COURT DELAYS IN THE ADMINISTRATION OF JUSTICE - THE NEED TO MAXIMISE THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION

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DEDICATION

This essay is dedicated to my family for all the encouragement given during the course of my Studies.

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INTRODUCTION

The objective of this essay is that the use of alternative methods of dispute resolution needs be be maximised so as to supplement the Court System. The basic challenge that lies with the Zambian courts is that they are under strain burdened as they are with a huge increase in their workload. The backlog of cases and therefore, the enormous congestion in courts results in inordinate delays in the administration of Justice. Many and varied reasons account for this state of affairs; for instance the population has continued to rise virtually unchecked and the employment figures have continued to rise resulting in the increase of the crime rate.

In Zambia, presently, the common modes of dispute resolution include Reconciliation, Conciliation, Arbitration and Mediation all of which are characterised by a process of negotiation or bargaining. Other modes of dispute resolution include the Ombudsman and the Industrial Relations Court.

It is, therefore, submitted that the utilisation of alternative dispute mechanisms be enhanced as this would have the effect of easing pressure on the court systems' workload.

CHAPTER ONE

Societies the world over, be it developing or developed have invariably a dispute resolution mechanism to settle disputes between individuals and/or organisations and/or their Governments. Such a mechanism is a necessity in the sustenance of law and order in any given society. Pre-colonial, colonial and Post-Independence Zambia has had experience in the evolution of her system of justice designed for the settlement of disputes not only through the costly adversarial court system whose bureaucratic procedures delay the delivery of justice but also through alternative dispute resolution mechanisms (hereinafter referred to as ADRMS) which are among things, inexpensive, expeditious and flexible. This Chapter therefore, endeavours to discuss the Zambian experience in dispute resolution mechanisms during the Pre-Colonial, Colonial and Post-independence periods.

PRE-COLONIAL PERIOD

During the Pre-Colonial period, various tribal or communities in Zambia dispensed justice through the apparatus of a village administration. The substantive law was the traditions of those societies, and justice was administered by elders, village headmen, counsellors, chiefs and kings, who acted as adjudicators, the lowest court being convened by an elder and the highest the king. The machinery of justice during that period was hierarchical and based on customary law. As Moffat J.P. a one time local courts advisor to the then Government of Tanganyika, in a foreword to Hans Cory's book on Sukuma Law

and Custom[1] stated:

> "It is common knowledge that the courts are no new thing introduced by the European, like the use of the plough and the bicycle, but are an outcome of those local arrangements which everywhere obtained for the settlement of disputes. Mr Cory has shown, in the part of his introductory chapter which describes the judicial organisation of the Sukuma, that an essential function of both chief and village headman was to administer justice and has given an account of how their 'court' operated.

There is no doubt that these 'courts' administered substential by local standards that they were popular, and that the people had confidence and trust in them.

This was equally true of what is now Zambia. The characteristics of the indigenous judicial systems were a simple and informal procedure. The main emphasis was compensation rather than punishment. Peaceable reconciliation, mediation and in some cases arbitration were the other features. The objective was the preservation of the relationship that existed hitherto. People lived in closely knit groups and societies and so the promotion and maintenance of social solidarity and harmony were of essence to them. Traditional institutions such as an extended family, a clan, a village

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1. Hans Cory: Sukuma Law and Custom.
   Oxford University Press (1953)
   London P xiii

or other neighbourhood arrangements played a crucial role in fostering social relatinship and harmony by resolving differences quarrels of disputes between persons. When a dispute arose, for instance between members of family or a clan, efforts were made to resolve it within the family circles. This would be achieved by reconciliation, conciliation, mediation or arbitration. If such efforts met with no success or with partial success, a mediator or arbitrator would be found outside the family circles such as a village headman or someone respectable from the same village.

The most common form of dispute resolution was reconciliation which had the advantage of allowing parties themselves to control the process of dispute settlement and to resolve their dispute. However, when the parties were unable to settle their dispute, a third party endowed with an ability to skilfully influence personal relationships would be secured. Such a person would then try to help parties to arrive at their own solution without making any recommendation to them (that is, conciliation),listen to the views of the parties and make recommendations which the parties may, or may not accept (that is, mediation), or receive evidence and thereafter impose a solution on the parties (that is, arbitration).

The need for reconciliation was most keenly felt when the parties belonged to the same family, extended family, clan, same village, and to same neighbourhood or area and

were, therefore, likely to come into regular contact with one another at social occasions such as beer parties, weddings or funerals. Should enemity be allowed to remain between parties, communal life itself would be threatened with a split or disturbance.

It is necessary to point out here that even when litigation was resorted to, adjudicators tried in most cases, to prevent the breaking up of relationships, especially those of a permanent nature, so as to make it possible for the parties to live together amicably in future.[2] They therefore, strove to promote conciliation. For them, it was of the utmost importance and value that villages or other groups of persons should remain united and in harmony, that kingsfold and families should not separate.[3] In order to fulfil this task, adjudicators constantly broadened the field of the enquires and considered the total history of relations between the litigants, not just the narrow issues raised by any of them.[4]

One important aspect of dispute settlement was that when a court or an orbitrator dealing with a case had reason to fear that further trouble might arise in future if disputants met one another, such disputants were often required to perform publicly some tangilble or concrete act of reconciliation, such as a hand-shake or an exchange of white chickens as a

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2. Max Gluckman: The Judicial Process Among the Barotse Manchester University Press (1973) London P.21.

2. IBID PP 20-21

demonstration of mutual goodwill and peace.[5] A disputant who stubornly refused to co-operate in this way brought upon himself the danger of losing respect. This is because he would be deemed to have failed to appreciate his duty towards the community. As the prospect of being ostracised was universally dreaded, it was a rare occurance for disputants to refuse to co-operate in a show of goodwill and peace.

COLONIAL PERIOD

The Colonisation of Africa in general and Zambia in particular ushered in new institutions for dispute settlement. In Zambia, the British brought with them the Anglo-Saxon common law system, but allowed the indigenous judicial system to remain in place through the courts were renamed 'Native Courts'. These courts were inferior to the newly introduced adversarial court system, and native customs that were considered 'repugnant to natural justice and morality' were outlawed. In essence however, the native court's approach to the maintenance of social and group solidarity continued unabated. This meant that traditional dispute settlement mechanisms continued to prosper within the indigenous judicial process.

The British Courts System which was introduced by the

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5. M. Fortes and Evans: African Political Systems, Oxford University Press. (1975), London P. 113

POST-INDEPENDENCE PERIOD

The colonial dispute settlement mechanism survived Zambia's attainment of independence on 24th October, 1964. However, there were a few changes that took place. Firstly, the independence of the judiciary was introduced under the new constitution. Secondly, the native courts were divorced from provincial administration and brought under the judiciary and reconstituted as local courts. Thirdly, the newly acquired freedom of movement which had been controlled during the colonial period appealed to some rural dwellers who began to flock to urban areas in serarch for greener pastures. This drift to urban areas has done much to disturb the social fabric and solidarity of thr rural population.

Although measures have continued to be taken in order to reverse the situation, it has not been an easy problem to resolve.

The overall result has been that traditional institutions such as the extended family, the clan or the village and religious institutions which once played a major role in dispute resoluution no longer retain the same degree of importance that they once enjoyed in fostering social relationships and harmony. These traditional dispute resolution mechanisms institutions though suitable for homegeneous societies are not suitable for complex societies post-independent Zambia had become one. Consequently, many people have increasingly resorted to litigation under the court

system for the resoluition of their disputes. This has precipitated a backlog of court business resulting in court delays.

In Zambia, presently, the common modes of dispute resolution are reconciliation, conciliation and mediation all of which are essentially characterised by a process of negotiation or bargaining. Other primary modes of dispute resolution include arbitration, the Industrial Relations Court, the Ombudsman, Income Tax tribunal and the Town and Country Planning tribunal with the most popular in this category being the Ombudsman and the Industrial Relations Court.

These various modes of dispute resolution will be dealt with in the third Chapter in an attempt to show how they maybe utlised to alleviate the heavy load imposed on courts in dispute resolution. However, prior to that, the various reasons advanced for court delays need to be discussed.

CHAPTER TWO

The establishment of the Special Committee on Delays in the Administration of Justice and Delivery of Judgements on 18th August, 1992, has served to bring to light a good deal of information on trends of the business coming before the courts. The long standing problem of delays in the administration of justice was discussed.

Submissions received by the Committee in relation to delays in the administration of justice in Criminal Court matters have clearly identified the institutions, factors and officers who have contributed in no small measure.[1] "In the Criminal Jurisdiction, the system of justice starts with the Police who prefer charges or indictments in the Magistrates Courts and the High Court. At trial, there are three main players involved - viz, the Judge, the Prosecutor, the Accused and Defence where applicable. The institutions involved are the office of the Director of Public Prosecutions, the Judiciary, the Legal Aid Department and members atthe the bar as the case maybe. For accused persons who are remanded, the Prison Services also plays a contributory role."[2]

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1. Report of the Special Committee on Delays in the Administration of Justice and Delivery of Judgements in Zambia. March, 1993, P.13.

I will now endeavour to show how the afore-mentioned institutions contribute to delays.

THE JUDICIARY

The inadequancy of judicial strength to cope with the backlog of cases as well as the current institutions together have been staring our courts in the face for quiet a long time. Evidence received by the committee showed that despite the shortage of courtrooms, no optimum use had been made of the few available and that most magistrates do not sit in the afternoons and rarely start on time.[3] A magistrate or judge who fails to deliver judgement on the set date equally causes delay in the administration of justice.[4]

Furthermore, certain cases are delayed simply because a case record cannot be found,or in some cases, case records are never found.[5]

THE LEGAL AID DEPARTMENT

Equal justice for all is a cardinal principle on which the entire system of administration of justice is based, hence the establishment of the Legal Aid Department. Its purpose is to grant legal aid especially in criminal cases to persons whose means are inadequate to enable them to engage private practitioners to represent them.

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3. IBID

4. M.A. N'gandwe : Delays in the Administration of Justice in Zambia - presented at a law seminar convened by the Law Association of Zambia held at Lusaka from 9th-10th December 1977, P. 5.

5. IDIB P. 13

However, the Legal Aid Department's role in the administration of justice has been undermined due to the fact that it has constant shortages of staff and funds.[6] Moreover, if the accused has been granted Legal Aid and a Legal Aid Counsel is not available, trial cannot proceed because to do so, in the absence of Defence Counsel, would certainly result in the trial being nullified by the Supreme Court.[7] "Shortage of transport has been one of the reasons why Legal Aid Counsel are unable to attend to court in time. Most Counsels walk to court and by the time they reach court they find that their cases are adj ourned."[8]

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6. OP Cit; Report of the Special Committee on Delays in the administration of justice and delivery of judgement in Zambia, 1993, P.15.

7. IBID

8. IBID PP 15-16

The former Director of Legal Aid and now Judge of the High Court, Mrs Justice Mambilima had this to say as regards the non-attendance of Legal Aid Counsel in court:

> "Legal Aid is the worst. There is no leadership, Counsel don't attend to cases. Attendance by Counsel is very erratic. Counsel change as and when the case comes. A bit more dedication and commitment is required. There is Private Practice with the Legal Aid Department." [9]

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9. IBID P.15

LAWYERS AT THE BAR

The committee heard that some of the court delays are a result of lack of knowledge of the law particularly on the part of young lawyers who are not assisted by senior lawyers.[10] Three years practice for a young lawyer before setting up a practice of his own has been said to be inadequate; the argument being that young lawyers require five (5) years supervision before setting up their own practice.[11] It is submitted that a young lawyer with less than five years supervision who sets up his own practice may find himself with a variety of clients and cases with which he cannot possibly cope. Consequently, this leads to delay and sometime, what is worse, bad advise being given.

POLICE AND PRISON DEPARTMENTS

Due to lack of transport, Police and Prison authorities have been unable to take accused persons to court and this has caused delays in disposing of criminal trials.[12] For instance accused persons in remand prison are sometimes kept there for a long period of time without being brought before court because there is no transport to take them there.[13] Moreover, it is not a rare occurance for accused persons to be detained at the police station for a week or more before they are finally brought to court. As a result, adjournments

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10. OP Cit; Report of the Special Committee on Delays in the administration of justice and delivery of judgements in Zambia, 1993, P.16

11. IBID

have to be sought and given, much to the inconvenience of the witness(s) and with scant consideration to the injury it causes to the efficient and expeditious administration of justice.

THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

This office is in charge of all prosecutions and state advocates fall directly under its jurisdiction when it comes to criminal prosecutions.[12] Evidence received by the committee showed that most cases are adjourned on account of non-availability of witnesses even in cases where transport is available. This attitude on the part of the office of the Director of Public Prosecutions inevitably delays the the administration of justice.

As regards the civil jurisdiction, some of the causes of delays in the administration of justice are, inadequate staff in the registries, inadequate courtrooms and the limited jurisdiction given to Magistrates and Justices.[13] For instance, the Surbodinate Court Act limits the Surbodinate Court of first cases to have jurisdiction in all personal suits, whether arising from contract or tort or from both where the value of property or debt or damage claimed is not more than K20,000. and in case of a Senior Resident Magistrate not more than K30,000. This increases the volume of civil

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12. IBID

13. N'gandwe, OP Cit., P.2

cases the High Court has to deal with which could otherwise be disposed of by the Surbodinate Courts.

Moreover, anticuated procedures in the civil jurisdiction are also one of the casues of court delays. An example of how ortmoded procedures and the legal profession cause delays is the case of DIANA LUNGU V THE ATTORNEY GENERAL[18] which was first set down for hararing for 23rd May, 1986. It could not take off that day because the state was not present. It was thus adjourned to 17th July, 1986. On this day both counsel were present but by consent it was again adjourned sine di e with a view to settle the matter out of court. On 4th October, 1988, the case was restored and adjourned to 20th October, 1989. It was then referred to the Solicitor General before the adjourned date. On 20th October, 1989, it was again adjourned to 9th May, 1990. On this day however, the case did not take off as the plaintiff was sick and the case was adjourned to 25th April, 1991. On 25th April, 1991 the case was further adjourned to 10th September, 1992 at the request of the state because there were no witnesses present. Finally, on 10th September, 1992, the lawyer was on leave and the case was adjourned sine die.

Appeals are another cause of court delays. They go

14, OP, Cit., Report of the Special Committee on Delays in the administration of justice and delivery of judgements in Zambia, 1992, P. 14.

15. IBID.

16. IBID P.17

17. Sections 19 and 20 of Act No. 11 of 1990.

through the High Court before they reach the Supreme. These appeals must be lodged within fourteen (14) days.[19] However, the appellant may appeal out of the stated time for good reasons acceptable to the High Court.[20] Furthermore, it takes the Surbodinate Court in some cases eight (8) months to forward cases on appeal to the High Court and it may again take another four (4) months before the High Court hears the appeal. Consequently, what happoens is that appeals are delayed by both the appellants and the court officials and thus contribute to the delay in the administration of justice.

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16. 1984/HK/414

Thus, although the courts are the most visible dispute settlers, it is submitted that they are not always the most efficient or effective method of resolving legal controversies.

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19. Section 322 (a) of the Criminal Procedure Code, Chapter 160 of the Laws of Zambia.

20. IBID Section 324

21. N'gandwe, OP Cit. P.4

CHAPTER THREE

Law is a dynamic phenomenon and so is the administration of justice, both of which must continue to develop and to move with the times. Lord Denning[1] has put it in this way:

> "The principles of law laid down by the judges in the 19th century - however suited to the social conditions of that time-are not suited to the social necessities and social opinions of the 20th century. They should be moulded and shaped to meet the needs and opinion of today."

From the preceding chapter, it is evident that the need to maximise the use of ADRMS, as a supplement to the ordinary court system, is real and urgent. As many people appear to be litigatious, especially those in urban areas, courts are under strain due to the ever increasing volume of court business. It seems instructive that a systematic campaign is desirable for the promotion of alternative methods of dispute resolution.

Besides the local courts, the other courts in the hierarchy do not appear to be doing much in the promotion of alternative methods of dispute resolution in suitable cases. In criminal cases, opportunities exist for magistrates' courts to promote reconciliation in misdemeanour cases. For example, section 8 of the Criminal Procedure Code, Chapter

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1. Lord Denning, M.R. : The Discipline of Law
Butterworths, (1979),
London, P.V.

160, provides that:

> "In criminal cases, a surbodinate court may promote reconciliation, and encourage and facilitate the settlement in an amicable way of proceedings for assault or for any other offence of a personal or private nature, not amounting to a felony and not aggravated in degree in terms of payment of a compensation or other terms approved by such court and may, thereupon, order the proceedings to be stayed."

Although this provision in law is used from time to time, its application is not as wide spread as one would wish to see. The courts and the parties concerned would do well to improve their attitude in this regard.

In suitable civil cases too, opportunities do exist for the promotion of alternative dispute resolution, not only in magistrates' courts but also in the High Court. In every divorce case filed in the High Court, it is a requirement for the petitioner's counsel to file a certificate with regard to reconciliation to show that he has discussed/not discussed with the petitioner the possibility of reconciliation. That such a certificate appears in every cases of this kind is a matter of course.

However, it is not mandatory in Zambia for counsel to attempt reconciliation. It is not easy to say with what seriousness the purpose of reconciliation is canvassed as cases that end up in reconciliation are rare. Here again, one would wish to see a positive attitude on the part of spouses

and their counsel to ADRMS.

The basic forms of ADRMs may be catergorised as follows: reconciliation, conciliation and mediation, arbitration and statutory bodies. These will now be considered in the order in which they appear.

RECONCILIATION

This is a process by which disputants confer with each other and thereby find a solution to their dispute without the intervention of a third party. Reconciliation is very common and vittually takes place every day in both rural and urban areas. The importance attached to it is that of settling disputes without the rupture of harmonious relationships or the creation of life-long enemity. For instance, it aims at preserving relationships among friends relatives, between people that belong to the same village, and between neighbours.

CONCILIATION AND MEDIATION

Mediation and conciliation are, in reality, one and the same thing and are normally discussed togehter. They involve the intervention of a third party who strives to effect a compromise acceptable to and accepted by the parties concerned.

However, conciliation on the one hand, involves a third party who attempts to assist the parties reach their own agreement without making any of his own recommendation to them. It can take place for example, in a marital situation,

that is between spouses and also in business partnership. Mediation on the other hand is a means by which a third party listens to the disputants' views and then makes recommendations that are devoid of any binding force. In other words, the disputants are free to accept or reject any, or all of such recommendation. Mediation is quite common amongst church situations and religious groupings.

Reconciliation, Conciliation and Mediation provide expeditious and inexpensive justice to disputants and are easily accessible in contrast to the ordinary court system. In addition, disputants have an assurance of confidentiality and are generally not exposed to public gaze.

ARBITRATION

This is a process by which an independent third party conducts a hearing and makes a decision on the merits of the case which is binding on the parties.

Arbitration in Zambia is based on the Arbitration Act, Chapter 180 of the laws. Even the Local Courts Act, Chapter 54 allows arbitration under appropriate customary law.[2] The advantages of arbitration in contrast to the court system include informality as it is unnecessary to observe the strict rules of evidence, privacy, economy, speed and finality. In the majority of cases, arbitration arises out of contracts especially those of a commercial nature.

See Proviso to section 50(1) of the Local Courts Act, Chapter 54.

THE INDUSTRIAL RELATIONS COURT

This is created under the Industrial Relations Act of 1993. Its responsibility is to maintain industrial harmony, and it settles trade disputes including those arising from terminations of contracts of employment and also deals, inter alia, with industrial conciliation. The Industrial Relations Court is also empowered to inquire into and make awards and decisions in collective disputes. Moreover, the court can prevail on any matters relating to industrial relations which may be refered to it. This makes the jurisdiction of the Industrial Relations Court very wide.

The Industrial Relations Court is an impartial tribunal which is mandated to administer substantial justice without strict observance of the rules of evidence.

Moreover, the Industrial Relations Court is flexible in the application of the provisions of the Industrial Relations Act. In the case of EMERSON PROSPER KAZUNGA V CITY RADIO AND REFRIGERATION SUPPLIES (1976) LTD[3] the applicant challenged his being declared redundant by the respondent and the court found for the applicant on a section which the application was brought. The applicant had based his case on Section 98(g) dealing with the rights, obligations and privileges of employees, employers and representative organisation. From the evidence submitted, the involved section 72 (2) which required management when dealing with matters of redundancy to consult the Works Council in an undertaking. The court held this provision to be mandatory and on those grounds ordered the reinstatement of the applicant

3. (1979-81) ZIRC 13.

to his original position as head of Security. This case not only illustrates the flexibility of the court but also shows its ability to enforce provisions of the Industrial Relations Act which are not specifically brought up by an applicant in his/her submissions.

It is important to state that the Industrial Relations Court, in its decisions, applies the common law where the Act needs to be supplemented and also applies rules of natural justice and the law of equity. Moreover, a person who is aggrieved by an award or declaration of the court may appeal to the Supreme Court on a point of law or mixed law and fact but not on fact alone.

THE COMMISION FOR INVESTIGATIONS

The Commission for Investigations also known as the Ombudsman was established in 1973 under the Second Republic Constitution and is regulated by Chapter 183 of the Laws of Zambia. The function of the Commision is to inquire into allegations of misconduct or abuse of office of authority in public service.

The Commission is responsible to the President and can merely recommend what remedial action ought to be taken. It is for the President to make a decision on the matter.

According to section 15 of the Commision for Investigations Act, Chapter 183, every investigation is to be conducted in camera, that is privately. One of the reasons for the secrecy surrounding the investigations is that it is meant to prevent

unnecessary suspicion developing around administrative officers and agencies which might prejudice their public image. In addition, receiving evidence, the commision is not bound by the rules of evidence. Its procedures are informal, simple and straight forward. Because of simplicity in its procedure and as it can sit and hear complaints at any place, where witnesses may readily and conveniently be reached, it is better equipped to secure an aggrieved person a speedy remedy in contrast to the courts of law.

It is unnecessary to deal in any detail with the other tribunals such as the Income Tax Tribunal, The Rent Tribunal and the Town and Country Planning Tribunal as their activities are not extensive.

In conclusion the merits of dispute resolution through ADRMS are many and need to be promoted in an attempt to ensure that alol have easy access to justice as litigation is expensive, time comsuming and cumbersome.

CONCLUSION

From the preceding chapter it is evident that the need for alternative methods of settling disputes, as a supplement to the ordinary court system is real and urgent. This need basically arises from the congestion of the court system and the appreciation of the adage 'Justice delayed is Justice denied'. It is therefore important that side by side with the desire to utilise alternative methods of dispute settlement, the court system should continually be examined with a view to reforming it in order to make it more relevant and responsive to the current needs of society and to make the delivery of justice expeditious and adequate in quality, quantity and accessibility. Some of the rigid and cumbersome procedures of the ordinary courts should thus be reformed in an effort to administer substantial justice free from technicalities. Furthermore, it is vital to constantly improve the quality of physical facilities and of the personnel involved in the administration of justice.

Indeed, as we have already observed, the processes of reconciliation, conciliation and mediation and, to some extent arbitration bear a striking resemblance to the African traditional methods of dispute settlement. This system of disposing of disputes without the rupture of relationships is certainly much better achieved through these informal arrangements than through the confrontational atmosphere that is endemic in the adversarial court system.

In an effort to improve the prospects of success of the ADRMS, it is cardinal that a campaign be aimed at educating the general public in order to persuade its members to resort more and more, where this is possible, to settling their disputes through the afore-mentioned ADRMS, the existence of many of which is usually unknown to the majority of the general public. If members of the public are made to appreciate that resorting to ADRMS is cheaper, informal and expeditious, many of them would resort to such methods. As delays are endemic in the court system, Counsel can use the very existence of delays to persuade clients to settle their disputes out of court.

Furthermore, the courts need trained manpower and the law Association of Zambia should actively participate in these actively participate in these programmes like their counterparts in America. Hence, the ADRM course should be included in either the University of Law Practice Curriculum. In the United States, this is part of the University Curriculum.

Training lawyers in law firms and public law officer to identify cater appropriate to non-litigation dispute resolution could also help a lot in diverting a large number of relatively routine cases to an expeditious process.

Moreover, the establishment of a small claims Tribunals which are designed to settle petty civil claims including consumer protection cases is urgent in an attempt to decongest the court system and to provide speedy delivery of justice. In Small Claims Tribunals, legal representation is usually excluded and the use of legally trained persons is also kept to a minimum. The most important attributes of the these tribunals are, 'inter alia' informality, low costs and speed. In countries such as Britain and the United States of America, Small Claims Tribunals already exist and are playing an important role in dispute settlement.

The alternative methods of dispute resolution merely serve as a supplement to the ordinary court system. What is now required is to publicise their usefulness to the general public and put them to maximum use.

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