shall accord to the courts the assistance that may be required by the courts to protect the independence, dignity and effectiveness of the courts. Article 199 (1) has provision for the judiciary to annually prepare and submit its budget estimates to the Minister of Finance who will be obliged to determine the budget of the judiciary taking into consideration equitable sharing of resources. Sub-article (2) of this Article requires that the approved budget for the judiciary be released in full directly to the judiciary which shall not be under funded in any financial year.

Sub-article (3) provides that the emoluments payable to or in respect of a member of the judiciary shall not be varied to the disadvantage of the member and sub-article (4) indicates that the operative and administrative expenses of the judiciary, including emoluments to members of the judiciary shall be charged on the Consolidated Fund.

Clearly these are progressive provisions which would go a long way in guaranteeing judicial autonomy and independence.

(vi) Provision of Additional Courts in Provincial Centres

From the findings of this study, it is apparent that presently there are serious shortages of court rooms, especially at subordinate and local court levels all over the country.³² It is recommended that in addition to improved conditions of service for judicial officers, more subordinate and local courts are built in all provincial centres in the country.

(vii) Extension of Court-Annexed Mediation to Lower Courts

It will be recalled from Chapter Five that the lower courts in Zambia handle a lot more cases than the higher courts in terms of volumes. Therefore, for the benefits of court-annexed mediation to be felt by a wider section of the Zambian community, it is recommended that court-annexed mediation be extended to subordinate courts and later, funds permitting, to local courts.

(viii) Training of Judicial Officers in ADR

Training of judicial officers³³ in ADR should be made a priority in order to improve their operations. Local court and subordinate court officials should also be trained in ADR to re-orient them to approach justice from a problem-solving perspective where all relevant players participate in the resolution of disputes.

³² With the exception of Lusaka at subordinate court level due to the construction of the new subordinate court building in 2005.

As a stop-gap measure while local court officials are being trained in ADR, they could be empowered to make use of assessors with the necessary knowledge in ADR who would help them assess which cases would be suitable for mediation.³⁴

(ix) Streamlining of Administration of Mediation Offices

From the findings in Chapter Seven, it is readily apparent that the administration of the court-annexed mediation programme is fraught with problems. There is no close monitoring of case files by the administrators of the programme and as a result, some files are kept for unduly long periods by mediators. The offices themselves have old furniture and office equipment which need replacing. The Robbing Room at the High Court where mediation sessions are held is in dire need of a facelift to make it more conducive to holding sessions. In order to improve the management of the mediation programme, it is recommended that a proper and effective mechanism to closely monitor the movements of files be put in place in the Mediation Offices at the High Court and the Industrial Relations Court. Penalties should be imposed on mediators who keep the case files longer than the prescribed time. It is further recommended that a facelift be done to the Robbing Room at the High Court to make it more conducive to the holding of mediation sessions. The furniture and other office equipment in the Mediation Offices should also be replaced. It is recommended that the Mediation Offices be empowered to charge some fee to be payable by mediators towards the maintenance of the offices.

(x) Provision of Formal Legal Training to Local Court Justices

In addition to training of local court justices in ADR, it is recommended that local court justices be provided with formal legal training. This could go a long way in changing the public's long-held perception of local court justices as meting their

³³ Including those in the Mediation Offices as a way of motivating them.

³⁴ Presently local courts, and indeed higher courts that need the services of assessors on matters of customary law, are empowered to make use of assessors conversant in matters of customary law whenever required. See s. 61 (1) of the Local Courts Act, Chapter 29 of the Laws of Zambia.

own brand of justice not found in any other courts in Zambia. These measures would undoubtedly, encourage the lower courts to pro-actively embrace ADR in Zambia.

(xi) Upgrading of Library Facilities

From the findings, it is apparent that library facilities in courts are dismally inadequate. This makes it difficult for judicial officers to do any meaningful research. It is thus recommended that library facilities in courts, especially higher courts be improved.

(xii) Introduction of Commercial Lists in Lower Courts

As indicated in Chapter Six, a Commercial List and Commercial List Registry have been introduced at the High Court in Zambia for commercial actions. Specially trained judges have been assigned to these cases and rules designed to expedite disposition of cases have been put in place. It is recommended that as resources become available, Commercial Lists be introduced at subordinate court level as well.

(xiii) Introduction of Circuit Courts

To address the valid complaints from some members of the public about the long distances they have to travel to the Industrial Relations Court which only sits at Lusaka and Ndola, it is recommended that circuit courts be introduced in the provincial centres around the country. This development would be a step in the right direction and would facilitate justice delivery to people in remote areas of the country.

(xiv) Introduction of Multidoor Courthouse

In Chapter Three above, we learnt about the concept of the Multidoor Courthouse and its advantages. We also learnt that this concept has been successfully tried and tested in the United States of America. It is the author's

considered view that this concept should be tried in Zambia too in the long run. Thus, at an opportune time, the Multidoor Courthouse concept should be introduced in Zambia to facilitate increased access to the formal justice delivery institutions.³⁵

(xv) Strengthening of Capacity of Commission for Investigations

The hallmark of the Commission for Investigations is that citizens have direct access to it and do not have to go through any other institution. The Commission is uniquely placed to identify gaps and weaknesses in the system and recommend preventive action. However, for the Commission to function properly there must be political will from all three arms of government. It must be given adequate resources and the public must be made aware of the office and understand its functions. As the Report on Good Governance proposed, the Commission's capacity could be strengthened by the provision of adequate, qualified, competent and skilled personnel that are adequately motivated and remunerated; adequate office equipment, plant and equipment; adequate and appropriate funding for recurrent and capital costs and training and retraining of personnel, including investigative skills training.³⁶ It is therefore, recommended that the Commission's capacity in this regard be strengthened at the earliest possible time.

(xvi) Empowerment of Commission for Investigations to Institute Investigations and Take Remedial Action

It will be recalled from the discussion on the Commission in Chapter Six that two major weaknesses of the Commission lie in its lack of power to institute investigations on its own motion and order remedial action once the substance of the complaint has been established. It is thus recommended that the

³⁵ It is acknowledged that it is not feasible to implement the concept immediately in Zambia. However, once implemented, the concept could prove very beneficial to Zambia in that it would increase the people's access to justice. Introduction of the concept should therefore be considered as a long-term project.

³⁶ GRZ Good Governance Report, p. 42.

Commission be empowered to institute investigations on its own motion and take remedial action after carrying out investigations once the allegations of abuse of authority have been proved. This would be in line with recent trends in other countries where the ombudsmen have powers to initiate such investigations as they might find suitable. One such country is South Africa. In South Africa the ombudsman is known as the Public Protector. This institution is considered to be one of those institutions necessary for the sustenance of constitutional democracy. The Public Protector has power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct and to take appropriate remedial action.³⁷ Article 182 (5) of the South African Constitution provides that any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

(xvii) Reports of Commission for Investigations to be open to Public

It is the author's considered view that reports of the Commission should be available to the public as is the case with the reports of the South African Public Protector. These measures would bring about transparency in the operations of the Commission and fear of public scrutiny would help improve the operations of the Commission. Further, the Commission should be empowered to hear any complaint that has merit. The fact that the complaint can be entertained through courts of law, by an executive authority, or on appeal before a tribunal should not bar a complainant with a genuine complaint which is within the Commission's competence from presenting it to the Commission for investigations. Further, the Commission should be empowered with capacity to

³⁷ Article 182 of the South African Constitution.

effectively disseminate information on its operations to the public and involve the public in the fight against maladministration.

(xviii) Strengthening Capacity of Permanent Human Rights Commission

The Permanent Human Rights Commission plays a noticeable role in justice delivery as the discussion in Chapter Six has shown. However, its participation in justice delivery is hampered by constraints highlighted in the chapter. To overcome these constraints, it is proposed that the following recommendations of the GRZ Good Governance Report be implemented as speedily as possible. The Report recommended that the Commission be strengthened to effectively carry out its mandate.³⁸ Further recommendations were that the Commission be provided with qualified, competent, skilled and experienced support personnel that are adequately motivated and remunerated in order to strengthen its capacity to investigate and report. The Report further recommended that the Commission be provided with adequate funding and appropriate office accommodation and furniture in all provinces, office equipment and plant, including motor vehicles.³⁹ It will be recalled from Chapter Six that lack of financial resources was a major drawback to the operations of the Commission. Therefore, provision of adequate financial resources could empower the Commission and enable it to effectively carry out its functions, including training in human rights to members of the public. It could also help the Commission fulfill its mandate of informing and rehabilitating victims of human rights abuse to enhance the respect for and protection of human rights.⁴⁰

³⁸ GRZ Good Governance Report, p. 63.

³⁹ Ibid.

⁴⁰ Permanent Human Rights National Plan of Action for Human Rights 1999 – 2009, p. 53.

Presently, the Commission does not have financial autonomy. Thus, it is further recommended that it be given more financial autonomy in order to operate independently and efficiently.

(xix) Empowerment of Permanent Human Rights Commission to Compel Observance of its Decisions

More recommendations by the Permanent Human Rights Commission National Plan of Action, which the author endorses, are that the Commission must be empowered to compel observance of its decisions. Presently the Commission does not have such mandate and this is a major drawback to the effectiveness of the Commission.

(xx) Divesting of Power of President to Appoint Commissioners without Consultation

It is recommended that section 5 (2) of the Human Rights Commission Act, which empowers the president to appoint any person to be commissioner without consultation subject to ratification by National Assembly, be removed because of the danger inherent in such a provision of undermining the independence of the persons so appointed who might owe their loyalty to the appointing authority.⁴¹

(xxi) Security of Tenure for Commissioners

Section 7 (2) of the Human Rights Commission Act, 1996 provides that a commissioner may be removed from office⁴² for inability to perform functions of the commissioner's office on the grounds of infirmity of body or mind, incompetence or misbehaviour. However, there are no guidelines on what constitutes incompetence or misbehaviour. There is no provision for an

⁴¹ Ibid.

⁴² Before the expiry of the term of office. The term of office for commissioners is three years subject to renewal. See s. 7 (1) of the Act.

independent tribunal to investigate and make recommendations for the removal of commissioners as is the case with judges. This state of affairs leaves it to the discretion of the appointing authority, the President, to determine what constitutes incompetence or misbehaviour. This lack of security of tenure for commissioners could affect their independence because of fear of being removed if they are seen to displease the appointing authority who has the subjective power to remove them. To address this apparent shortcoming, it is recommended that security of tenure of commissioners be ensured through the provision of guidelines on what constitutes incompetence or misbehaviour and the establishment of an independent tribunal to investigate and make recommendations on issues of removal of commissioners from office.

(xxii) Empowerment of Commission to Institute Legal Proceedings

It is recommended that the Commission be empowered to institute legal action on its own whenever necessary, to speed up disposal of cases. Presently the Commission does not have such powers and relies on other institutions to do that for them. It is submitted that for a human rights institution such as the Commission, this power is crucial if cases are to be disposed of speedily.

(xxiii) Official Recognition of Headmen and Chiefs' Courts

Informal institutions of justice delivery have played and continue to play complementary but significant roles in justice delivery. Even though only passively tolerated, headmen and chiefs' courts play vital roles in justice delivery in peri-urban and rural areas where the distances to official courts make the official courts inaccessible to most disputants. The headmen and chiefs' courts are easily accessible, cheaper, faster and characterised by simple and informal procedures. There are also shared values of what constitutes justice between the people and these courts. These courts go beyond ensuring that the rules are

observed, but are concerned with restoring relationships of the parties.⁴³ In these courts maintenance of harmonious relations to ensure peaceful co-existence is of paramount importance because there is a realisation that in the communal set-up that characterise these communities, peaceful co-existence is essential. For these reasons, these courts are popular and have contributed significantly to justice delivery. It is thus recommended that they be given official recognition by the government.

(xxiv) Measures to Ensure Self-sustainability of NGO's.

From the discussion in Chapter Six above, it is clear that NGO's have played notable roles in justice delivery in the country. We have seen impressive statistics for both the Legal Resources Foundation (LRF) and the Legal Aid Clinic for Women (NLACW). Unfortunately, these NGO's depend on donor funding for their sustenance. Presently, the financial resources provided by the donors are insufficient for their needs. These problems could worsen when the donors finally stop funding the operations of these institutions. For these reasons, it is recommended that measures be taken to enable them to become self-sustaining. Institutions such as LAZ could assist them with finances which could then be invested in income-generating activities. These institutions should be slowly weaned from their dependency on donor funding. With improved funding, they could perform better than they presently do.

(xxv) Encouragement of NGO's to Use ADR

This study has shown that the LRF and NLACW rely mostly on courts for resolution of their clients' disputes, although they sometimes resort to negotiation and mediation. It is recommended that these institutions be encouraged to use more ADR methods for resolution of their clients' cases rather

⁴³ WLSA Zambia Trust (1999). *Women and Justice: Myth or Reality in Zambia*, p. 34.

than the courts particularly since the majority of their clientele is grass-root based with limited financial resources.

(xxvi) Training of NGO's Lawyers and Paralegals in ADR

Training of lawyers and paralegals of the LRF and NLACW in ADR mechanisms could go a long way in empowering them with knowledge of ADR mechanisms. It is therefore, recommended that programmes be made by these NGO's to train their lawyers and paralegals in ADR. Donors could be approached for increased funding to cover this type of training.

(xxvii) Making ADR Education an Integral Part of Learning Institutions

The reasons most frequently given for the failure of disputants to make greater use of mediation and other alternatives to the courts is that they do not know about their existence.⁴⁴ In Zambia, not many people know about the existence of ADR which is only catching up now. In order to increase society's knowledge of ADR, it is recommended that education be made an imperative and integral part of learning institutions. Schools could teach children skills in dispute resolution. In the United States of America, problem-solving, communication and interest-based negotiation skills are taught in many of their elementary and high schools and in community programmes. This strategy could be adopted in Zambia and could result in the creation of a society that understands and utilises ADR methods of dispute resolution and only turns to courts as a last resort.

(xxviii) Revision of Law School Curricula

The introduction of mediation and arbitration in the School of Law of the University of Zambia is a good development. However, the teaching should be aimed more at promoting consensual problem solving methods and less on the adversarial approach in order to produce well rounded lawyers who would gladly

⁴⁴ Goldberg, Green and Sander (1985) *Dispute Resolution*, p.485.

embrace ADR. Honorable Janet Reno⁴⁵ aptly put the problem in proper perspective as follows:

...Our young lawyers need to be educated to recognize that even if the outcome of litigation is relatively certain, there is not always just one right answer to a problem. Our lawyers need to be educated in how not only to root out the facts of a problem, but to understand the context in which the problem arose. We should work with law schools to encourage curricula that include an expanded approach to traditional casebook study of appellate decisions, exposure to interdisciplinary insights, as well as academic courses and clinics that promote crosscutting skills such as negotiation, mediation, and collaborative practices.⁴⁶

The author wholly agrees with Reno's sentiments above and recommends that the Law School adopt such an approach. Thus it is recommended that the curricula in the School of Law be revised to include an expanded approach to traditional legal study to expose the students to interdisciplinary insights and promote cross-cutting skills such as negotiation. This new curricula would be augmented by the Zambia Institute for Advanced Legal Studies (ZIALE) which has the mandate to impart legal practice skills.

8.3 Concluding Remarks

There is need for the participation of all branches of government, the private sector and the Zambian community in general, in ADR to ensure growth in the use and development of ADR while ensuring that it is tailored to meet the country's needs. However, this is a complex process that requires time, resources and commitment from all stakeholders. As an ancient Biblical nugget of wisdom wisely states, there's "a season for all things." Indeed the season for ADR has truly arrived in Zambia

⁴⁵ 'Promoting Problem-solving and Peacemaking as Enduring Values in our Society.' 19 Alternatives, No. 16. In Folberg, J., Golann, D., Kloppenberg, L., and Stipanowich, T. (2005). *Resolving Disputes – Theory, Practice and Law*. at p.671. Honorable Reno was the first female Attorney General of the United States of America, a position she held from 12 March 1993 when she was sworn in to 2001.

⁴⁶ Ibid.

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LIST OF ABBREVIATIONS

ACC	-	Anti-Corruption Commission
AFRONET	-	Inter African Network for Human Rights and Development
ADR	-	Alternative Dispute Resolution
BSA Co.	-	British South Africa Company
CEDR	-	Centre for Dispute Resolution
COMESA	-	Common Market for East and Southern Africa
DEC	-	Drug Enforcement Commission
ENE	-	Early Neutral Evaluation
FICA	-	Foundation for International Commercial Arbitration
ITC	-	International Trade Centre
LAZ	-	Law Association of Zambia
LRF	-	Legal Resources Foundation
MEDALOA	-	Mediation and Last Offer Arbitration
MMD	-	Movement for Multiparty Democracy
NGO's	-	Non-Governmental Organisations
NLACW	-	National Legal Aid Clinic for Women
SADC	-	Southern African Development Community
SCZ	-	Supreme Court of Zambia
SJZ	-	Selected Judgments of Zambia
UNCITRAL	-	United Nations Commission on International Trade Law
USAID	-	United States Agency for International Development
WLSA	-	Women and Law in Southern Africa
YWCA	-	Young Women Christian Association
ZAA	-	Zambia Arbitrators Association
ZACCI	-	Zambia Association of Chambers of Commerce and Industry
ZCEA	-	Zambia Civic Education Association
ZCDR	-	Zambia Centre for Dispute Resolution
ZLJ	-	Zambia Law Journal
ZR	-	Zambia Law Reports

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