SCHOOL OF POSTGRADUATE STUDIES

ALTERNATIVE DISPUTE RESOLUTION - THE ROLE OF ADJUDICATIVE TRIBUNALS IN PROVIDING SPEEDY ADJUDICATION: THE CASE OF THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL OF ZAMBIA

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DECLARATION

I, Simon Ng'ona, student number PHDITL 1611073, having studied a Doctoral of Philosophy in International Trade and Investment Law at the University of Lusaka, declare that this thesis has been dully researched by me and all misrepresentations, if any, are my own and not the institution.

DEDICATION AND RECOGNITION

When gratitude is expressed, it is, often, not so much for what people have done. Rather, it is more about who they are and how they have touched your life.

Words describe the conduct yet, beyond the meaning of the words, there are emotions and feelings that words cannot convey for they dwell in the silent understanding between the giver and the receiver. So it is, that I thank all those that have been with me during the writing phase of this thesis. Evidently, others hardly understood the demands of this work and in the process, I lost friends and compatriots along the way.

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SUPERVISOR'S RECOMMENDATION – PROFESSOR EUSEBIO WANYAMA, SC,

I, Professor Eusebio Wanyama, SC, having supervised this research by, Simon Ng'ona, Titled The role of Adjudicative Tribunals in Providing Speedy Adjudication: The Case of the Competition and Consumer Protection Tribunal (CCPT) of Zambia" do hereby recommend that it be accepted for examination. I thoroughly provided guidance to this work and I am satisfied that the paper fulfils the requirements for the award of the Doctoral of Philosophy in Trade and Investment Law by the University of Lusaka.

Signature.....Date.....24/6/2020

SUPERVISOR'S RECOMMENDATION - DR. JUSTICE PHILIP MUSONDA,

I, Dr. Justice Philip Musonda, wish to confirm that I have supervised this research by, Simon Ng'ona, Titled **"Alternative Dispute Resolution - The Role of Adjudicative Tribunals in Providing Speedy Adjudication: The Case of the Competition and Consumer Protection Tribunal (CCPT) of Zambia".** I, therefore, do hereby recommend that it be accepted for examination. I thoroughly provided guidance to this work and I am satisfied that the paper fulfils the requirements for the award of the Doctoral of Philosophy in Trade and Investment Law by the University of Lusaka.

Signature.....Date.....24/08/2020.....

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

LIST OF STATUTES

ZAMBIA

SUPREME LAW

Constitution of Zambia No. 2 of 2016

STATUTES

High Court Act, Chapter 27 of the Laws of Zambia

Competition and Consumer Protection Act No. 24 of 2010 of Zambia

Competition and Fair-Trading Act Chapter 417 of 1994 of Zambia

Lands Tribunals Act of Chapter 39 of 2010.

Land Surveyor Act Chapter 88

Urban and Regional Planners Act 4 of 2011

Revenue Appeals Tribunal Act of 1998

The Tax Appeals Tribunal Act, 2015

Valuation Surveyor Act Chapter 207 of 1979

STATUTORY INSTRUMENTS

The Competition and Consumer Protection (Tribunal) Rules, 2012 (Statutory Instrument No. 37 of 2012)

OTHER JURISDICTIONS

Competition Act 89 of 1998 Act of South Africa

LIST OF CASES

1. African Life vs CCPC 2014/CCPT/013/CON
2. Bribery Commissioners vs Ranasinghe [1965] AC 172
3. CCPC vs Tokyo Vehicle Limited 2014/HP/A1018
4. F-M ASAfrica (Pty) Ltd vs CC (2003) South Africa (33/CAC/Sep03)
5. Godfrey Miyanda vs Matthew Chaila. (Judge Of The High Court) (1985) Z.R. 193 (H.C.)
6. Lipimile and Another vs Mpulungu Harbour Management SCZ/8/270/2005) [2008] ZMSC 15 (22 July 2008);
7. Macnicious Mwiimba vs Airtel Networks Zambia and CCPC- 2014/CCPT/015/CON;
8. McCawley vs The King [1920] AC 691 (Readings 6/)
9. MTN (Zambia) vs CCPC. 2016/CCPT/018/COM
10. R vs Askov, [1990] 2 S.C.R. 1199
11. R. vs. Jordan (2016) AC
12. Southern Cross Motors vs CCPC. 2016/CCPT/008/CON
13. Southern Pipeline Contractors and Another v Competition Commission (2011) (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6 (1 August 2011)
14. Wael vs CCPC, Hazida. 2015/CCPT/004/CON
15. Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another (480/01) [2002] ZASCA 141; [2001-2002] CPLR 13 (SCA) ; [2003] 1 All SA 82 (SCA) (26 November 2002)
16. Vehicle Centre vs CCPC. 2016/CCPT/002/CON
17. Zambia Breweries vs CCPC. 2014/CCPT/004/CON
18. Zambia Airports Corporation vs CCPC and ZEGA-/2016/CCPT/010/COM

LIST OF ACRONYMS, ABBREVIATIONS AND KEY WORDS AND PHRASES

A. ACRONYMS AND ABBREVIATIONS USED IN THE THESIS

1. AG - Attorney General
2. BLRP - Business Licensing Reform Programme
3. BLRPC - Business Licensing Reform Programme Committee
4. CCPA - Competition and Consumer Protection Act
5. CAM - Court Annexed Mediation.
6. CAT - Competition Appeals Tribunal
7. CPR - Civil Procedure Rules of 1999 of England
8. CRS - Community Relations Services
9. CPC - Code of Civil Procedure OF India
10. CCPC - Competition and Consumer Protection Commission
11. CCPT - Competition and Consumer Protection Tribunal
12. CFTA - Ccompetition and Fair Trading Act
13. CUTS - Consumer Unity and Trust Society
14. DPP - Director of Public Prosecution
15. EC - European Commission
16. EU - European Union
17. GBV - Gender-Based Violence
18. IRC - Industrial Relations Court
19. JSC - Judicial Service Commission
20. KPI - Key Performance Indicators
21. LAZ - Law Association of Zambia

22. MCTI - Ministry of Commerce, Trade and Industry

23. NPA - National Prosecution Authority

24. OECD - Organisation for Economic Co-operation and Development

25. PSDRP - Private Sector Development Reform Programme

26. PSDIJU - Private Sector Development Industrialisation and Job Creation Unit

27. RAT - Revenue Appeals Tribunal

28. SCC - Small Claims Court

29. US - United States

30. USA - United States of America

31. TAT - Tax Appeals Tribunal

32. SCT - South African Competition Commission

33. SI - Statutory Instrument

34. UNCTAD - United Nations Conference on Trade and Development

35. UNCITRAL - United Nations Commission on International Trade Law

36. ZAM - Zambia Association of Manufactures

37. ZCC - Zambia Competition Commission

38. ZICA - Zambia Institute of Chartered Accountants

39. ZAMBIALII - Zambia Institute of Legal Information

B. KEY WORDS AND PHRASES

1. “Board” means the Board of the Commission as constituted pursuant as established under the CCPA;
2. “Constitution of Zambia” means the Constitution of Zambia (Amendment) Act No. 2 of 2016.
3. “Key elements of ADR” means negotiation, mediation, arbitration and adjudicative tribunals;
4. “Framework” refers to the legal, regulatory and institutional framework for public distribution of securities across international borders;
5. “Informal Dispute Resolution” means Alternative Dispute Resolution;
6. “Legal, regulatory and institutional framework” refers to the legal, regulatory and institutional framework for administrative justice in Zambia;
7. “Schools of thought” means legal philosophies;
8. “ Small claims court” has the meaning assigned to it in the Small Claims Courts Act of Zambia;
9. “Traditional court system” means formal judicial or court structure as established by law;
10. “Traditional justice delivery system” means formal judicial or court structure as established by law.
11. “The take-off” means commencement of hearing of a case;
12. “The landing” means judgment of a court or appointed tribunal;
13. “The Act” means the Competition and Consumer Protection Act (CCPA) No 24 of 2010;
14. **“**The Commission means” Competition and Consumer Protection Commission**;**
15. “Justice delivery system” means a well-functioning Judiciary.

ABSTRACT

This study focuses on the role and performance of ADR, specifically adjudicative tribunals, in addressing the challenge of inundation in traditional courts in Zambia. The study, whilst using the CCPT as a yardstick, uses a mixed methodological approach of descriptive and inferential statistical methods to analyse the extent to which cases brought before the CCPT were speedily being settled. According to the author's knowledge, no comprehensive work was available dedicated to understanding the performance of ADR, specifically adjudicative tribunals, using a mixed methodological approach as stated. Quantitatively, the study calculated the disposition times of published decisions of the CCPT from 2014 to 2017. The study finds that the average duration of disposal of cases was 11 months, a value significantly higher than the envisaged target of 6 months.[1] The study, however, notes that there has been constant improvement in the duration of cases settled overtime. However, despite the enunciated ensuing positive developments, the study notes that more needs to be done if the CCPT was to operate at its optimal level. Firstly, the CCPT needs to operate on a full-time basis and should be adequately funded. Conversely, the budget for the tribunal was 500% lower than that of a similar outfit in South Africa. This signified an eminent challenge affecting performance.

Further, improved performance should entail having in place properly outlined and legally encoded timeframes for which cases should be heard and determined. The study also notes that appeals from the CCPT should lie straight under the Court of Appeal. This is because for one to be appointed Chairperson, they need to under have 10 years or more experience at the bar which is the same qualification as that of High Court Judges. Further, the study also notes that ADR processes should be accountable to the court system. Any development which breeds unbridled preference for ADR has potential to promote unhealthy competition with the courts. And thus, the study underwrites the oversight role of the Court on tribunal decisions through appeals. In the case of *Tokyo vehicles limited vs CCPC*[2], the Supreme Court found the action of the CCPT *ultra vires* when it attempted to hear a criminal matter whose jurisdiction was that of the superior court of records. Therefore, without interpretation of the court, wrong precedence would have been advanced.

Key words: Alternative Dispute Resolution; Adjudicative Tribunals, Performance.

[1] Note: One of the KPIs of the CCPT was to dispose of cases within 6 months.
[2] SCZ/8/261/2015

CHAPTER ONE

1.0 Introduction

This study responds to the contemporary debate in Zambia and other jurisdictions, regarding the modification of existing litigious practices and the revision of the values underlying the public adjudicative process[3]. Abundant reasons for dissatisfaction with the judicial process could be put, but only the most salient will be advanced. An initial reaction might be that a brief diagnosis of the ailments of civil procedure is an incongruous starting point[4] for a work that looks at performance of Alternative Dispute Resolution (ADR) mechanisms. According to Robert Coulson[5]:

> *"Litigation has not kept up with modern, fast-moving society… there have been revolutionary changes in the business practices since the basic court structure was adopted from English Common Law… Compared to modern business, Civil Courts have changed very little… Alternative Dispute Resolution (ADR) allows the lawyers to use new processes, encourages problem-solving attitude and an openness to compromise."*

In line with the reasoning of Coulson, albeit not directly making reference to his position, Chief Justice Irene Mambilima, in March 2019[6], opined that;

> *"The court processes often take too long to conclude, causing congestion in our judicial system. And in many instances, we have found that not all of these disputes require court intervention. As the Judiciary, we recognised this deficiency….measures to promote ADR as an alternative to litigation can be stepped up so that courts can be left to deal with deserving cases. Globally, it is accepted that ADR mechanisms such as reconciliation, adjudication, mediation and arbitration are effective and efficient in resolving disputes. The mechanism provides a much more sustained and mutually beneficial resolution of conflicts through negotiation."*

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[3] John Andrew Faris. (1995). an Analysis of the Theory and Principles of Alternative Dispute Resolution. University of South Africa Press

[4] Ibid.

[5] Robert Coulson, (1987). The Immediate Future of Alternative Dispute Resolution, 14 Pepp. L. Rev. Issue. 4 Available at: https://digitalcommons.pepperdine.edu/plr/vol14/iss4/3. 773

[6] Note. This was during the Open Day of Alternative Dispute Resolution organised by the Zambian branch of the Chartered Institute of Arbitrators,

The former Chief justice's assertion is underwritten by Article 118 (2) (b)[7] of the Constitution Amendment No. 2 of 2016 of the Laws of Zambia which places emphasis on justice not being delayed and (d)[8] which promulgates the necessity and relevance of ADR.

In view of the foregoing, and in line with the view held by Slapper and Kelly[9], ADR is a means of resolving disputes without resorting to court action and it is available in civil cases and not criminal cases. Accordingly, ADR includes Arbitration, Mediation, Conciliation, Ombudsman, and administrative tribunals. Each process is distinct and separate, having its unique form, function and method of transforming a dispute[10]. Outwardly, this represents a diverse collection of disjunctive processes[11]. Arbitration is the procedure where parties in dispute refer the issue to a third party for resolution[12]. Mediation, on the other hand, involves a mediator who helps both sides come to an agreement[13]. In Conciliation, the conciliator takes a more interventionist role between parties[14]. Ombudsmen are independent office-holders who investigate and rule on complaints from members of the public about maladministration in government, public and private sectors[15]. Administrative tribunals are quasi-legal bodies empowered by an Act of parliament or by delegated legislation[16]. The focus and delimitation of this study hinges on administrative tribunals, profoundly those with adjudicative jurisdiction such as the Competition and Consumer Protection Tribunal (CCPT). This chapter, therefore, introduces the rationale behind adjudicative tribunals. Whilst making a case of the CCPT, this chapter explains the research gap which exits and how the said void is addressed using a defined method.

[7] Article 118 (2) (b) justice shall not be delayed
[8] Article 118 (2) (d) alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted,
[9] Gary Slapper & David Kelly, (2006). The English Legal System,-London: Cavendish,
[10] John Andrew Faris. (1995), an Analysis of the Theory and Principles of Alternative Dispute Resolution.
[11] Ibid
[12] Munshya, E. (2015). A Theory of Alternative Dispute Resolution in Zambia, Elias Munshya Blog .www.eliasmunshya.org. Last visited September 2018.
[13] Ibid. Last visited September 2018
[14] Ibid. Last visited September 2018
[15] Ibid Last visited September 2018
[16] Ibid Last visited September 2018

1.1 Background to the study

Adjudicative tribunals refer to independent administrative bodies that are created by statutes to resolve disputes between conflicting parties. [17] Bequeathed with power to perform quasi-judicial functions that are otherwise fulfilled by the formal judicial system,[18] these tribunals are a product of administrative law which is concerned with public authorities.[19] Administrative law is concerned with the way power is acquired and exercise of that power.[20]

Significantly, these adjudicative tribunals are established on the premise to provide simple, cheap and speedy justice.[21] Their introduction is part of legal reforms to address the challenge of inundation by the traditional court systems. Literature indicates that, in most countries globally, Zambia inclusive, there has been inordinate delays in the processing of cases by ordinary courts.[22] This has led to the proliferation of ADR related processes, including those with adjudicative functions. This is the case in the Commonwealth administrations, where rapid multiplication of adjudicative tribunals has been observed. [23] And Zambia has copious adjudicative Tribunals[24] covering various jurisdictions i.e. social, political, and economic matters.

The CCPT is one such. As an adjudicative tribunal, it is an integral component of Zambia's economic governance system. Created by the Competition and Consumer Protection Act (CCPA)[25] No. 24 of 2010, this body is granted dispute resolution powers[26] to hear appeals from consumers and businesses of the decisions of the Competition and Consumer Protection Commission (CCPC)[27]. The Commission can also refer cases to the competition adjudicative body for action after completing the investigations. The Act mandates the Commission to

[17] Sossin, Lorne, and Steven J. Hoffman Empirically. (2012). Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. Journal of Health Economics, Policy and Law 7: 147-174.
[18] Ibid. 162.
[19] Mulenga Besa (2019). Administrative Law and Process: Cases and Commentaries. Chribwa Publishers. p.1
[20] John P. Sangwa. (2004). Control of Administrative Actions in Zambia. Last Accessed June 2021. p.2
[21] Josi K.C "Constitutional Status of Tribunals" (1999). Journal of Indian law school. Vol 41, No 1 pp 116 -119
[22] Winnie .S. Mwenda, (2006) P. 31. Dana H. Freyer (1997). Henry J. Brown and Arthur L. Marriott (1993). ADR Principles and Practice. p.14. Rao and Sheffield's book. 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). Also see Winnie .S. Mwenda, (2006) p. 33
[23] Hoffman, Steven J. and Sossin, Lorne, "Evaluating the Impact of Remedial Authority: Adjudicative Tribunals in the Health Sector" (2009).Osgoode Legal Studies Research Paper Series. 143.
[24] These include, the Lands Tribunal, Tax Appeals Tribunal, Local Government Elections Tribunal etc.
[25] Hereunto Referred to as "The Competition Act"
[26] Under Article 68 of the Competition and Consumer Protection Act; The functions of the Tribunal are to — (a) hear any appeal made to it under this Act; and (b) perform such other functions as are assigned to it under

[27] Here unto referred to as the Commission

perform regulatory functions[28] in all sectors of the economy. These functions include regulating restrictive business practices, abuse of dominant position of market power, anti-competitive mergers and acquisitions and cartels as these have potential to minimise competition among players in markets and also affect the consumer welfare[29].

The competition adjudicative tribunal draws its statutory authority to hear disputes hinging on the aforementioned functions of the Commission from Section 68 of the Act. These provisions grant the Tribunal inherent responsibilities to render impartial decisions according to a judicial procedure on the basis of law and legal standards that guarantee at a minimum - the procedural equality of the parties. The Act also grants the adjudicative tribunal powers to perform such other functions as are assigned to it under the Act or any other law[30]. This gives room for the adjudicative body to also preside over cases that do not originate from appeals against the decisions of the Commission. The Act has also provided for an appeal system beyond the tribunal. Those not happy with the decision of the tribunal can still appeal to the High Court of Zambia and all the way to the Supreme Court[31]. This appeal process is applicable to all cases that would have been presided over using the Act, regardless of the volume of fines or size of the parties concerned.

Preceding the current dispute settlement framework as prescribed under the Act, the institutional design for competition and consumer adjudication was different under the predecessor – the Competition and Fair-Trading Act (CFTA) Cap 417 of 1994[32]. Appeals under the CFTA were taken straight to the High Court and this is said[33] to have been characterised by a very long appeal processes as courts took time in handling cases of firms and consumers that appealed against the decision of the Commission[34]. This was perceived to be a costly

[28] Article 5 of the CCPA outlines the functions and these include a) review the operation of markets in Zambia and the conditions of competition in those markets; (b) review the trading practices pursued by enterprises doing business in Zambia; (c) investigate and assess restrictive agreements, abuse of dominant positions and mergers; (d) investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary; (e) undertake and publish general studies on the effectiveness of competition in individual sectors of the economy in Zambia and on matters of concern to consumers; (f) act as a primary advocate for competition and effective consumer protection in Zambia; (g) advise Government on laws affecting competition and consumer protection; (h) provide information for the guidance of consumers regarding their rights under this Act;

[29] Competition and Consumer Protection Commission Policy (2009)

[30] Section 68 (b) of the CCPA

[31] Section 75 of the CCPA

[32] Note: Competition and Fair Trading Act Chapter 417 of 1994 was the first law dealing with competition and consumer protection matters in Zambia.

[33] CUTS (2015), The Impact of the Competition Reforms on Business in Zambia: An Evaluation of the Zambian Business Licensing and Regulatory Reform Programme, Lusaka 2015

[34] See UNCTAD (2012), Voluntary Peer Review Of Competition Law And Policy: Zambia, UNCTAD/DITC/CLP/2012/1 (OVERVIEW) Zambia, Geneva, 2012

approach and was undermining the due process of justice[35]. Thus, the Government of the Republic of Zambia, based on the recommendation of the Business Licensing Reform Programme (BLRP) Committee Report of 2009[36] and reaffirmed in the Competition Policy of 2009[37], recommended the need to repeal the CFTA. The mooted purpose for this legal reform was twofold. To strengthen the provisions on competition and consumer protection and to grant the commission with enhanced administrative powers to impose fines. The second purpose was to introduce a new adjudicative model that would expeditiously hear and dispose of appeals ensuing from the decisions of the Commission and perform any other functions as prescribed by the law.

The introduction of the new adjudicative model was, perhaps, with anticipation that the enhanced administrative powers granted to the Commission to impose fines would result in eminence of cases and disputes. This, therefore, conjured the need to introduce an institution that would perform quasi-judicial functions that are otherwise fulfilled by the formal judicial system. And in affirmation, the tribunal has between October 2012 and December 2017, presided over one hundred (100) appeal cases[38].

These cases reflect the intensity of the work handled by the adjudicative body over the years. It is, however, unclear whether the cases have been speedily disposed of as envisioned by its introduction or not. The prosecution of a case (the take-off) does not always, or regularly tell us much about the effect of the case on society (the landing)[39]. Further, an aggregate tally of activity does not also provide insight into the doctrinal significance of individual matters, especially "small" cases whose influence on jurisprudence exceed their seemingly modest economic stakes[40]. Knowledge, therefore, informed by empirical considerations is necessary. And it must be appreciated that the creation of an institution that works by delivering good policy results for consumers and business typically occurs through a series of incremental improvements over time[41]. An agency or institution tests different approaches, evaluates

[35] Ibid
[36] BLRC (2009), Assessment of the Business Licensing and Regulatory Reforms in Zambia: Government of the Republic of Zambia Report, Lusaka, 2009. Page 132 states that "*the Act should be repealed and replaced with a modern competition and fair trading law to regulate effectively commercial activities and consumer protection. The needed to introduce a dispute settlement mechanism that expedites disposal of cases should be explored"*
[37] See Competition Policy of Zambia under P. 33.
[38] See 2016 CCPT Annual Report…CUTS (2017), Ibid. World Bank (2016), Assessment of Political Economy of Competition in Zambia: Working Draft, Lusaka 2016
[39] Kovacic W. Hollman H. and Grant P. (2011), how does your competition agency measure up? European Competition Journal.
[40] Ibid
[41] Ibid

consequences and makes refinements[42]. This is a general trend that is influencing institutions across the public policy spectrum worldwide, not just in the area of competition enforcement and adjudication.[43]

Therefore, given that it is now over four years since the adjudicative body was established, and considering its statutory role in providing parties with remedies, it was important to subject it to evaluation, hence this study.

1.2 Statement of the problem

The emergency of alternative dispute resolution (ADR) has transformed the administration of civil justice[44]. As both a rival and a complement to formal adjudication, ADR presents an alternative forum for most disputes[45]. Arguably, ADR offers a system with procedural flexibility, a broad range of remedial options, and a focus on individualised justice. This, according to Goldsmith and Ingen-Housz improves performance.[46] ADR procedures are said to be often quicker than court proceedings, which is of benefit to both disputing parties.[47]

Globally, notable jurisprudential developments have been observed in ADR application and most countries have codified the principles in their national laws. It is however, unclear on the extent to which the crystallisation of ADR principles in most countries globally has improved performance of the justice delivery system generally. This question is significantly relevant to the national context. Locally, Article 118 (2) (b) [48] and (d) [49] of the Constitution Amendment Act No. 2 of 2016 of the Laws of Zambia expressly advances the principle of expedited justice and ADR as a remedy towards resolving disputes in timely and less costly manner. To give effect to this provision, a number of traditional court systems and ADR-related mechanisms and processes exist. What is, however, unclear is the sufficiency of the present traditional

[42]World Bank (2016), Assessment of Political Economy of Competition in Zambia: Working Draft, Lusaka 2016
[43] OECD (2016) Ibid.
[44]Main, Thomas O, (2005). "ADR: The New Equity" Scholarly Works. Paper 739.http://scholars.law.unlv.edu/facpub/739. 329
[45] Ibid. P 329
[46] Goldsmith, J, Pointon G. & Ingen-Housz, A. 2006. ADR in business: Practice and issues across countries and cultures. The Netherlands: Kluwer Law International, p. 7.
[47] Goldsmith, J, Pointon G. & Ingen-Housz, A. 2006. ADR in business: Practice and issues across countries and cultures. The Netherlands: Kluwer Law International, p. 7.
[48] Article 118 (2) states that in exercising judicial authority, the courts shall be guided by the following principles: (b) justice shall not be delayed.
[49] Article 118 (2) states that in exercising judicial authority, the courts shall be guided by the following principles….(d)) alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted,

justice delivery system and the institutionalised ADR processes in addressing the challenge of inundation and delay in addressing disputes.

Proximate to this study is the CCPT which is a creation of Section 67[50]of the CCPA No 24 of 2010. The functions of the CCPT, as an adjudicative tribunal, are, to among others, hear any appeal made to it under the CCPA.[51] Section 71 (1) (b) [52] of the CCPA, further underwrite the aforementioned constitutional provisions, by mandating the CCPT to employ mechanism which may lead to the just, speedy and inexpensive settlement of any matter before it.

Notably, before the present institutional and legal design for competition and consumer protection adjudication, disputes were handled through the traditional court system. Under the CFTA Cap 417 of 1994, the predecessor of the CCPA, cases often took too long to conclude[53]. For example, in the case of *Lipimile and Another v Mpulungu Harbour Management Ltd*[54], the case took about 34 months to be disposed of. These and other compelling factors necessitated the repeal of the CFTA. The promulgation of the CCPA, which bequeathed the CCPT, was with the expectation that disputes would be resolved in a timely and less costly manner.[55]

Since its inception, the CCPT has handled way over 100 cases[56]. The highlighted cases reflect the intensity of the work handled by the adjudicative body over the years. It is, however, unclear on whether the cases have been speedily resolved as envisioned by its introduction, hence this study. Further, other than the step-by-step procedural requirements contained in the CCPA and the tribunal rules contained in Competition and Consumer Protection (Tribunal) Rules 2012[57] for appeal and disposal of cases, the CCPT, in its Strategic document, had set an average target of six months for disposing of cases as its Key Performance Indicator (KPI). It is also, however,

[50] Section 67. (1), There is hereby established the Competition and Consumer Protection Tribunal which shall consist of the following part-time members...
[51] Section 68 stated the functions of the Tribunal are to— (a) hear any appeal made to it under this Act
[52] Section (71)... The Tribunal may…(b) take any other course which may lead to the just, speedy and inexpensive settlement of any matter before the
Tribunal.
[53] See: The Business Licensing Review Committee Report 2009. P 201.
[54] SCZ/8/270/2005) [2008] ZMSC 15 (22 July 2008);

[55] Supra. P 201
[56] Note: The 2017 Annual report for the CCPT notes that, between October 2012 and December 2014, eighty five (85) appeal cases had been filed with the competition adjudicative tribunal ssecretariat, with about seventy five (75) percent of them being consumer-related[56]. The adjudicative body passed eleven (11) judgments, twelve (12) appeal cases were withdrawn from the tribunal as a result of both parties (the commission and clients/companies/consumers) agreeing to settle the matters outside the adjudicative body. Nine (9) nine cases were voluntarily withdrawn
[57] Statutory Instrument No 37 of 2012

unclear on the extent to which the present legal and institutional regime was ornate enough to support the CCPT in performing its statutory purpose. As indicated in the introductory section, the prosecution of a case (the take-off) does not always or regularly tell us much about the effect of the case on the economy (the landing).[58] And further to note, an aggregate tally of activity does not provide insight into the doctrinal significance of individual matters, especially "small" cases whose influence on jurisprudence exceeds their seemingly modest economic stakes[59]. And learning from other jurisdictions, like South Africa, can be a significant complement as it would enable one to draw lessons and best practices relevant to such a study.

This study, therefore, looks at the performance of ADR generally and specifically the CCPT. Without such an assessment, then a dearth in knowledge will continue to exist on the extent to which the ADR or adjudicative tribunals were contributing towards addressing the challenge of inundation and delay as espoused in Section 67[60] and 71 (1) (b) of the CCPA[61]. More profoundly, absence of such information, will devoid any ruminant account of how constitutional[62] desires of Article 118 (2) (b) and (d) were being met.

1.3 Study Objectives

The general objective of the study is to assess the performance of adjudicative tribunals, as a branch of ADR, in addressing the challenge of inundation and delay in the formal court system in Zambia[63], through making a case study of the CCPT.

The study aimed to achieve the following specific objectives;

a) *To assess the historical and contemporary jurisprudential developments of ADR and its effect in addressing the challenge of inundation and delay in ordinary court systems globally*

[58] Kovacic W. Hollman H. and Grant P. (2011), how does your competition agency measure up? European Competition Journal.
[59] Ibid
[60] Section 67. (1), There is hereby established the Competition and Consumer Protection Tribunal which shall consist of the following part-time members...
[61] CCPA No 24 of 2010
[62] Constitution Amendment Act No. 2 of 2016
[63] Note Part VIII Article (118) (d) states that "alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted"

b) *To assess the sufficiency of the ordinary justice delivery system and the institutionalised ADR process in addressing the challenge of inundation and delay in the ordinary court system in Zambia;*
c) *To assess the legal, administrative and institutional factors that affect performance of adjudicative tribunals in Zambia;*
d) *To undertake a comparative study with the South African Competition Tribunal, an established tribunal in the region of over 10 years of experience, African, so as to draw lessons and best practices; and,*
e) *To determine the successes and failures of the competition adjudicative tribunal in providing speedy adjudication;*

1.4 Research Questions

a) *What are the historical and contemporary jurisprudential developments of ADR and their effect in addressing the challenge of inundation and delay in ordinary court systems globally?*

b) *How sufficient is the ordinary justice delivery system and the institutionalised ADR process in addressing the challenge of inundation and delay experienced by ordinary courts in Zambia?*
c) *What are the existing legal, administrative and institutional factors of dispute resolution that affect performance of adjudicative tribunals in Zambia?*
d) *What are the developments and lessons in adjudicating competition and consumer-related disputes which can be drawn from the South African Competition Tribunal?*
e) *What are the successes and failures of the competition adjudicative tribunal in providing speedy adjudication?*

1.5 Hypothesis

A Hypothesis, in the view of Martin and Bateson, ensures that research methodologies are scientific and valid.[64] It helps to assume the probability of research failure and progress[65]. Having, therefore, defined the required research questions for this study above, below is the

[64] Paul Martin and Patrick Bateson. (1993) Measuring behavior: An introductory guide. Cambridge University Press, Cambridge, England, Second Edition, 222 pages, ISBN 0521 446147
[65] Ibid

hypothesis for every question. The genetic stature of these hypotheses is drawn from the theory of legal positivism discussed subsequently in this chapter.

Hypothesis one (1)

Hypothesis one (1) tests the extent to which historical and contemporary jurisprudential developments of ADR have had an effect in addressing the challenge of inundation experienced in selected court systems globally. Therefore, the *Ho* and *Ha* hypothesis were as follows;

a) ***Ho -*** *That the global historical and contemporary jurisprudential developments of ADR have not contributed towards addressing the challenge of inundation and delay in ordinary court systems; and,*

b) ***Ha -*** *That the global historical and contemporary jurisprudential developments of ADR have contributed towards addressing the challenge of inundation and delay in ordinary court systems.*

Hypothesis two (2)

Hypothesis two (2) hinged on testing the sufficiency of the ordinary justice delivery system and the institutionalised ADR process in addressing the challenge of inundation experienced by ordinary courts in Zambia. Therefore, the *Ho* and *Ha* hypothesis were as follows;

a) ***Ho -*** *that the existing ordinary justice delivery system and the institutionalised ADR process were not sufficient in addressing the challenge of inundation and delay experienced by ordinary courts in Zambia; and,*

b) ***Ha -*** *that the existing ordinary justice delivery system and the institutionalised ADR process were sufficient in addressing the challenge of inundation and delay experienced by ordinary courts in Zambia;*

Hypothesis three (3)

Hypothesis *three (3)* tests the sufficiency of the existing legal, administrative and institutional framework in underwriting the performance of CCPT. Therefore, the *Ho* and *Ha* hypothesis were as follows;

a) ***Ho –*** *That the existing legal, administrative and institutional framework of dispute resolution is insufficient in underwriting the performance of CCPT to meet its statutory purpose; and,*

b) ***Ha –*** *That the existing legal, administrative and institutional framework is sufficient in underwriting the performance of CCPT to meet its statutory purpose.*

Hypothesis four (4)

To answer the question on what were the developments and lessons in the region, specifically South Africa, in adjudicating competition and consumer related disputes, the study tested the following hypothesis.

a) ***Ho*** *– there is no significant difference in the key performance rudiments of legal, administrative and intuitional, between the Zambian and South African competition and consumer protection adjudication regime, and,*

b) ***Ha –*** *there is significant difference in the key performance rudiments, of legal, administrative and intuitional, between the Zambian and South African competition and consumer protection adjudication regime.*

Hypothesis five (5)

To answer the question on the successes and failures of the competition adjudicative tribunal in providing speedy adjudication, the study tests the below hypothesis which bases its measure on the KPI of the CCPT which envisioned to have cases resolved within six (6) months.

Therefore, the null *(Ho)*[66] and alternate *(Ha)*[67] hypothesis of the aforementioned research question was as follows;

a) ***Ho*** **-** *That the length of cases handled by the CCPT between 2014 and 2017, from date of filling to date of disposal, is equal or less than 6 months, and,*

b) ***Ha*** **-** *That the length of cases handled by the CCPT between 2014 and 2017, from date of filling to date of disposal, is greater than 6 months.*

In view of the forgoing, the hypothesis is summarised as follows.

Hypothesis:

$$H_0: \mu \leq 6$$

$$H_a: \mu > 6$$

With the above hypothesis, therefore, the study tests whether the average duration of cases from date of filling to date of disposal is significantly greater than six months as envisaged in the KPIs of the tribunal. If the average duration is significantly greater than six months, then the tribunal has not achieved its estimated six months target for disposal of cases.

1.6 Significance of the study

This paper presents an opportunity to inform Government, both existing and potential beneficiaries of the services of the adjudicative body and the Academia on the performance of the Tribunal in dispensing justice. As indicated earlier, Section 68 of the Act grants the adjudicative body authority to provide aggrieved parties with remedies. This is in the quest to contribute towards the development and facilitation of an enabling national growth environment which is transparent, equitable, and efficient and provides for procedural fairness and protection of the competitive process and consumers, as espoused in competition policy[68].

This paper, therefore, validates whether the remedies rendered by the competition adjudicative body do advance that purpose through subjecting it to a performance evaluation. The paper provides Government with insights on the performance of the tribunal, as such information is

[66] Note: The null hypothesis is a statement of no difference between sample means or proportions or no difference between a sample mean or proportion and a population mean or proportion

[67] Note: The alternative hypothesis is a claim about the population that is contradictory to H0 and what is concluded when H0 is rejected.

[68] See Competition Policy of Zambia' Vision. P. 24.

essential for planning (policy projections), decision making and resource allocation. More importantly, success of the adjudicative body is also dependent on the proactiveness of consumers and business players - given their rights to appeal the decisions of the Commission. Thus, the findings might be useful to them if they are to proactively participate in the process.

Lastly, empirical evaluations of adjudicative systems remain a complex, but a worthwhile undertaking. Scholars[69] have argued that most evaluations of the work of adjudicative Tribunals have focused on internal measures of accountability and independence rather than external indicators of societal impact. This could potentially justify the absence of such studies on the competition tribunal and others in Zambia. Given that models have been developed and theoretical reference points in other fields such as the health sector have been created, this study has attempted to provide footing for such research in the competition and consumer field for other scholars to build from.

1.7 Scope and Delimitations of the study

The focus of the study is ADR. As explained in the introductory section, there are many forms of ADR[70] but this study focused on administrative tribunals which are a creature statue. To make an accurate account on the performance of adjudicative tribunals, as a branch of ADR, in addressing the challenge of inundation in formal court system in Zambia, this study makes a case study of the study of the CCPT. The significance of a case study is that it involves an up-close, in-depth and detailed investigation of a subject of study and its related contextual position[71]. To further have a defined scope, the coverage of this study is from two perspectives i.e. technical and institutional coverage. The latter dimension acknowledges that the legislation in question, besides being a hybrid law covering both consumer and competition-related matters, has two institutions assigned to implement the law, the CCPC and CCPT. Therefore, discussing the tribunal raises the temptation of one discussing the commission. However, focus of the study is limited to the operations of the adjudicative body, the CCPT. References have, however, been made to the Commission given that the CCPT operates on appeals of its decisions.

[69] Sossin, Lorne, and Steven J. Hoffman (2012), Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. Journal of Health Economics, Policy and Law 7 (2012): 147-174.
[70] Forms of ADR includes Arbitration, Mediation, Conciliation, Ombudsman, and administrative tribunals.
[71] See: Essaymin. (2018). Importance of a Case Study. Blog. https://essaymin.com/blog/importance-of-a-case-study/

In terms of technical coverage, the study limits its scope to discussing the contextual and contemporary developments of adjudicative tribunals both globally and nationally. This is for purposes of drawing erudite theoretical precision that informs the methodological approach of this study. Further, the study looks at the jurisprudential developments ensuing from the decisions of the CCPT. This is for purposes of appreciating the ensuing case law and determining whether the decisions made provide a foundation for further reforming the existing competition and consumer protection law. From an operational point of view, the study looked at the sufficiency of the existing legal, administrative and institutional framework in underwriting the performance of CCPT. Relatedly, the study assesses the vertical relationship that exist between adjudicative tribunals and mainstream court system with the view to understand the extent to which judicial oversight was being provided[72]. The question which birthed this exploration is that, whatever the similarities between tribunals and ordinary courts, what is the relationship between them? According to Carnwath[73] as quoted by Elliott and Thomas[74], that relationship can be conceived of in "anti-hierarchical terms", in the sense that the tribunals system is, or should be, substantially free from control of higher courts. However, if viewed in less positive terms, freedom from control may imply freedom from correction[75]. To what extent should the courts be regarded as guarantors of standards to which the tribunals system is expected to adhere and to what extent is the very notion of such judicially divined standards an affront to the institutional status and credentials of tribunals[76]?. These are the questions which help unpack the silent elements of the existing legal framework and how it affects the performance of the tribunal.

[72]Warren H. Pillsbury. Administrative Tribunals Harvard Law Review, Mar., 1923, Vol. 36, No. 5 (Mar., 1923), pp. 583-592 notes that in general, the judicial function is characterized by the power to " hear and determine " controversies, indeed, almost its sole function. To this power to " hear and determine " are attached many subsidiary powers such as to compel attendance of wit- nesses and to punish for contempt, etc., necessary to the due execution of the main function. Administrative tribunals, on the other hand, often possess the following general powers: (i) To hear and determine controversies administrative in nature (the quasi-judicial function). (2) The rule-making function (exercise of delegated legisla- tive powers). (3) The right of initiative (investigating or regulating func- tion). (4) Freedom from judicial rules of evidence and procedure. The first function mentioned, the power to " hear and deter- mine " or " quasi-judicial " function, distinguishes administrative tribunals from other administrative officers, having purely execu- tive functions.

[73] R. Carnwath, "Tribunal Justice—A New Start" [2009] PL 48 at 57.

[74] Elliott, Mark, and Robert Thomas. "Tribunal Justice and Proportionate Dispute Resolution." The Cambridge Law Journal, Vol. 71, No. 2, 2012, Pp. 297–324. Jstor, Www.Jstor. Org/Stable/23253648. Accessed 13 May 2021.

[75] Ibid P. 1

[76] Ibid P.1

1.8 Literature Review

Generally, there are a number of studies which have looked at judicial reforms and evolution of the concept of ADR, both from a theoretical and practical point of view. Stewart, observe that most ADR practitioners prefer the acronym ADR to refer to any form of appropriate dispute resolution methods and processes outside the traditional court process. [77] The Collins Dictionary of Law, further, describe ADR as a means used to resolve disputes without resorting to litigation in the formal court system. With the forgoing therefore, ADR can be defined as a legal method that allows for the resolution of a conflict or dispute through a process that is tailored for the particular form of that conflict or dispute.

Therefore, as efforts to reform judicial systems, through the introduction of ARD, continue internationally, it will be increasingly important to understand the extent to which studies have looked the performance of tribunals from the context of providing speedy adjudication.

Relatedly, a study by Mudenda makes an attempt at looking at ADR in Zambia, albeit in a generic manner. The study notes that Zambia has followed the global trend and adopted some ADR mechanisms.[78] Most commonly used ADR mechanisms in Zambia are mediation/ conciliation, arbitration and negotiation.[79] This position is underwritten by Mutapa[80] who notes that there have been ADR related legal reforms which were key in improving the dispute handling and settlement processes. And the enactment of the Arbitration Act, No. 19 of 2000 and Statutory Instrument Number 72 of 2018 which was passed to amend some provisions to the High Court Rules on Mediation are cited as some of the major reforms.[81]

Sangwa further notes that, besides the above cited ADR processes, a number of other processes exist.[82] Among these processes include administrative tribunals which are of two kinds. These included those which are established on a permanent basis with permanent staff such as the the

[77] Stewart, W.J. (2006). Collins Dictionary of Law. (Online). Available at: (Accessed: 23rd July August 2021).
[78] Winnie .S. Mwenda, (2006) Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia. University of South Africa Press. P. 29. Also see; http://home.att.net~norton/lincoln78.html. Last visited 24 May, 2021. p. 6.
[79] Ibid. p. 6.
[80] Mary Mutupa. (2019) ADR practice in Zambia: exploring legislative reforms and future prospects to further enhance the practice. https://www.ciarb.org/resources/features/adr-practice-in-zambia-exploring-legislative-reforms-and-future-prospects-to-further-enhance-the-practice/ . Last visited June 2021.

[81] Mary Mutupa. (2019) ADR practice in Zambia: exploring legislative reforms and future prospects to further enhance the practice. https://www.ciarb.org/resources/features/adr-practice-in-zambia-exploring-legislative-reforms-and-future-prospects-to-further-enhance-the-practice/ . Last visited June 2021.
[82] John P. Sangwa. (2004). Control of Administrative Actions in Zambia. Lecture Notes. Last Accessed June 2021. p.36

Lands Tribunal[83], Tax Appeal Tribunal, The Competition and Consumer Protection Tribunal (CCPT) among others. There are others, which are established on ad hoc basis, as and when there is a matter to be investigated.[84] His analysis, however, does not assess performance of these tribunals and their net contribution in reducing time and costs for disputants.

A study by Sossin, Lorne, and Steven J. Hoffman[85] argues that tribunals are dynamic, independent and powerful oversight mechanism of administrative bodies. Their dispute resolution potential, may only be realised with further information on the ways in which they interact with the rest of the complex system they preside over and the impact they have within it.[86] Chirwa, adds that tribunal are specialist judicial bodies which decide disputes in a particular area and sphere of law.[87] These adjudicative Tribunals, according to Lorne and Hoffman, are independent administrative bodies that are created by statutes to resolve disputes between conflicting parties by performing quasi-judicial functions that are otherwise fulfilled by the formal judicial system.[88] In line with this reasoning, Curzon defines tribunals as judicial bodies outside the hierarchy of the courts with administrative or judicial functions. [89] These adjudicative Tribunals are premised on the need to provide simple, cheap and speedy justice.[90] Although there are some studies that have attempted to highlight the role of adjudicative tribunals, however, a dearth of such information exists when it comes to Zambia on the actual impact of ADR and specifically adjudicative tribunals generally and those which handle competition and consumer-related matters.

A study by CUTS[91] is the most relevant attempt at doing this. This was a study that carried out an evaluation of BLRP, and touched on the tribunal from the point of view that the competition reforms that brought about the adjudicative body were part of the BLRP. However, it was more interested in showcasing the number of cases disposed of without empirically assessing the

[83] Ibid. p.36
[84] Ibid. p.36
[85] Sossin, Lorne, and Steven J. Hoffman (2012), Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. Journal of Health Economics, Policy and Law 7 (2012): 147-174.
[86] Ibid.
[87] Joseph Chirwa. (2020). Commentary on Public Law in Zambia: Law, Politics and Governance. Juta and company (Pty) LTD. P.139.
[88] Sossin, Lorne, and Steven J. Hoffman. (2012). Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. Journal of Health Economics, Policy and Law 7: 147-174.
[89] Curzon Dictionary of Laws (Pearson 1994). P. 387
[90] Josi K.C "Constitutional Status of Tribunals" (1999). Journal of Indian law school. Vol 41, No 1 pp 116 -119
[91] CUTS (2015), The Impact of the Competition Reforms on Business in Zambia: An Evaluation of the Zambian Business Licensing and Regulatory Reform Programme, Lusaka 2015

impact side of the cases handled. In affirmation of the reasoning of Kovacic W, Hollman H, and Grant P[92], counting the number of cases the tribunal has initiated in a given period should not only be the proxy for its contributions to a nation's economic performance. Capturing and documenting of the cases handled by the tribunal was, however, a noble attempt in documenting the state of implementation by the CUTS paper.

The paper reveals that, between October, 2012[93] and December, 2014, eighty-five (85) appeal cases were filed with the Tribunal secretariat. Out of these, the adjudicative body passed eleven (11) judgments, ruled to allow twelve (12) appeal cases to be withdrawn from the adjudicative body as a result of commission and clients/ companies/ consumers agreeing to settle the matters outside the adjudicative body. Nine (9) cases were reported to have been voluntarily withdrawn. Only thirty-two (32) cases had been completed. The report further notes that some of the cases presided over by the adjudicative body were appealed to the High Court. This, according to the paper, signified lack of confidence in the tribunal as it implied that; instead of the cases going straight to the High Court, they went through another layer (the tribunal) which only further delayed the time for their cases to be heard[94]. This reasoning would have, however, been strengthened if the ruling on the appeals were documented and shared – as it is not granted that appeals would be at variance with the decisions of the tribunal. However, the *CCPC v. Tokyo Vehicle Limited*[95], *CCPC vs Africa Supermarket Trading as Shoprite*[96] *and Zambia Breweries vs CCPC*[97], remain some of the key cases where the decisions of the tribunal were nullified.

Therefore, whereas it is true that an appeal can be situated within the thought of dissatisfaction, narrowing the scope without looking at important issues which are subtly shaping the Zambian tribunal system but have received less formal attention limits the appreciation of the bigger picture. This includes the importance of judicial oversight in tribunal proceedings – given that most tribunals are situated outside the normative cycles of judicial function and architecture. Therefore, an appeal presents an opportunity for the formal courts to review the decisions, and where necessary, provide legal guidance through either upholding or overruling the decision

[92] Kovacic W. Hollman H. and Grant P. (2011), *How does your competition agency measure up*?. European Competition Journal.
[93] Note: This is when the tribunal started operating
[94] Supra.f.n 92
[95] 2015SCZ/8/261
[96] 2015/CCPT/011/CON
[97] 2014/CCPT/004/CON

of the Tribunal. For example, in the *CCPC v. Tokyo Vehicle Limited*[98], a case which hinged on criminal jurisdiction, the High Court gave guidance that the Tribunal had no mandate to hear criminal matters. This was against the earlier held view that the Tribunal had jurisdiction to hear all appeals.

Two other studies which also make an attempt to evaluate the existence of the Competition Tribunal include the paper by UNCTAD[99] and Chilepa. UNCTAD, in one of its editions of peer reviews on competition policy and law for countries across the globe, makes an ex ante assessment of Zambia's competition policy and law regime - post the enactment of the CCPA of 2010. The analysis also focuses on the tribunal, albeit, from an operational perspective. For example, the paper notes the absence of rules spelling out the vertical relationship in terms of roles of the Commission, the Tribunal and general courts in the enforcement of consumer protection provisions of the CCPA of 2010.

However, this observation is contestable as the CCPA of 2010 has made an attempt to define jurisdictional matters. Section 68 of the CCPA of 2010 defines the statutory mandate of the Tribunal and confines it to hearing disputes arising from the decision of the commission. Therefore, the tribunal will only hear appeals after the first level of adjudication has been undertaken by the commission. Further, Section 75 of the CCPA of 2010 provides for an appeal system beyond the tribunal. And this entails that those who are not happy with the decision of the tribunal can still appeal to the High Court of Zambia and subsequently the Supreme Court[100]. Therefore, this sequenced procedure does, to some extent, provide for defined roles in the dispensation of justice within the competition and consumer protection jurisdiction. The other point is situated within the legal reason of ensuring that appointment of tribunal members is based on a meticulous process that is legally underwritten. Although the appointment of tribunal members is addressed in chapter two, emphasis should be placed that a number of scholars have weighed in on this matter and are in support of the observation.

[98] 2015/CCPC SCZ/8/261
[99] UNCTAD (2012), Voluntary Peer Review Of Competition Law And Policy: Zambia, UNCTAD/DITC/CLP/2012/1 (OVERVIEW) Zambia, Geneva, 2012
[100] Section 75 of the CCPA

Abraham and Desta argue that competent and impartial Tribunals are extremely important in promoting rule of law and good governance within the administrative system[101]. Jessica[102] on the other hand, in a paper which looks at the nexus between judicial effectiveness and judicial independence, adds that it was paramount for Judges to be paragons of justice and virtue once they are selected. She observes that it was often necessary to provide judges with a framework for judicial conduct that furthers the need to preserve judicial impartiality, judicial independence, and public confidence in the judiciary through judicial regulation. Chilepa[103] also makes an attempt at assessing the impact of competition agencies in the Zambian economy. However, the focus was mostly on the Commission rather than CCPT. The focus was also on the impact of mergers and takeovers on consumer protection rather than the effective of the Tribunal in meeting its statutory purpose.

More closely related studies undertaken in this field look at Court efficiency and access to justice in Zambia, and the efficiency of the lands tribunal in resolving land disputes in Zambia. The former, a paper written by Banda, makes general assessment of the performance of ordinary courts in Zambia and acknowledges the evolution of ADR processes with adjudicative functions.[104] Generally, his examination of the legal framework and court structure exposes elements that may impact on delay. One example he cites is that there existed no mechanism to control, manage and monitor complex litigation. [105] In justifying the foregoing, Banda notes that Zambian courts are courts of record. However, while the court registrar has been computerised, judges still frequency take notes by hand and few staff have the necessary computer literacy to maintain and update the records, resulting in delays. [106]Issues with administrative infrastructure are noticeable and lost files and problems with case management compound delays.[107] This is particularly problematic due to the divided responsibility of sentencing between the Subordinate Courts and High Courts, which has itself been criticised.

[101] Aberham Yohannes and Desta Michael, 'The Advantages and Disadvantages of Administrative Adjudication' (Law Blog, 01 February 2012) https://www.abyssinialaw.com/about-us/item/314-the-advantages-and-disadvantages-of-administrative-adjudication

[102] Jessica Conser, Achievement of Judicial Effectiveness through Limits on Judicial Independence: A Comparative Approach, 31 N.C. J. Int'l L.& Com. Reg. 255 (2005). Available at: http://scholarship.law.unc.edu/ncilj/vol31/iss1/5

[103] Chilepa, Louise De-Assis. (2013). Mergers and takeovers: The Jurisdiction of the competition and consumer protection commission and its impact on consumer protection. UNZA Press 2013

[104] Tinenenji Banda (2019). Access to Justice: Court efficiency in Zambia. Occasional Paper Series. Institute for African Development. Cornell University. Last accessed June 2021. p.36

[105] Ibid. p. 37

[106] Ibid. p. 38

[107] Ibid. p. 38

He observed that the transfer of cases for sentencing between the two is said to be outdated and an unnecessary drain on the resources of the judiciary. [108]

Banda further notes the evolution ADR-related processes and cites a number of tribunals established by law which are expected to perform quasi-judicial functions. Among those he cited included The Gender-Based Violence (GBV) Fast Track Court, The Small Claims Court, Revenue Appeals Tribunal (RAT), now the Tax Appeals Tribunal, and the Lands Tribunal. [109] The context of his discussion was, however, only limited to discussing their scope and statutory purpose. Other scholars have, however, attempted to discuss the performance of some of these tribunal, albeit limited, in scope. Mushinge[110], in the aforementioned study focusing on the efficiency of the lands tribunal in resolving land disputes in Zambia, notes that the tribunal has not performed to expectation due to a number of factors. And delayed delivery of judgments was among the eminent factors.[111] According to section 12 of the Lands Tribunal Act of 2010, the tribunal shall deliver judgment within sixty days after the conclusion of the hearing of the case. However, Mushinge notes that a significant number of judgments were delivered way beyond the indicated threshold. The paper, however, does not quantify the extent of the delay despite citing the necessitating factors which included low funding and lack of awareness.[112]

Sangwa further notes that performance is affected due to contradictions in the procedure of the Lands Tribunal and also in the supervising ministry.[113] Section 24 of the Lands Act confers power upon the Chief Justice to make regulations to govern the procedure of the Tribunal and for summoning witnesses to appear before the Tribunal. [114]The regulations issued by the Chief Justice in 1996 appear to limit the jurisdiction of the Lands Tribunal. For instance, regulation 3(1) provides: *"An appeal to the Tribunal against any directive or decision may be instituted by sending the Secretariat, in duplicate, a written notice of appeal."* The rules are framed on the assumption that the Lands Tribunal is an "appeals tribunal" and not a tribunal with jurisdiction to hear any matter arising under the Lands Act. Sangwa further notes that the Act does not make reference to appeals.

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[108] Ibid. p. 38
[109] Ibid. p. 35, 36, 37
[110] Anthony Mushinge, (2012) 'An Evaluation of the Lands Tribunal in Resolving State Land Disputes in Zambia. Master Thesis, University of Technische Universität München https://core.ac.uk/download/pdf/234676084.pdf Last accessed August 2019. p.21.
[111] Ibid. p. 21
[112] Ibid. p. 21
[113] John P. Sangwa. (2004). Last Accessed June 2021. p.38
[113] Ibid p.38
[114] Ibid p.38

The Lands Tribunal has the power to hear any matter concerning land provided it can be related to some provision of the Lands Act. This is not the case from the Regulations. According to the regulations, the Lands Tribunal cannot entertain a dispute between two chiefs over the extent of their customary lands. This is so since no decision has been made in the matter. This is contrary to section 22. The said section employs the expressions such as the Tribunal shall "inquire into and make awards and decisions in any disputes", "inquire and adjudicate". They connote original jurisdiction on the part of the Lands Tribunal to hear and determine any matter covered by the Act.

Another tribunal discussed is the Tax Appeals Tribunal (TAT). The analysis mainly hinges on assessing the extent to which the law establishing the TAT was sufficient to support effective performance of the TAT. Sangwa observed that the authority of the Tribunal was limited. In the relation to matters arising under the provisions of Customs and Excise Act the Tribunal can hear and determine an appeal in three situations. First where an importer of goods feels that the goods he has imported are incorrectly classified by the Commissioner under the Customs Tariff.[115] Before the tribunal can be moved the importer must pay the duty as demanded by the Commissioner or furnish security to cover the amount of the duty due and payable. The importer must appeal within three months from the date of the payment of the duty. [116]The essence of the appeal is to allow the Tribunal to review the decision of the Commissioner to classify the item in issue in the manner it is been classified. If the Tribunal finds that the classification is wrong, it will make such a declaration. The effect of the finding is that the duty paid will have been improperly paid and a refund will be ordered.

The second situation arises where a person intends to import or manufacture an item, which he is of the opinion that the Commissioner General has wrongly classified it. In such a situation the intention is to secure the correct classification of the item in the Customs Tariff. [117]The third situation applies where the Commissioner General has determined the value of the goods intended for importation into Zambia or manufactured within Zambia for purposes of taxation and the party involved is aggrieved by the value fixed by the Commissioner General. In relation to the provisions of the Value Added Tax Act, the Tribunal has authority to hear appeals stemming from the decision by the Commissioner General on the registration, or cancellation

[115] Ibid p.45
[116] Ibid p.45
[117] Ibid p.47

of registration of a supplier. [118]The decision to refuse the registration of a supplier can be a subject of appeal to the Tribunal. The tribunal has authority to hear and determination an appeal on the tax assessed on the supply of goods and services or on the importation of any goods. Any person aggrieved by the decision of the Commissioner General on the amount of the input tax that may be credited to him as a supplier can appeal to the tribunal. The decision to allow or disallow the apportionment of input tax is founded on the application of various administrative rules. [119]Where a person is dissatisfied with the rules applied in his case, he has the right to appeal to the tribunal.

Thus, the impact of the existence of the adjudicative body in Zambia is yet to be explored. However, despite the dearth of such information, erudite attempts have been made by eminent scholars and research institutions globally to aid in the crystallization of the measuring performance of adjudicative bodies which are otherwise relevant to this study. Sossin and Hoffman[120], defines adjudicative Tribunals as independent (operating at arm's length from government) administrative bodies that are created by statutes to resolve disputes between conflicting parties by performing quasi-judicial functions that are otherwise fulfilled by the formal judicial system. Thus, a Competition Tribunal is also a competition adjudicative institution put in place to resolve disputes arising from competition enforcement.

A study by Fox and Trebilcock[121] identifies three types of institutional designs with respect to competition adjudication which are key when measuring performance. The first is the bifurcated judicial model. Under this system, the competition authority does the investigations and then goes to court for enforcement. The second is the bifurcated agency/tribunal model, where the competition authority has to rely on a specialised tribunal for enforcement. This means that the competition authority will only be an investigation arm without any power to pass an order, which is the role for the tribunal. The third is the integrated agency model, where the first level of adjudication is done by the competition authority, with the Tribunal coming in on appeals.

[118] Ibid p.48
[119] Ibid p.49
[120] Sossin, Lorne, and Steven J. Hoffman (2012), Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. Journal of Health Economics, Policy and Law 7 (2012): 147-174.
[121] Fox, Eleanor M. and Trebilcock, Michael J (2012), the Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project. New York University Law and Economics Working Papers. Paper 304.

This categorisation implies that a competition adjudicative tribunal can perform two roles. The first one would be that the tribunal would be the sole agency vested to any power to make orders on competition matters[122]. In the second instance, the Tribunal would only come in to hear appeals and grievances on the decisions of the competition authority[123]. The advantages of each of these systems depend on other country-specific situations. Fox and Trebilcock argue that, where courts are weak, the bifurcated or integrated agency/tribunal models have some significant advantages as they serve pressure on the weak courts, but where courts are strong, independent, honest, and efficient, the bifurcated judicial model has some significant advantages. In another study by Trebilcock, co-authored with Iacobucci[124], it has been argued that the bifurcated agency/tribunal model ensures a high level of independence in the performance of the adjudicative function, while at the same time ensuring some degree of accountability in the performance of this function through the judicial appeal process.

This generally shows that a strengthened institutional framework matters if a system is to be considered better. A study by the Cambridge Economic Policy Associates (CEPA)[125] for example established that in Canada, the Tribunal had developed a reputation for high cost and delay. This is also supported by Trebilcock and Iacobucci, who also note that in its first 11 years of operation since its establishment, the Competition Tribunal of Canada handled only 11 cases, demonstrating that the Competition Tribunal had become a minor institutional player in the competition policy process relative to the competition authority. The fear was that the resulting costs, delays and uncertainty involved in tribunal proceedings had induced firms and the Commissioner to shift even difficult cases away from the tribunal towards the competition authority. Thus, and as suggested by another study Trebilcock and Iacobucci[126], a competition tribunal, once instituted should be able to live up to expectations, as the process of adjudication is quite involving. Cases typically involve many days of hearings, voluminous documentary evidence, many industry and expert witnesses, and a highly adversarial process.[127]

[122] Ibid.f.n 121
[123] Ibid.f.n 121
[124] Trebilcock M J and Iacobucci E M (2002), Designing Competition Law Institutions, World Competition 25(3): 361–394, 2002, Kluwer Law International, The Netherlands
[125] Cambridge Economic Policy Associates (2006), Jamaica Regulatory Impact study, PPIAF Issues Paper, August 2006
[126] Trebilcock M J & Iacobucci E M (2010), Designing Competition Law Institutions: Values, Structure, and Mandate, 41 Loy. U. Chi. L. J. 455 (2010).
[127] Ibid

This generally shows that it is not the structure on paper that matters, but the manner in which the institutions operate that is more important. This makes the assessment of performance of any adjudicative body important. In addition, even though two separate bodies, one for investigations and one for adjudication can be established, it is not given that these two will have the necessary skills and knowledge on competition issues as well as the requisite administrative backing. This validates the arguments advanced by Kovacic, Hollman and Grant[128] in their study *"how does your competition agency*[129] *measure up?*. The scholars argue that a competition agency, which for purposes of this research – the tribunal can improve its ability to attain substantive ends by strengthening its process, through the adoption of superior administrative techniques that assist in implementing programmes that generate good substantive results and facilitate continuing improvements over time[130]. One of the key cited pillars of good agency process is regular and substantial capital investments in building knowledge and, where appropriate, collaborating with other public agencies and academic research centers both at home and abroad. The cited justification for this need by the authors is that this will aid in maintaining the institutions' proficiency. The scholars argue that an institution must stay attuned to state-of-the-art developments in economic theory, empirical work, legal analysis, and the implementation of superior techniques in other competition agencies or adjudicative bodies. This requires ongoing investments in competition law research and development outlays that make the agency or tribunal smarter. By necessity, this means funds for training staff, interaction with academic research centres at home and abroad, evaluation of past tribunal initiatives and initiation of research that examine current developments.

Whilst some scholars such as Kovacic and team are pressing the need for institutional investments, others such as Hosken[131], on the other hand, consider setting up of competition agencies or Tribunals as costly to the economy as these have to be adequately resourced with operating space and personnel. But why is it necessary to invest in such additional costs to strengthen competition enforcement and adjudicative process? Connor[132] argues that this is

[128] Kovacic W. Hollman H. and Grant P. (2011), How does your competition agency measure up? European Competition Journal.
[129] Note: The Authors focuses on the competition agency but however, the principles indicated remain relevant to other institutions such as the competition tribunal.
[130] See theoretical framework for the list of the proposed characteristics of good agency process.
[131] Hosken, D. S., Olson, L., & Smith, L. (2012). Do Retail Mergers Affect Competition? Evidence From Grocery Retailing. Working Paper 313, Federal Trade Commission, Bureau of Economics. http://ssrn.com/abstract=2192189
[132] Connor J M (2009), Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008, AAI Working Paper #09-06

generally because the cost that the economy suffers as a result of anticompetitive practices is generally higher than the costs of preventing them. In other words, competition enforcement and adjudication are generally beneficial to the economy in the long run - irrespective of any enforcement and adjudication costs that may arise.

One other critical issue which affects performance of tribunal is independence and accountability. An institution that is seen to be independent from direct government control but can make predictable decisions based on the interpretation of the law regardless of whether the parties in breach of the law are considered critical to the political interest is generally considered more effective. Trebilcock and Iacobucci[133] point out at critical realities that an institution that is considered independent also has to live with. They point out that even though an institution can be specialised and vested with investigative or adjudicative functions, it has to be politically accountable because:

- *the head of the agency or tribunal will be appointed by the elected executive arm of government;*
- *budgetary appropriations to the agency, or to the Ministry through whom the agency or tribunal accounts to Parliament, must be approved by the Ministry or Parliament;*
- *the Auditor-General can exercise oversight functions within their respective mandates;*
- *policy directives might be issued by the responsible Minister or Cabinet to the agency, opening up opportunities for control from politicians.*

The World Bank[134] suggests that the head of an institution such as the competition authority should be appointed by a committee or the parliament rather than by the president, minister or another appointing authority for the competition authority to be fully independent.

It is clear from the above cited literature that there was a dearth in knowledge on the extent to which ADR, specifically adjudicative tribunals, were contributing towards speedy adjudication.

[133] Trebilcock M J and Iacobucci E M (2002), Designing Competition Law Institutions, World Competition 25(3): 361–394, 2002, Kluwer Law International, The Netherlands
[134] World Bank (2002), World Bank World Development Report 2002, Building Institutions for Markets, Oxford University Press, 2002, Chap. 7.

1.9 Theoretical Framework

Understanding the theoretical footings of dispute resolution requires looking at a universal approach than confining it to the jurisdiction of adjudicative Tribunals. Therefore, understanding the sources of disputes and the relevant redressal tenets is important. More importunately, one cannot discuss dispute or dispute settlement without looking at conflict or conflict resolution. These are intimate concepts. The study of conflict and conflict resolution precedes the literature on disputes and dispute resolution institutions in the law. This section, therefore, attempts to do so, in an effort to arrive at a relevant framework for this research.

1.9.1 Theoretical Premise – nexus of conflict and dispute resolution

It must be noted that the occurrence of conflict or disputes in human society is endemic since time immemorial. More broadly, conflict and dispute resolution demonstrate, in their multifarious nomenclature, their rather promiscuous or multiple-heritage ancestry[135]. Historical developments of the two fields and their ideas and concepts, suggests disputes and dispute resolution have been constituted by the legal field, and conflicts and conflict resolution by the broader pastiche of the social sciences[136] and their more multidisciplinary social activist spinoffs, such as peace studies[137]. It must be noted from the onset that the study of conflict and conflict resolution predates the focus on disputes and dispute resolution institutions in the law[138].

Riskin[139] defines disputes as manifestations of conflict arising from a clash of interest or aspirations. These interest or aspirations are either actual or perceived. In this definition, it is implied by Riskin's assertion that conflict is a source of disputes. A dispute is a short-term occurrence[140]. It is a disagreement over a particular issue between two groups or people[141]. It manifests from an underlying conflict[142].

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[135] Meadow M. C. "From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary (2004). 54 J. Legal Educ. 7-29 : http://scholarship.law.georgetown.edu/facpub/584

[136] Note: the referenced social sciences are anthropology, political science, international relations, sociology, psychology, history, economics, and game theory.

[137] Supra. f.n 135. p. 13

[138] Supra. f.n 135. p. 13

[139] Riskin L.L ent all "Dispute Resolution and Lawyers (2005). West group, Rd 3d ed. Paper 962.

[140] Ibid

[141] Ibid

[142] [142] Richard C. Reuben. "The Impact of News Coverage on Conflict: Toward Greater Understanding, 93 Marq. L. Rev. 45 (2009)

On the contrary, Mitchell[143] , using a work setup scenario, argues that conflicts can also ensue from continual disputes as the frustration level rises. If two workers continually dispute one another over their tasks, for example, they may begin to see each other as stubborn, aggressive or hostile and develop a mutual dislike of one another[144]. This can increase their disputes and eventually result in full-blown conflict over their work methods or a conflict on a personal level.

Legal Philosopher Carrie Menkel-Meadow further explains that disputes are about legal cases and conflicts are more broadly and deeply about human relations and transactions. Conflict handling may be both more and less involving and complicated than dispute settlement or conflict management. Further conflict is that which arises from the belief that the real or perceived interests and aspirations of the parties cannot be achieved simultaneously[145]. The emphasis here is on "divergence" of interests and "aspirations" of the parties. Interests can generally be understood in terms of the needs, desires, and concerns of the parties, while aspirations can generally be seen as the highest manifestation of these interests[146].

Conflict can have both positive and destructive implications. Sociologists such as Emile Durkheim, Karl Marx, Georg Simmel, and Lewis A. Coser, who were interested in both the structure and function of various forms of conflict in society, were the first to argue 'for the constructive role of conflict and the positive social change dimensions of conflict in society[147]. Social psychologists such as Morton Deutsch[148], Dean G. Pruitt and Jeffrey Z. Rubin [149] took up the study of conflict, from the destructive and constructive forms[150]. They focused on both individual and group behaviours in preventing, making, escalating, resolving, and reconciling conflict. Given that a conflict processe might require minimum procedure as a yardstick for ensuing fairness in the process, psychologists such as Tom R. Tyler [151]have linked procedural justice as a necessity to successful conflict outcomes.

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[143] See Josalin Mitchell http://www.ehow.com/about_6610108_conflict-vs_-dispute.html
[144] Ibid
[145] Supr Richard C. Reuben. "p.g 50
[146] Ibid
[147] Meadow M. C. "From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary (2004). 54 J. Legal Educ. 7-29: ……Also. See. Corer L A. The functions of social conflict. Glencoe, IL: Free Press, 1956. 188 p. (Brundeis University. Waltham, MA1)
[148] See Morton Deutsch, The Resolution of Conflict: Constructive and Destructive Processes (New Haven, 1973); Kurt Lewin, Resolving Social Conflicts (New York, 1948),
[149] Dean G. Pruitt & Jeffrey Z. Rubin, Social Conflict: Escalation, Stalemate and Settlement (New York,1986).
[150] Meadow M. C. "From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary (2004). 54 J. Legal Educ. 7-29: ……Also. See. Corer L A. The functions of social conflict. Glencoe, IL: Free Press, 1956. 188 p. (Brundeis University. Waltham, MA1)
[151] Tom R. Tyler. "Mechanisms of Legal Effect: Theories of Procedural Justice" (2009). Monograph for the Public Health Law. University Beasley School of Law

Indisputably, social philosopher Stuart Hampshire[152] also argues that fairness in procedures for resolving conflicts is an invariable value, a constant in human nature. Hampshire further adds that justice and fairness in substantial matters will always vary with varying moral outlooks and with varying conceptions of the good. Therefore, given that there will always be conflicts between conceptions of the good, moral conflicts, both in the soul and in the city[153], there is everywhere a well-recognized need for procedures of conflict resolution, which can replace brute force and domination and tyranny. This assertion is, to some extent, a reflection of the pluralisation of conflict resolution procedures and platforms.

In the legal parlance and in reference to dispute resolution, Tayler extended his analysis on procedural justice through contrasting adversarial[154] with inquisitorial[155] legal structures, and mediation and arbitration forms with adjudication. Tyler and other social scientists[156] have documented that, participants in dispute resolution processes have a strong desire for procedural fairness, either in adversarial and inquisitorial legal structures (or in mediation, arbitration litigation)

Meadow adds that the field of conflict resolution is now variously referred to as dispute resolution, alternative dispute resolution (assuming all processes other than adjudication are alternative), or appropriate dispute resolution. Although there is some element of truth in the assertion raised by the legal philosopher, it is imperative to ensure that the ensuing academic literature on dispute resolution corrects this posture being created that conflict resolution equates to dispute resolution. Although similar, these two are conceptually and theoretically at variance.

1.9.2 Theorising Dispute Resolution

Traditionally, the focus of studies on legal disputes or cases has been narrow. Most studies that have evaluated their work have focused on measures of accountability and independence, rather than the indicators of societal impact or the extent to which the judicial judgements contribute towards realising the statutory purpose. This is what has coerced selected legal writers and

[152] Hampshire S. "Justice Is Conflict" (2001).Book. 120 pp

[153] Note: *"Both in the soul and in the city"* is an analogy used by the Philosophy (Stuart Hampshire) in describing that conflict can be resolved within the mind (soul) and in a public setup using existing institutions.

[154] Adversarial is a legal system that allows parties, acting independently and in a partisan fashion, to be responsible for uncovering and presenting evidence before a passive and neutral trial judge or jury. Inquisitorial system, on the other hand, grants authority to an official body to gather evidence both for and against the accused.

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[156] E. Allen Lind et aI., In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System, 24 Law & Society Rev. 953 (1990)

philosophers both from the legal and other disciplines to look at dispute resolution from a broader disciplinary framework.

The study of dispute resolution is a sort of bridge terminology and field, having been constituted by ***legal anthropologists***[157]***.*** Sir Henry Maine, an English lawyer is often credited with founding the study[158] of ***Legal Anthropology***. He advanced legal anthropological research which narrowly focused on conflict management[159]. Although his work was widely discredited[160] within the discipline, his reasoning has shaped the subsequent discourse of the study.

However, a turning point was presented in the 1926 publication of Crime and Custom in Savage Society by Malinowski [161] who in turn proposed the cross-cultural examining of law through its established functions as opposed to a discrete entity. In addition to law centred studies, this has led to multiple researchers focusing on aspects as order, dispute, conflict management, crime, sanctions, or formal regulation. This has led to insightful self-reflections and better understanding of the founding concept of law. Carrie Menkel-Meadow builds on this legal reasoning and draws conclusions that, besides narrowly focusing on internal measures of accountability and independence etc., focus on external indicators of societal impact should also be given due attention[162] if a comprehensive appreciation of the matter is to be valued. Therefore, she comes to a conclusion that dispute resolution revolves around ***"process*** and ***"substance".*** Therefore, theorizing and empirical studies of dispute resolution in the tradition of sociolegal studies should aim to study disputants, their representatives, the context and content of their disputes, and the varieties of processes chosen to process their disputes, in order to uncover what social processes and relationships, in addition to, or other than, law, influence what actually happens to disputes[163].

Varieties of dispute resolution processes include mediation, arbitration and litigation among others. The goal of mediation is for a neutral third party to help disputants come to consensus on their own. A professional mediator works with the disputing parties to explore the interest

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[157] Meadow M. C. supra. P.27
[158] See Maine H. "Ancient Law" (1861)
[159] Ibid
[160] Note. This ethno-centric evolutionary perspective was pre-eminent in early Anthropological discourse on law, evident through terms applied such as 'pre-law' or 'proto-law' and applied by so-called armchair anthropologists.
[161] See Malinowski, B. 1926. Crime and Custom in Savage Society.
[162] Meadow M. C. "From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary (2004). 54 J. Legal Educ. 7-29 : http://scholarship.law.georgetown.edu/facpub/584
[163] Ibid. p. 12.

underlying their positions. In Arbitration, a neutral third party serves as a judge who is responsible for resolving the dispute. The arbitrator hears both parties and renders a binding decision. Litigation, on the other hand, involves disputing parties presenting their case before the judge or a judge and jury. The judge or the jury is responsible for weighing the evidence and making a ruling. Information conveyed in hearings and trials usually enters the public record. Lawyers typically dominate litigation, which often ends in a settlement agreement during the pretrial period of discovery and preparation. At the core of all these processes is procedural justice – a legal necessity that underwrites the principles of satisfaction in a dispute process.

1.9.3 Procedural Justice

Using the general legal parlance, Tyler[164] defines procedural justice as the fairness of a process by which a decision is reached. Procedural justice is premised on the principles of neutrality and equality because it requires that decisions be made impartially and through the consistent application of legal rules and the consideration of facts[165]. Gaffney[166] adds that procedural equality of the parties is "an inevitable and indispensable concomitant of any judicial institution exercising judicial functions. Therefore, if any dispute system including the competition and consumer protection mechanism is to achieve and maintain legitimacy under current law, then litigants' claims must be adjudicated under established legal principles, namely, independence, impartiality, and objectivity of the adjudication process.

1.9.4 Complying with the Law

There are two principal models for compliance or rule adherence. The first is deterrence theory, also referred to as a sanction-based or command-and-control model. The assumption underlying this theory is that behaviour is shaped by varying the risks associated with breaking rules and the gains associated with adherence[167]. The legal system attempts to project credible

[164] Tyler, Tom R., "Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution" (2011). Faculty Scholarship Series. Paper 4992.
[165] Ibid
[166] Gaffney, John P. "Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System." American University International Law Review 14, no. 4 (1999): 1173-1221.

[167] Tom R. Tyler. “Mechanisms of Legal Effect: Theories of Procedural Justice” (2009). Monograph for the Public Health Law. University Beasley School of Law

risks for wrongdoing. It is sometimes possible to motivate compliance by creating a risk of punishment for non-adherence. One of the cited motivations of the CCPA of 2010 was to enhance the fines for those who breach the competition Act. The fines can go up to 10% of the annual turnover of an offending company and the question that ensues, therefore, is to what extent has the inclusion of these fines evoke adherence. From a motivational perspective, instrumental approaches like deterrence are not self-sustaining and require the maintenance of institutions and authorities that can keep the probability of detection for behaviour that threatens public health at a sufficiently high level[168].

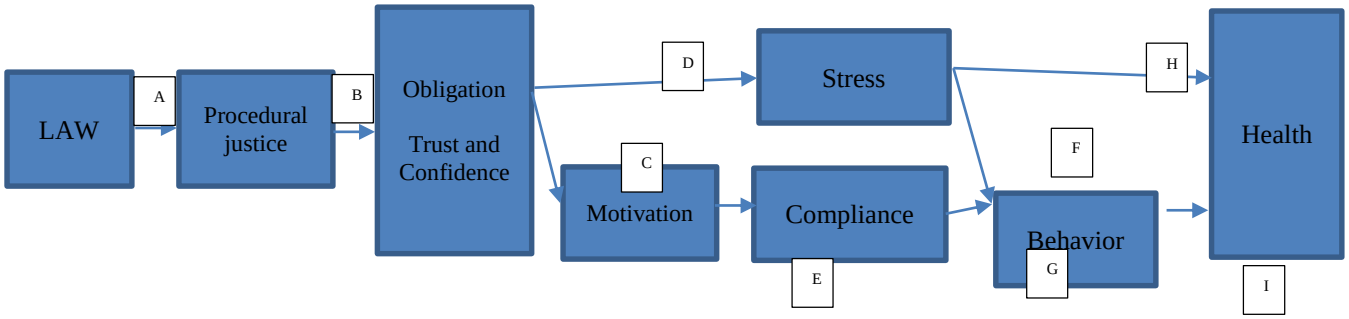
Self-regulation offers an alternative to the deterrence model[169]. Here people are seen as motivated to follow rules because their own values suggest to them that doing so is the appropriate action to take[170]. When values are the driver of behaviour, rule adherence does not need to be sustained either by enacting a credible system of surveillance and sanctioning or by developing a way to incentivize desired behaviours

The legal question that, therefore ensues is how to motivate everyday self-regulation and adherence to legal rules. The answer lies in self-regulatory motives and legitimacy of legal authorities. Self-regulatory motivations are activated when people believe that legal authorities are legitimate and they therefore have an obligation to conform to the law[171]. There is also consensus among vintage academic papers[172] that, consequently, people who identify with legal authorities and permeate the legal system with legitimacy will voluntarily abide by laws and submit to authorities.

Using the health sector as a case, Tyler developed a causal diagram depicting areas which can be used in understanding areas for legal research.

[168] Ibid
[169] Ibid. P. 4-5
[170] Ibid. Note: Voluntary healthy behaviour that is motivated by a person's own attitudes and values is superior from a regulatory perspective to behaviour that has to be coerced.
[171] See Tyler, T. R. (2007). Psychology and the design of legal institutions. Nijmegen, the Netherlands: Wolf Legal Publishers.
[172] See. Darley, J. M., Tyler, T. R., & Bilz, K. (2003). The sage handbook of social psychology. In M. A. Hogg & J. Cooper (Eds.), Enacting justice: The interplay of individual and institutional perspectives. Thousand Oaks, CA: ……Jost, J. T., & Major, B. (2001). The psychology of legitimacy: Emerging perspectives on ideology, justice, and intergroup relations. New York: Cambridge University Press.

Figure 1: Mechanisms through which Law affects different stages



Source; Tyler, Tom (2011)

Path A captures the behaviour of public health authorities toward citizens and groups in terms of the core dimensions of procedural justice (impartiality, transparency, respect, fairness). Such authorities may be individual agency personnel tasked with law's enforcement or organizations that have the authority and responsibility to create and sustain healthy corporate environments for workers. Path B represents the legitimacy (obligation, trust and confidence) of legal authorities which flows from their procedurally just character and with the existence of system legitimacy, people are motivated to comply with the law (path C).

The type of motivation captured here is internally driven and value-based (as opposed to instrumentally driven and based on the threat of punishment or the receipt of incentives). Based on this motivation, people comply with the law (path E), thereby undertaking the proscribed healthy behaviours (path G) which affect different public health outcomes (less deaths, fewer injuries, lower rates of communicable disease) (path I) depending on the area of intervention. We also reviewed studies pointing to the role of procedural justice, trust and ultimately legitimacy (path D) in reducing stress. Less stress can yield direct health benefits such as fewer psychiatric disorders (path H) and it can also lead to healthier behaviours including drinking less (path F), which in turn contributes to population level health outcomes (path I) such as lower death rates from impaired driving. (Source: Tyler[173])

[173] Tom R. Tyler. "Mechanisms of Legal Effect: Theories of Procedural Justice" (2009). Monograph for the Public Health Law. University Beasley School of Law

Therefore, building on these theories above, Sossin and Hoffman[174] have developed an amalgamated concept for evaluating Tribunals. The legal scholars have argued that evaluators of adjudicative Tribunals may need to assemble interdisciplinary perspectives in order to bring an aura of independence and credibility to the work. Like the process for assessing the effectiveness of complex interventions, the legal scholars have recommend that evaluators of adjudicative Tribunals may also need to conceptually map out the way in which tribunal functions, its interactions and relationships with others in the particular jurisdiction and legal systems, and its potential effects on each of them. This, according to the scholars will aid in focusing the inquiry, identifying areas in which little is known, generating suitable research questions and determining the appropriate methodology[175].

Further, the scholars also suggest that potential evaluators of adjudicative Tribunals must also thoughtfully consider both the target audience of their research and the overall goal that their particular adjudicative tribunal is expected to help achieve, and then identify the most important targeted outcomes that are relevant to the audience and important for the goal's fulfilment[176]. When such outcomes cannot directly be measured, the scholars suggest that, strong surrogate endpoints should be identified and these should be key measurements that reflect important outcomes even if they are of indirect or diminished practical.

Once a system of empirical observation is in place, the scholars further suggest the need establish benchmarks. The benchmarks will be the yardstick to use to track and assess performance.

The scholars further suggest that such comparative points of measurement can be drawn from thoughtful consideration, aspirational goals of leaders, expert judgments on what is possible, data from similar Tribunals in other jurisdictions (i.e., comparative analysis), or previous empirical observations from the same tribunal (i.e., interrupted time-series analysis)[177]. For experimental methods like randomized, controlled trials that are rarer in socio-legal studies, the control group would serve as the comparative benchmark rather than any observational data that is external to the evaluation[178]. According to the scholars, such comparisons are better

[174] Sossin, Lorne, and Steven J. Hoffman (2012), Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. Journal of Health Economics, Policy and Law 7 (2012): 147-174.
[175] Ibid p. 545
[176] Ibid p. 545
[177] Ibid p. 545
[178] Ibid p. 545

because they more accurately represent the counterfactual of what the situation would be like without the tribunal and can help lead to determinations of causation[179].

This study was informed by Sossin and Hoffman[180] theoretical framework for evaluating Tribunals. Sossin and Hoffman have argued that empirical evaluations of Tribunals, by contrast, seek scientific, evidence-based methods and can be used to, inter alia, quantitatively or qualitatively assess their impact on the health system, identify the factors that determine their successful operations, and track perceptions of them over time. These authors classify assessment of adjudicative bodies (Tribunals) into two; internal procedural analyses and External impact evaluations. These can also be assessed using two general methodologies; expert reviews and empirical evaluations (Table 1). Factors that would be the subject of analysis and each of these methods can be described as follows:

[179] Ibid p. 545

[180] Sossin, Lorne, and Steven J. Hoffman (2012), Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. Journal of Health Economics, Policy and Law 7 (2012): 147-174.

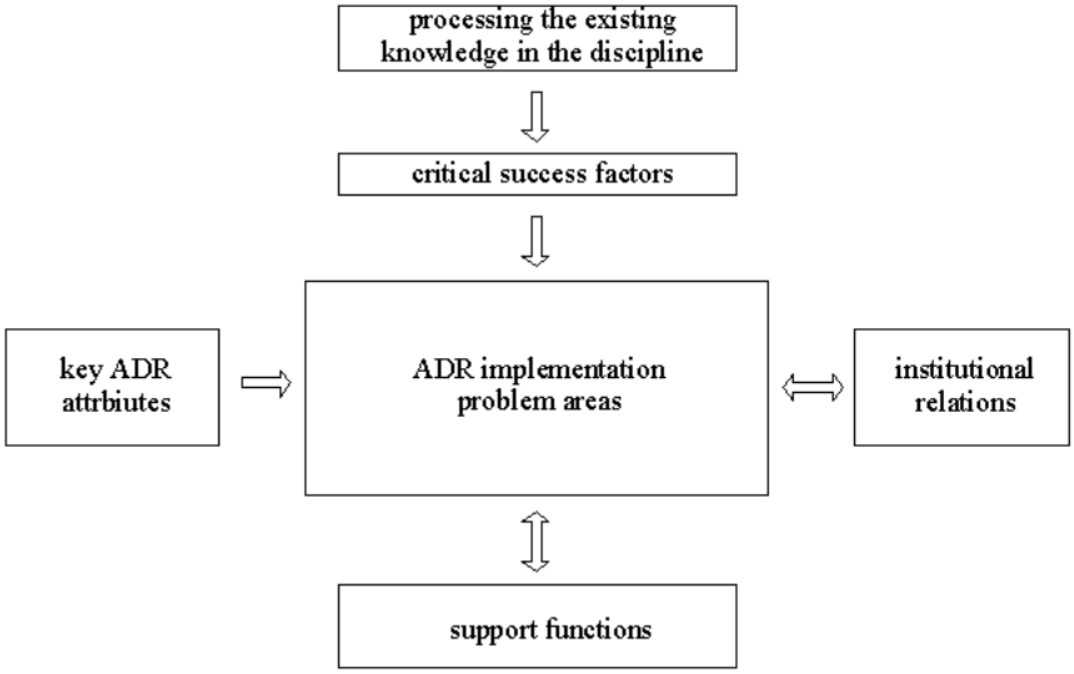
Table 1: Internal procedural analyses and External impact evaluations

	Empirical evaluations	Expert reviews
Procedural analyses	• Are tribunal adjudications fair? • Are procedures transparent? • Is there sufficient independence in the body's decision-making? • What management structures should be in place? • Are there sufficient accountability mechanisms in place? • What barriers exist to prevent potential users from accessing the services of a tribunal? • What bottlenecks exist in the provision of services? • Has there been inconsistency in decision-making process of the tribunal? if yes, cite any? • What steps can be taken to increase the consistency of decision-making – if any?	• How many disputes are resolved? • How many employees are needed for optimal efficiency of operations? • What costs are involved? • What factors influence independence and impartiality? • How long is the average hearing? • Under what circumstances do they positively influence the economy? • How can the tribunal increase its impact on the community it serves? • What legal reforms are required in the CCPA to improve the operations of the tribunal? • What institutional reforms might be require addressing to improve the operations of the tribunal?

Source: Sossin, Lorne, and Steven J. Hoffman (2012),

The framework developed by Sossin and Hoffman is significantly important to this study owing to the mooted elements of internal and external measures of accountability using empirical and expert reviews. The proposed thoughtful consideration of aspirational goals of leaders, expert judgments on state of play, data from similar tribunals in other jurisdictions (comparative analysis), or previous empirical observations from the same tribunal using interrupted time-series analysis) is at the core of this research hence its importance. However, given the complexity of the area of study, the framework proposed by Sossin and Hoffman ought to be augmented with other theories. More significantly, the theoretical framework for application of ADR developed by Ilter and Dikbas[181], is eminently proximate.

Figure 2: Theoretical Framework for ADR Application



Source: Ilter and Dikbas (2008)

The framework was developed based six core groups or elements. These elements define and outline the required pillars and processes to use to measure performance of ADR in the construction sector. Among the six core groups include among others the following:[182]

a) **Processing Existing Knowledge and Identification of Critical Success Factors**: This component deals with processing the existing knowledge and derivation of critical

[181] Ilter, D and Dikbas, A (2008) The use of key attrıbutes ın alternatıve dıspute resolutıon (ADR) process desıgn. In: Dainty, A (Ed) Procs 24th Annual ARCOM Conference, 1-3 September 2008, Cardiff, UK, Association of Researchers in Construction Management, p. 455-464.
[182] Ibid. p. 459

success factors from them as input data. When tackling a research problem, Ilter and Dikbas note that selection of the information to be used as input was important. This component, therefore, determines what and how the existing information should be processed as input to the model. This involves the analysis of ADR literature, ADR practices, legislations and ADR institutions.[183]

b) **ADR Implementation Problem Areas**: This is at the core of this framework. Problem areas are the key bottlenecks which ought to be analyzed to have an appropriate account of the factors necessitating the developments. Preceding understanding the problem areas, an appreciation of the key ADR attributes which define the foundations which the problem areas are built-on is inevitable. Ilter and Dikbas have classified ARD problem areas to include: ***ADR method selection and process design, ADR institution design, adaptation of legislation for ADR, standards and accreditation of third parties, provisions in the standard forms of contract, determination of the ethical codes (code of conduct) and interaction of the model with existing business practices and culture.***

c) **Relations with the Environment**: This deals with institutional relations with other key institutions such as the judiciary, government agencies and other organisations are defined. These relations also determine how the problem areas of the model are resolved. Therefore, assessing these relationships based on internal and external measures for measuring accountability as defined by Sossin and Hoffman[184] becomes inevitable if one was to have a fair appreciation of the challenge at hand.

d) **Support Functions**: These are ancillary related interventions which may include publicity and promotion, monitoring and auditing and training.

e) **Key ADR Attributes:** Key ADR attributes are the main input of the proposed framework. These attributes have been categorized into:

i. **Process Nature Attributes**: Credited to type of attributes include flexibility, confidentiality, formality, control by parties, ability of the parties to appeal and independency.

ii. **Settlement Attributes:** This hinges on judgement or agreement reached in an ADR process. A mutually agreed settlement should be the common objective of

[183] Ibid p. 460

[184] Sossin, Lorne, and Steven J. Hoffman (2012), Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. Journal of Health Economics, Policy and Law 7 (2012): 174.

the parties, the achievement of which depends on many factors. In this respect, and being immune from external pressure, consensus, creative settlements, bindingness, and fairness being immune from external pressure were categorized in settlement group.

iii. **Neutral Party Attributes:** Inherently, human factors by nature, have an impact on the dispute settlement process. Besides disputing parties, neutral persons or attributes may define the success or failure of the process. The effectiveness of the process depends heavily on the competence, experience and knowledge of the neutral.[185]Therefore, involvement of a neutral in assisting the parties to reach a settlement is another key characteristic of ADR.

iv. **Benefit Attributes:** This hinges and re-emphasizes the advantages of ADR over the traditional court process of dispute settlement. Therefore, variables such as speed which is at the core of this research, cost reduction, power imbalance and preservation of relationships, were key elements in this conceptual framework.

In view of the forgoing, therefore, and bearing in mind that the two frameworks were similar albeit complex, a Conceptual framework, was developed.

1.10 Conceptual Framework

According to Jabareen, a conceptual framework is defined as a network, or plan of interlinked concepts that together provide a comprehensive understanding of a phenomenon or phenomena.[186] He adds that concepts that constitute a conceptual framework support one another, articulate their respective phenomena, and establish a framework-specific philosophy.[187] Further, he notes that conceptual frameworks have epistemological, methodological and ontological, assumptions, and each concept plays an ontological or epistemological role.

According to Guba and Lincoln, 1994, ontological assumptions relate to knowledge of the way things are, the nature of reality, real existence, and real action.[188] The epistemological

[185] Goldberg, S B, Sander, F E A and Rogers, N H (1992) Dispute Resolution. Toronto: Little Brown and Company
[186] Yosef Jabareen. (2009). Building a Conceptual Framework: Philosophy, Definitions, and Procedure © 2009.p.51
[187] Ibid. p.51
[188] Guba, E. G., & Lincoln, Y. S. (1994). Competing paradigms in qualitative research. In N. K. Denzin & Y. S. Lincoln (Eds.), Handbook of qualitative research (pp. 105–117). Thousand Oaks, CA: Sage. Last Accessed August 2021.

assumptions, on the other hand relate to how things really are and how things really work in an assumed reality.[189] The methodological assumptions relate to the process of building the conceptual framework and assessing what it can tell about the real world.[190]

Notably, the research problem of this study hinged on unavailability of data to affirm whether ADR processes, specifically those with adjudicative functions, were contributing towards reducing the challenge of inundation through speedy delivery of justice. As noted earlier,

Measuring performance of ADR, using a case study was, therefore, inevitable. A review of the multidisciplinary literature on ADR revealed unavailability of a comprehensive theoretical framework for understanding the phenomenon and complexities associated with it. However, the philosophical foundations and theoretical principles, highlighted above were still sufficient to enable this research arrive at an appropriate framework and methodology.

Further, the conceptual analysis undertaken earlier identified three (3) distinct concepts that make up the theoretical world of ADR. More important to note, the six core groups, itemized by Ilter and Dikbas[191] were key collaborative elements to further define the needed attributes and investigative approach to be explored. Further, the research questions of this study assist in providing a specific inquiry which the research seeks to provide a response to.

- ***Theory 1. Dispute:*** As defined earlier, a dispute is 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.[192]
- ***Theory 2. Procedural Justice and fairness:*** Tyler[193], as highlighted earlier defines procedural justice as the fairness of a process by which a decision is reached. This theory hinges on the Ontological concept. Procedural justice, is premised on the principles of neutrality and equality because it requires that decisions be made

[189] Ibid
[190] Ibid
[191] Ilter, D and Dikbas, A (2008) The use of key attributes in alternative dispute resolution (ADR) process design. In: Dainty, A (Ed) Procs 24th Annual ARCOM Conference, 1-3 September 2008, Cardiff, UK,
[192] Winnie.S. Mwenda, (2006) Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia. University of South Africa Press. P. 29.
[193] Tyler, Tom R., "Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution" (2011). Faculty Scholarship Series. Paper 4992.

impartially and through the consistent application of legal rules and the consideration of facts.

- **Theory 3. *Dispute Resolution:*** This refers to one of several different processes used to resolve disputes between parties. [194]

Table 2: Building blocks towards a Conceptual framework of ARD and selected sources of data

The Concept	*Inquiry Character*	*Selected Sources of Data*
Dispute	Epistemological concept	Case law and Juristic writing
Procedural Justice and fairness	Ontological concept	Philosophy and ethics, CCPT, Judiciary, Legal fraternity
Dispute Resolution/ADR	Methodological concept	Journals, Books, Judiciary, Legal fraternity

Source: Authors' Compilation (2021)

Each of the three concepts and the complementing factors identified above collectively constitute the theoretical framework[195] for measuring ADR, specifically the competition adjudicative tribunal. These concepts have interwoven relationships with one another. [196]The concept of ethical paradox is the framework's ontological basis and sits at its core, articulating the paradox between ADR and development in terms of ethics. In other words, the epistemological foundation of the theoretical framework of ADR is based on the unresolved and fluid paradox of ADR and its contribution to dispensation of Justice.

Further, the three outlined theories have a proximate collaborative relationship with the six identified core elements by Ilter and Dikbas. Specifically, the element of knowledge processing was inevitable in unpacking the existing *epistemological, ontological and methodological concepts.* This, intern, resulted in appreciating and documenting the other core elements:

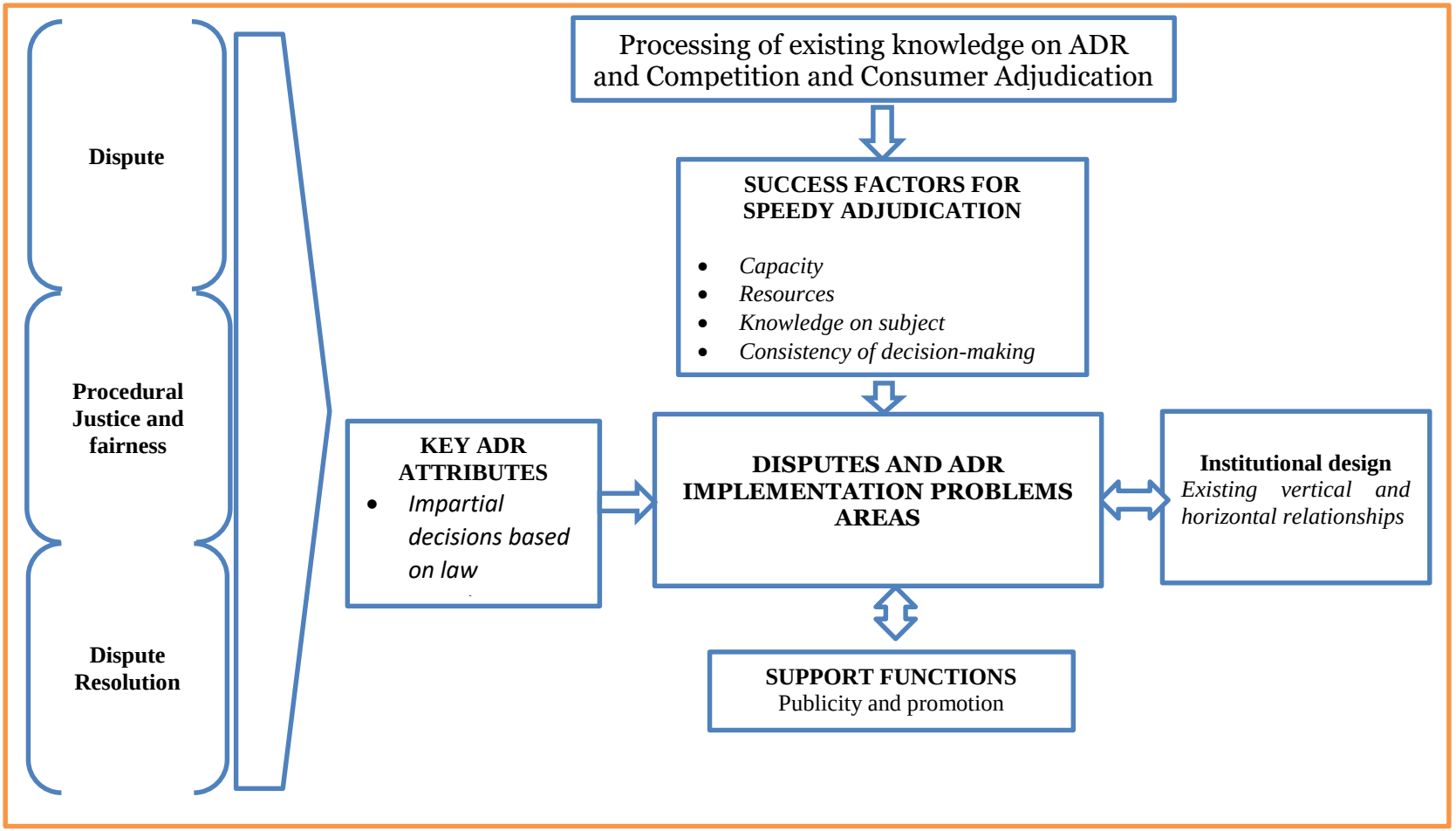
- ***The problem that exists:*** *An appreciation of the void in knowledge that exist on performance of ADR in the justice dispensation process.*
- ***Relations with the Environment*****:** *An appreciation of the existing legal and institutional vertical and horizontal relationships between ADR institutional*

[194] https://www.pon.harvard.edu/category/daily/dispute-resolution/
[195] Yosef Jabareen. (2009). Building a Conceptual Framework: Philosophy, Definitions, and Procedure © 2009.p.57
[196] Ibid .p.57

relations with other key institutions such as the judiciary, government agencies and other organisations are defined. More essentially, the role and function of judicial oversight was also explored.

- ***Support Functions:*** *An appreciation of how critical support functions publicity and promotion, monitoring and auditing and training.*
- ***Key ADR Attributes****: Based on the identified category of ADR, the process involved disaggregating and appropriating the suitable attributes for this research and these included level of Speedy in Dispensation of justice and level of impartiality in the decision-making process.*

Figure 3: Conceptual Framework



Source: Reconstructed by author (2021)

Further and more significantly, the outlined research questions of the study were key in informing both the theoretical and conceptual frameworks. These questions were framed in a way which aids in having a specific inquiry which the research seeks to provide a response to. The questions resided at the core of the method used and helped in clearly defining a path for the research processes.

1.11 Legal Philosophical Tenets underpinning the research

Building on theories discussed in the preceding section, this section discusses the legal philosophical tenets which underpin the research. Notably, there are several schools of legal philosophy that exist. Prominently, however, only legal Philosophies which been predominantly used by jurists in their writings[197] were the area of focus. These schools of thought are:

The Natural Law School

The natural law theory is the initial school of thought to develop under jurisprudence and has its origins in the primeval Greek civilization. In the earliest times many societies believed that there was a link between the natural world of physical matter and the spiritual world of Gods and spirits.[198] They questioned their own origins and the origins of the other forms of creation, and concluded that the spiritual world was in control of the physical World and that human kind belonged to the physical world. [199] It was as a result of this thinking that gave rise to the idea that there was actually a higher authority in the spiritual world which controlled human existence and the rest of the natural world. This school then concluded that it is this superior being in the spiritual world that planned a set of rules, principles and doctrines which mankind was able to discover through his power of reason that was given to them. Natural law is thus an idea that there are rational objective limits to the power of legislative rulers. The foundations of law are accessible through human reason and it is from these laws of nature that human created laws gain whatever force they have. This view is frequently summarized by the maxim an unjust law is not a true law, in which 'unjust' is defined as contrary to natural law. Natural law is closely associated with morality and, in historically influential versions, with the

[197] Professor Roscoe Pound. (1988). Theories of Law. Yale Law Journal; Jules L. Coleman. Legal Theory and Practice https://core.ac.uk/download/pdf/72833667.pdf

[198] Melissa Moschella and Robert George. (2015). *The International Encyclopedia of Social and Behavioral Sciences*, Second Edition. Last Accessed. February, 2021. p.1

[199] Ibid

intentions of God.[200] To oversimplify its concepts somewhat, natural law theory attempts to identify a moral compass to guide the lawmaking power of the state and to promote the good. Notions of an objective moral order, external to human legal systems, underlie natural law. What is right or wrong can vary according to the interests one is focused upon.[201] Natural law is sometimes identified with the maxim that ***an unjust law is no law at all***.[202] Therefore, in this school, the law was divided into two sets of law namely, natural law and human law. Natural law was superior while human law was inferior and was to correspond to natural law or risk being called unjust law.[203]

The Positivist School

The was the second school that emanated from the natural law school during the 17th and 18th centuries where several theorists challenged certain aspects of the natural law theory.[204] It is actually a reaction to natural law teachings. The argument was that natural law had nothing to do with God because to them what mattered was the rationality in man which made him able to derive the perception of natural virtues. Others argued that laws cannot be immutable because they were dynamic and changed with social beliefs and values. The theorists who challenged the natural law school ultimately gave rise to the positivist school of law in the 19th century.[205] According to this theory, law is ***"as it is" and not "as it ought to be".*** Bentham[206] opposed natural law proposition that human law derived its validity from God's law.[207] His theory became known as "utilitarianism" and defined law as "a means of emancipating the individual person from the constraints and restraints imposed upon his freedom". [208] Therefore, positivism is a theory of law which is directly opposed to natural law Positivism arose at the time when science was making an impact.[209] The new scientific age was no longer satisfied

[200] John M. Finnis & Germain Grisez, (1981). The Basic Principles of Natural Law: A Reply to Ralph McInerny, 26 Am. J. Juris. 21 Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/848. p.24
[201] Ibid. p.26
[202] Melissa Moschella and Robert George. (2015). *The International Encyclopedia of Social and Behavioral Sciences*, Second Edition. Last Accessed. February, 2021. p.14
[203] Ibid. p.14.
[204] Brian Z. Tamanaha. (2001) Socio-Legal Positivism and a General Jurisprudence. Oxford Journal of Legal Studies Vol. 21, No. 1 (spring), pp. 1-32 (32 pages) Published By: Oxford University Press. Last Accessed. February, 2021. p. 13

[205] Ibid. p.13
[206] Jeremy Bentham (1748 – 1832)
[207] See: Stanford Encyclopedia of Philosophy. First published Tue Mar 17, 2015; substantive revision Mon Jan 28, 2019. https://plato.stanford.edu/entries/bentham/ . Last Accessed. February, 2021.
[208] Ibid. Last Accessed. February, 2021.
[209] Ibid. Last Accessed. February, 2021

with natural law theories and their explanation of the natural happenings. Positivists tried to define law, not by its contents, but according to formal criteria. [210]

Legal Positivism, by contrast to natural law, holds that there is no necessary connection between law and morality and that the force of law comes from some basic social facts.[211] Positivism simply means that law is something that is "posited": laws are validly made in accordance with socially accepted rules. [212]The positivist view on law can be seen to cover two broad principles: Firstly, that laws may seek to enforce justice, morality, or any other normative end, but their success or failure in doing so does not determine their validity.[213] Provided a law is properly formed, in accordance with the rules recognized in the society concerned, it is a valid law, regardless of whether it is just by some other standard. Secondly, that law is nothing more than a set of rules to provide order and governance of society. No legal positivist, however, argues that it follows that the law is therefore to be obeyed, no matter what.[214] According to the positivists, law is that which is laid down in the form of precedents, statutes etc. positivists admit that, issues of morality or ethics do influence law makers or judges, but it is only incorporation of these moral and ethics into precedents and status which gives them the quality of law.[215] An unjust law would be law nonetheless, as long as it has been given the stamp of validity through precedence and statutes. Any proposition which has satisfied formalities and procedures of becoming actual law is law, irrespective of other considerations. While the natural law school is worried of ethic and morality content of the law, the positivists are worried about formality, i.e. that the formal procedure must be satisfied in order to have law.[216] For the naturalist, a proposition is law not merely because it satisfies the formal procedure but its law virtue of having some addition moral content i.e. if it complies with the principles of natural law. The positivists insist on the separation between law and morality for purposes of certainty. They argue that we should be able to clearly know what is or what not law is. This is in contrast to the natural law school of thought which insists on what out to be law. I.e. law ought to have a moral content and in compliance with the principles of natural

[210] Ibid. Last Accessed. February, 2021
[211] Brian Z. Tamanaha. (2001) Socio-Legal Positivism and a General Jurisprudence. Oxford Journal of Legal Studies Vol. 21, No. 1 (spring), pp. 1-32 (32 pages) Published By: Oxford University Press. p. 17
[212] Ibid.p.20
[213] Ibid.p.21
[214] Brian Leiter. (2009) "Why Legal Positivism?" (University of Chicago Public Law & Legal Theory Working Paper No. 298. p.8
[215] Ibid. p. 8
[216] Ibid. p. 8

law. [217]Positivists maintain that courts have no time to state the validity of law by a moral test. The maintenance of any legal system requires political authorities to make law, enforce and administer them to the exclusion of what other people may believe the laws should be. Societies need well defined laws. Positivism therefore, wants order which flourishes best in stable social conditions in which the law 'is' and not what it 'ought' to be. [218]

Sociological School

Another school that criticized the positivists in order to justify their own philosophy, was the sociological school. It criticised positivists in order to justify their own explanations of what they believed as law.[219] One of the criticisms was that positivism did not provide for continuity when one superior dies and before another superior takes over. They argue that since this may take time it is not clear who gives the commands in the interim from the positivists. [220]The second criticism by those who support this school is that it is wrong to state that all laws must have sanctions or threat of harm attached to it. [221]They argue that some laws are only regulatory and merely guide people on how they must act without necessarily threatening punishment. Sociologists argue that laws are rules of conduct found in statutes and decided cases that actively serve human interests. This excludes dormant or unused laws. To them a law that is habitually disregarded is not a living law.

Historical School

Historical school of Jurisprudence argued that the law is the exaggerative form of social custom, economic needs, conventions religious principles, and relations of the people with society. The followers of this school argued that law is found not made.[222] The historical school doesn't believe and support the idea of the natural school of law which believe that the origin of law is from superior authority and have some divine relevance.[223]

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[217] Brian Z. Tamanaha. (2001) Socio-Legal Positivism and a General Jurisprudence. Oxford Journal of Legal Studies Vol. 21, No. 1 (spring), pp. 1-32 (32 pages) Published By: Oxford University Press. p. 20
[218] Ibid. p. 20

[219] Roscoe Pound. (1912). The Scope and Purpose of Sociological Jurisprudence. (Concluded) III. Sociological Jurisprudence. Harvard Law Review. Vol. 25. Published by: The Harvard Law Review Association Stable URL: https://www.jstor.org/stable/1324775. p.495.

[220] Ibid. p.496.
[221] Ibid. p.508
[222] Faiyaz Md. Khan. (2006) Historical School of Jurisprudence. C.M. Law College, Darbhanga. http://cmlclnmu.org/wp-content/uploads/2020/04/Historical-School-of-Jurisprudence.pdf . Last Accessed April 2021. p.1
[223] Ibid. p.1

This school of thought is also known as the anthropological school. The leading adherents of this school are Hegel and Sir Henry Maine.[224] It stresses on the importance of the historical reasons of law, as against, for instance, statutes and precedents. [225]It asserts law as one of the intrinsic developments in any society just like language or economic activity. In other words, proponents of this school argue that law is a natural and spontaneous norm of a people. Sir Maine for example, argued that law was a norm of conduct freely and instinctively formed by all reasonable members of society who agree to be bound by it. Others in this school state that law is a manifestation of a particular spirit of a people.[226] In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character peculiar to the people, like their language, manner or constitution.[227] These phenomena have no separate existence, but are the particular faculties and tendencies of an individual people. The people's law grows with the growth and strengthens with the strength of the people, and finally dies away as a nation loses its nationality.

Socialist School

The socialists have defined law as a tool of the dominant in and propertied classes for the permanent oppression of the underprivileged social groups.[228] This proposition is based on the opinion that politics is a struggle for power between the privileged and the underprivileged classes in society. Adherents of this school believe that law is made by the dominant groups in society for the protection of their appropriations against the "have- nots" who out of envy and jealousy, are likely to interfere with their possessions. [229]To a socialist philosopher, therefore, law is a rule or norm which the "bourgeoisie" formulates and use as an instrument to keep the "proletariats" at the bottom of the economic ladder.

Realist School

[224] Robert E. Rodes, (2004). On the Historical School of Jurisprudence, 49 Am. J. Juris. 165: https://scholarship.law.nd.edu/law_faculty_scholarship/858 . Last Accessed April 2021. p.175
[225] Ibid. p. 175
[226] Ibid p. 177
[227] Ibid. p. 178
[228] Allan C. Hutchinson and Patrick J. Monahan Stanford (1984) Law Review Vol. 36, No. 1/2, Critical Legal Studies Symposium (Jan., 1984), pp. 199-245 (47 pages) Published By: Stanford Law Reviewhttps://doi.org/10.2307/1228683
https://www.jstor.org/stable/1228683 last Accessed. February, 2021.
[229] Laurence Lustgarten. (1988) Socialism and the Rule of Law. Journal of Law and Society Vol. 15, No. 1, Law, Democracy & Social Justice (Spring,) pp. 25-41 (17 pages) Published By: Wiley

Realist School is a type of school which focuses on decisions. It is a branch of sociological approach. [230]They believe that law is only on official action.[231] The realist school of thought looks to the courts as a principal movement to the making of law, and they play down the role of the legislature. [232]To the realist, what the judge says is law and the legislature is only a source. Statutes only become law when they have passed through judicial interpretation. The realist asserts that you do not know the law until the judge pronounces it. Realists argue that judges are lawgivers because statutes are of general application.[233] These words will either be vague or ambiguous. It is the judge who gives the real meaning to a statute when presented with particular sets of facts in a given case. What courts pronounce is the law is that at any a particular time when you want to know what the law is, you must go to the courts and not the legislature. Hence, I conclude by stating that "statutes as far as realists themselves are concerned are dead, until the courts put life in them.

Applicable Legal Philosophical

This research weighed its philosophical underpinning on legal Positivism. As noted, legal positivism is a theory which argues that legal rules or laws are valid not because they are rooted in moral or natural law, but because they are enacted by legitimate authority and are accepted by the society as such. Notably, most ADR processes with adjudicative functions are a creature of statues which are Acts of Parliament. Therefore, this study used the principles of positivism and this was explored from the context of their applicability with the Epistemological, Ontological and Methodological concepts.

[230] See Legal Desire. Realist School of Jurisprudence, https://legaldesire.com/realist-school-of-jurisprudence/#_ftn4 Last Access April 2021
[231] Ibid. Last Access April 2021
[232] Hanoch Dagan. (2007) The Realist Conception of Law. The University of Toronto Law Journal Vol. 57, No. 3 607-660 (54 pages) Published By: University of Toronto Press.

[233] Ibid

1.12 Methodology

The study employed a mixed methodological approach of a descriptive research and inferential statistical method, underwritten by use of qualitative and quantitative research approaches. This multi-disciplinary approach is justified. As Kombo and Tromp, argues, for the study of law to be meaningful, it should reflect, define and shape fundamental societal values.[234] And therefore, understanding the extent to which law was shaping society and their corresponding effects, a mixture in approach becomes necessary. Preference in use of descriptive sample design was merited based on the views expressed by White[235]. According to White, descriptive sample design, is a way of collecting information through use of variety of tools.[236]Additionally, descriptive research aimed to accurately and systematically describe a population, situation or phenomenon and the addressed the hypotheses and research questions which related to this matter. The hypotheses which were assessed for this particular purpose included the following:

- *That the global historical and contemporary jurisprudential developments of ADR have not contributed towards addressing the challenge of inundation in ordinary court systems;*
- *that the existing ordinary justice delivery system and the institutionalised ADR process were not sufficient in addressing the challenge of inundation experienced by ordinary courts in Zambia;*
- *That the existing legal, administrative and institutional framework of dispute resolution is insufficient in underwriting the performance of CCPT to meet its statutory purpose; and,*
- *there is no significant difference in the key performance rudiments of legal, administrative and intuitional, between the Zambian and South African competition and consumer protection adjudication regime,*

These hypotheses were sufficient to deduce the required information, as they prefigured a number of assumptions, diversity and applicability of descriptive designs. To aid this process, use of both qualitative and quantitative methods was employed. Qualitatively, the study does

[234]Abel Lukam R,
[235] White, C.J. Research a Practical Guide, (Pretoria: Ithuthuko Investments Publishing, 2015), p.14.
[236] Ibid p.14.

two things: first, it employs a non-participant observation method on the key developments of ADR adjudication processes and procedures. Specifically, focus was given to the competition tribunal and this exploration was focused on understanding procedure for appeals, preparations for hearing and its interface with disputing parties. Part of the tools used in collecting this information included conducting Semi-structured interviews with the tribunal secretariat and the CCPC staff. Kombo and Tromp, note that Semi-structured interviews offer a considerable amount of flexibility to researchers to examine the respondents using a basic interview structure.[237] Even if it is a guided conversation between researchers and interviewees – an appreciable flexibility is offered to the researchers. [238] Kombo and Tromp add that a researcher can be assured that multiple interview rounds will not be required in the presence of structure in this type of research interview.[239]Thus interviews with the tribunal secretariat and the CCPC staff were conducted to understand the processes involved which have influence on performance. Open-ended questions were used are they the respondent to elaborate on their points. At the point of these interviews, literature had already shown that performance was affected by a number of factors, among which included, internal measures. To have an appreciation of these internal measures, therefore, open ended questions were used with a view to get broader and expressive responses.

Secondly, using content analysis, the paper also examines, compares and contrasts between developments in Zambia and those at global and regional level – with South Africa used as a yardstick. Content analysis, involved mapping the spectrum of multidisciplinary literature regarding the phenomenon in questions and hypothesis. This process included identifying text types and other sources of data, such as existing empirical data and practices.

Quantitatively, the study calculated the disposition times of published decisions of the tribunal from 2014 to 2017. As noted by White, a target population is a pool of potential research participants from which actual respondents are picked.[240] Bernard adds that a population is the entire group that one wants to draw conclusions about.[241] A sample, on the other hand, is the specific group were data will be collected from. [242]Arguably, the size of the sample is always

[237] Kombo K Donold and Delno L.A Tomp. (2012). Proposal and Thesis writing – an introduction. Last Accessed. December, 2019.
[238] Ibid
[239]
[240] White, C.J. Research a Practical Guide, (Pretoria: Ithuthuko Investments Publishing, 2015), 22.
[241]Russell H. Bernard. (2006) Research Methods in Anthropology Qualitative and Quantitative Approaches. Fourth Edition. Rowman & Littlefield Publishers, Inc.p.146
[242] Ibid. p.169

less than the total size of the population. The target population for this exercise was the number and category of cases heard and disposed of by the competition tribunal. As reported earlier, the competition tribunal has presided over One Hundred (100) appeal cases from 2012 and December 2017.[243] Of these appeal cases, about 41 were reportedly conclusively disposed-off.[244] And a thorough assessment of these, from the perspective of when they were commenced and disposed-off, revealed that only 24 cases had such information recorded in the competition tribunal secretariat. These 24 cases were those which were documented from 2014 following the consolidation of the tribunal secretariat and improvement in record management. Therefore, the targeted sample, give the small number, was the entire 24 cases recorded.

In undertaking this analysis, the inferential statistical method[245], particularly the One Sample T Test, was used to test the indicated hypothesis. The One Sample T Test was desired because the data points used were fewer than 30 and this could not inform normal distribution to enable one use other analytical processes. Therefore, the One Sample T Test tested the hypothesis which presaged that if the average duration of disposal of cases was greater than six (6) months then the tribunal was not meeting its envisaged target based on its Key Performance Indicators (KPIs).Therefore, the hypothesis was given as follows:

Hypothesis:

$$H_0: \mu \leq 6$$

$$H_a: \mu > 6$$

While the Test statistic under H_0 is given as $t_{n-1} \sim \frac{\bar{x}-\mu}{s/\sqrt{n}}$.

The above equation was framed on the assumption that the population duration measurements were independent and normally distributed. Therefore, the X-BAR was the sample mean, MU was the population mean or target months for disposal of cases, **'s'** was the sample standard deviation, and 'n' was the sample size.

Note under the null hypothesis, the H_0 was rejected if the test statistic was greater than the critical **value at α=5%.**

[243] Annual Report (2018). Competition and Consumer Protection Tribunal. Last Accessed. May 2019. p.8.
[244] Ibid. p.8.
[245] Note. While descriptive statistics allowed this research to quickly summarize the major characteristics of a dataset, inferential statistics went further uncover patterns or relationships in a dataset and judgments about data in terms of the time it took for cases sampled.

In complementing the above qualitative and quantitative procedures, the study also used the assessment of adjudicative bodies tools described in Sossin and Hoffman and the Theoretical Framework for ADR Application Model Design by Ilter, D and Dikbas, A to evaluate the impact of the competition adjudicative tribunal. This involved using both the internal procedure analysis and the external impact evaluation.

Lastly, this study was carried out in Lusaka, Zambia, the choice of Lusaka was based on purposive sampling. Purposive sampling enables researchers to collect enough information from the data collected.[246] This sampling procedure provides non-probability samples which receive selection based on the characteristics which are present within a specific population group and the overall study.[247] Therefore, the following factors were used for the choice of Lusaka. Firstly, the competition tribunal was domiciled in Lusaka and all the proceedings held there. Secondly, the CCPC, which is the major party to the disputes heard by the competition tribunal, is head quartered in Lusaka. Thirdly, the Judiciary, which anchors the mainstream traditional courts is also head quartered in Lusaka.

1.13 Ethical Consideration

Undertaking such a highly qualitative research of this nature requires ethical considerations to be employed. The research process involved reviewing both public and highly classified information which required the necessary confidentiality. Therefore, the research granted such considerations as well as ensured that procedure and permission was solicited when getting information pertinent to this research, especially from those which required consent from the authors.

1.14 Organisation of the paper

Chapter one introduces the topic and gives a background to the problem. It also projects the death in literature that exist on ADR specifically that which relates performance of adjudicative

[246] Heather Ames, Claire Glenton3 and Simon Lewin: (2019). Purposive sampling in a qualitative evidence synthesis: a worked example from a synthesis on parental perceptions of vaccination communication. l. BMC Medical Research Methodology 19:26
https://doi.org/10.1186/s12874-019-0665-4
[247] Ibid.

tribunals. It outlines the methodology and provides a philosophical examination of the various factors which are required to examine ADR processes. It highlights the basic conceptual ideologies behind each process, and relates these concepts to the manner in which the lawyer and the client relate within the ADR environment.

Chapter two, on the other hand introduces the concept and rationale behind ADR. This is analysed from the historical and theoretical point of view so as to show the evolving developments on ADR. The relevance and importance of this normative background is that it gives the reader who is new to the concept of ADR an idea of the impetus and speed with which the concept of ADR has grown in modern times. This remains an essential aspect as it creates a setting in which the concept of ADR has become an important subject, of interest within the periphery of dispute resolution.

Chapter three discusses the background and concept of dispute settlement resolution in Zambia both from the normative and contemporary point of view. In discussing the latter, emphasis paid on the evolution of ADR in Zambia and the relevant legal framework which exist to support it.

Chapter five, on the other hand, focuses on assessing the existing legal, administrative and institutional framework that exist and how they affect performance of the CCPT in meeting its statutory purpose.

Chapter Six makes a case study with South Africa's Tribunal Adjudicative regime so as to draw lessons and comparisons – given that South Africa tribunal has been in existence for over 17 years.

Chapter seven discusses the CCPT, as an ADR mechanism and is performance in speedy resolution of cases.

Chapter eight makes an attempt to provide general conclusions and key findings.

1.15 Conclusion

The introductory chapter notes that litigious disputes can be time consuming. They also can be protracted and acrimonious and they have potential to destroy commercial relationships of contracting parties, and adversely impacting the supply chain. Literature shows that they can add substantially to business costs, negating much of its benefits or advantages. Merits, therefore, of ADR in addressing the issue of inundation in courts has been emphasized.

To measure the performance of ADR, this chapter disaggregates the elements of ADR and moots the idea of focussing on adjudicative tribunals. Notably, these adjudicative tribunals are premised on the need to provide simple, cheap and speedy justice. Their introduction is part of legal reforms to address the challenge of inundation by the traditional court systems. Literature shows that, in the Commonwealth administrations, there has been rapid multiplication of adjudicative tribunals. And Zambia has copious adjudicative tribunals covering various jurisdictions i.e., social, political, and economic matters. The literature, however, shows that there has been dearth in knowledge on the performance of adjudicative tribunals in contributing towards addressing the challenge of backlog of cases. And in bridging this void, this chapter, therefore, outlines the methodological approach used which involved a mixture of a descriptive and inferential statistical method of analysis and other key instruments as outlined.

And to that effect, the CCPT was used as a pivot for analysing performance, albeit within the periphery of competition and consumer protection adjudication.

CHAPTER TWO

Antique and contemporary developments of Alternative Dispute Resolution (ADR)

2.0 Introduction

Most ADR practitioners prefer the acronym ADR to refer to any form of appropriate dispute resolution methods and processes outside the traditional court process.[248] The Collins Dictionary of Law, further, describe ADR as a means used to resolve disputes without resorting to litigation in the formal court system.[249] With the forgoing therefore, ADR can be defined as a legal method that allows for the resolution of a conflict or dispute through a process that is tailored for the particular form of that conflict or dispute.

The concept behind the introduction of ADR methods was, inter alia, to reduce delays and costs associated with litigation. ADR processes were thus intended to produce better outcomes. [250] The question that, therefore, ensues is to what extent have the global historical and contemporary jurisprudential developments of ADR have contributed towards addressing the challenge of inundation in ordinary court systems. Secondly, how alternative is ADR system to the formal court function. Or should ADR system be considered as a separate entity from the court-based arrangements for civil justice?

In this chapter, these are questions which are addressed with a view to address the general research question and hypothesis[251]. This done through discussing the developments of ADR both from the historical and contemporary perspectives. In this exploration, references are made to key countries which have made significant progress in the codification process of ADR process in their legal system. This chapter also discusses the different types of ADR processes from the context of their evolution and application. It also looks at the difference between adjudicative and non-adjudicative ADR processes with a view to clearly distinguish the two.

[248] See: Goldsmith, J, Pointon G. & Ingen-Housz, A. 2006. ADR in business: Practice and issues across countries and cultures. The Netherlands: Kluwer Law International, p. 7.
[249] Stewart, W.J. (2006). Collins Dictionary of Law. (Online). Available at: (Accessed: 23rd July August 2021).
[250] See Butler, D. & Finsen, E. 1993. Arbitration in South Africa: Law and practice. Cape Town: Juta. Also see Van Zyl, C.H., Verster, J.J.P. & Ramabodu, M.S. 2010. Dispute resolution alternatives: Problems, preference and process. Paper delivered at the Construction, Building and Real Estate Research Conference (COBRA) of the Royal Institution of Chartered Surveyors (RICS), 2-3 September, Université Paris-Dauphine.
[251] Note: The hypothesis is noted as follows: That the global historical and contemporary jurisprudential developments of ADR have not contributed towards addressing the challenge of inundation in ordinary court systems.

2 . 1 International developments of ADR

ADR, as a concept, dates back from time in memorial. And more eminently, the 12th Century is credited to have birthed ADR systems in many societies.[252] Among the counties to have embraced the concept of ADR include China, England and America. [253] Sir Francis[254], quoted by Roney,[255] is among the early scholars to have advanced the concept of ADR. In an expressive commentary, he noted that it was generally better to deal matters by speech than by letter. He was also of the view that it was also better to deal matters by mediation of a third party than by a man's self. This commentary advances the need to settle matters via verbal engagement or through a neutral third party which presents an alternative way of resolving matters and makes one eschew the ailments of civil procedure.[256]

Other vintage advocates of ADR include Mahatma Gandhi. He held a view that the true function of a lawyer was to unite the parties and a large part of his time during his practice was occupied in bringing about private compromises in cases.[257] Preceding views held by Gandhi, other advocates, including Abraham Lincoln, did contribute towards advancing the concept of ADR. Lincoln, is credited to have issued the following counsel 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"*[258].

The above proclamations draw their foundation in the key elements of ADR which have been codified in international customary law. ADR elements, such as arbitration, mediation,

[252] Supra. p.79.
[253] Ibid
[254] 1561 – 1621
[255] John H.B. Roney (1999). 'Alternative Dispute Resolution: A Change in Perception.' International Company and Commercial Law Review. 11, at p.329.
[256] Note ADR is only available in civil cases and not criminal cases.
[257] 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 24 May, 2021.

[258] Winnie .S. Mwenda, (2006) Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia. University of South Africa Press. P. 29. Also see; http://home.att.net~norton/lincoln78.html. Last visited 24 May, 2021

conciliation, ombudsman, and administrative tribunals, each has a distinct and separate, having its unique form, function and method of transforming a dispute.[259]

With this established, a cursory glance on how earlier societies dealt with disputes before establishment written law and the institutions which enforce it is required. Derek Roebuck, whilst using England as a reference point, notes that there was evidence of assemblies in the early days where citizens met to deal with a wide range of disputes between individuals and groups.[260]

In other jurisdiction like the United States of America, ADR has grown rapidly since the political and civil conflicts of the 1960's[261]. The community dispute resolution movement spawned from the social activism of the 1960's and helped to propel the ADR movement generally[262]. 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.[263]

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.[264] For example, the Civil Rights Act, 1964, United States (US) outlawed discrimination in employment or public accommodations on the basis of race, sex, or national origin.[265] This law gave the American people new grounds for seeking compensation for rights violations[266]. During this time, there was also a significant increase in the number of lawsuits being filed in

[259] Note. Arbitration is the procedure where parties in dispute refer the issue to a third party for resolution. Mediation, on the other hand, involves a mediator who helps both sides come to an agreement. In Conciliation, the conciliator takes a more interventionist role between parties. Ombudsmen are independent office-holders who investigate and rule on complaints from members of the public about maladministration in government, public and private sectors. Administrative tribunals are quasi-legal bodies empowered by an Act of parliament or by delegated legislation.

[260] Winnie. S. Mwenda, (2006) Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia. University of South Africa Press. P. 29. Also see; http://home.att.net~norton/lincoln78.html Last visited 28 June May, 2021. Also see: Derek Roebuck (2006). 'The Prehistory of Dispute Resolution in England.' 72 Arbitration International. No.2 at p. 93.

[261] Winnie. S. Mwenda, (2006) P. 30.

[262] Ibid. P 30

[263] Ibid. P. 30. Also see: 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.

[264] Ibid. P. 30. Also see: Stephen B. Goldberg, Eric D. Green and Frank E.A. Sander (1985). Dispute Resolution. p.3.

[265] Stephen B. Goldberg, Eric D. Green and Frank E.A. Sander (1985). Dispute Resolution. p.4.

[266] Ibid. p.4.

United States courts in cases due to the growing women's and environmental movement. This, eventually, led to the system becoming overloaded with cases, resulting in delays.[267]

The delays resulted the push for use of ADR. And the year 1976, the American Bar Association recognized ADR when it established a Special Committee on Minor Disputes.[268] Arbitration was the most preferred and utilised mechanism for resolving disputes. However, the development and application of other ADR techniques such as conciliation, mediation, mini trials, facilitation, expert fact-finding and summary jury trials also ensued.[269] Among the prominent fields to have utilised the ADR system in its formative stages included labour management related disputes. However, the use of ADR in the United States, has significantly increased to other fields including, divorce consumer disputes, parent child disputes among others.[270]

There are a number of reasons credited to this increase. 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[271]; the costs of litigation are high and not ordinarily recoverable[272]; and very high awards are often granted, making litigation an extremely hazardous exercise which has led increasingly to dissatisfaction with the system.[273]

Since the codification of the ADR system in the United States of America, the application and institutionalization of the system has proliferated in other countries. [274] The countries, which include among others Hong Kong, Australia, Canada, United Kingdom, India, South Africa, New Zealand, including Zambia, have adopted ADR systems following experience of inundation in their formal court systems.

Mainly, the concerns of society about the justice systems, are among the compelling reasons as to why there has been an increase in the use and interest in ADR in aforementioned countries. In Wales and England, the justice system was faced with many difficulties indistinguishable to

[267] Ibid
[268] Winnie .S. Mwenda, (2006) P. 31. Dana H. Freyer (1997)
[269] Ibid. p.31
[270] Ibid.p.31
[271] Henry J. Brown and Arthur L. Marriott (1993). ADR Principles and Practice. p.14.

[272] Ibid.p.14
[273] Ibid.p.14
[274] Ibid.p.15

those of the United States of America.[275] In these countries, the poor and rich citizens could afford litigation[276]. This is because the poor were legally aided while the rich can afford it. Therefore, those excluded from this strata of category were those who faced challenges in accessing the justice system due to costs in litigation.[277] The promulgation of the Civil Procedure Rules (CPR) in 1999, was therefore, to act as a catalyst in the promotion of access and speedy justice through ADR. English judges, using Rule 1.4 of the CPR, encouraged litigants to use ADR systems.[278]

In Germany and France, which are the also leading jurisdictions in the evolution of ADR in the European Union (EU), challenges associated to cost and delay in the adjudicative process were reportedly beyond the means of the average citizen[279]. In Italy, the delay and cost in using courts was seen as a public scandal[280]. These challenges led the European Commission (EC) to consult widely and recommended use of ADR which was adopted.

In other jurisdictions like India, the ADA initiative also has its roots to ancient times. Disputes, during the pre-British colonial time, were resolved by the head of the family or the clan.[281] Likewise, when there was common trade or corporations among the people, they used to appoint a person to resolve the disputes.[282] During the colonial rule, many legislations were introduced and change were made in the administration of country.[283] The courts, in 1772, were empowered to encourage disputants to refer disputes to arbitration.[284] In 1859 the Code of Civil Procedure (CPC) was enacted. Sections 312 to 327 of the act dealt with arbitration but in 1882 these sections which related to arbitration were repealed.[285] In 1899 The Indian Arbitration Act, 1899 was enacted to give effect to ADR.[286] This was, however, later repealed with The Arbitration Act, 1940.

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[275] (1993). *ADR Principles and Practice*.
[276] Winnie .S. Mwenda, (2006) P. 33. Dana H. Freyer (1997)
[277] Ibid
[278] Note Rule 1.4 states that: Judges' actions will be 'Justly' by 'actively managing cases'. This is through…. (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
[279] Arthur Marriot, (2004). Address to the International Congress and Convention Association (ICCA) Conference. Beijing on 18 May, 2004.
[280] Ibid
[281] Via Meditation and Arbitration Centre: (2017): Evolution and Codification of ADR Mechanism in India. Last visited 28 May, 2021. https://viamediationcentre.org/readnews/MzEx/Evolution-and-Codification-of-ADR-mechanism-in-India
[282] Ibid
[283] Ibid
[284] Note: This was either at the request of the parties or by the courts' discretion.
[285] Ibid
[286] Ibid

All these developments in the justice system were mooted with the view to address the ensuing developments of inundation in the court system. Sir Thomas Bingham, notes that the cost, delay, anxiety and uncertainty in the litigation process made the experience scarcely to be endured. [287] Legal and judicial reforms, therefore, continued. In 1996, the Arbitration and Conciliation Act, 1996, was enacted[288] to codify all laws dealing with ADR related matters[289]. Other than The Arbitration Act, 1940 which was used for referring disputes to ADR mechanisms, other laws which were in force included The Arbitration (Protocol and Convention) Act, 1937 which was used for the enforcement of foreign awards.[290] This also applied to The Foreign Award (Recognition and Convention) Act 1961 which was enacted following India's ratification of the New York Convention.[291]

Notably, all these legislations were said to be unclear and ambiguous. In the M.S Guru Nanak Foundation vs. Rattan Singh & Sons[292] case, the Supreme Court expressed their opinion on the Arbitration Act, 1940 as follows:

> *"The way in which the proceedings under the act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the act have become highly technical and accompanied by unending prolixity, at every stage providing a legal trap to the unwary."*

Such position and reforms at international level, such as the promulgation of the United Nations Commission on International Trade Law (UNCITRAL) model law necessitated the enactment of The Arbitration and Conciliation Act, 1996.

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[287] Note: These views were noted in his foreword to Rao and Sheffield's book. 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). Also see Winnie .S. Mwenda, (2006) p. 33

[288] Via Meditation and Arbitration Centre: (2017): Evolution and Codification of ADR Mechanism in India. Last visited 28 May, 2021. https://viamediationcentre.org/readnews/MzEx/Evolution-and-Codification-of-ADR-mechanism-in-India

[289] Note: Note that The Arbitration and Conciliation Act, 1996 was developed based on the UNCITRAL model law which was adopted and signed by India.

[290] Ibid

[291] Ibid

[292] 1981 AIR 2075, 1982 SCR (1) 842

Therefore, with this abridged account of historical developments of ADR from an international perspective, the subsequent section discuses different types of ADR.

2.2 ADR Mechanisms and Processes

The modification of customary litigious practices, processes and procedure and the revision of the general values underlying the public adjudicative process has been evolving overtime. Abundant reasons for dissatisfaction with the traditional judicial process have been highlighted in the preceding section. And a brief diagnosis of the ailments of civil procedure is an incongruous starting point for a work looks at the performance and types of ADR systems. According to Slapper and Kelly,[293] ADR is a means of resolving disputes without resorting to court action and it available in civil cases and not criminal cases. As highlighted in the preceding sections, ADR includes arbitration, mediation, conciliation, ombudsman, and adjudication through administrative tribunals. Others include, private judging, med-arb, mini-trial, early neutral evaluation, summary jury trial, neutral fact-finding expert, last offer arbitration and mediation.[294]

Although the characteristics of these ADR procedures justice vary, all share a few common elements of distinction from the formal judicial structure.[295] These elements permit them to address development objectives in a manner different from judicial systems. [296]Most fundamentally, ADR processes are less formal than judicial processes. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or rules of evidence. [297]This informality is appealing and important for increasing access to dispute resolution for parts of the population who may be intimidated by or unable to participate in more formal systems. [298] Equally important, ADR programs are instruments for the application of equity rather than the rule of law.[299] Each case is decided by a third party, or negotiated between disputants themselves, based on principles and terms that seem equitable in the

[293] Gary Slapper & David Kelly, (2006). The English Legal System, - London: Cavendish,
[294] Winnie. S. Mwenda, (2006) p. 35.
[295] Scott brown, Christine Cervenak, David Fairman, (2017). Alternative Dispute Resolution Practitioners Guide. Conflict Management Group (CMG). p.6

[296] Ibid. p 6
[297] Ibid. p 6
[298] Ibid. p6
[299] Ibid. p 6

particular case, rather than on uniformly applied legal standards. [300] ADR systems cannot be expected to establish legal precedent or implement changes in legal and social norms. ADR systems tend to achieve efficient settlements at the expense of consistent and uniform justice

The ADR processes are either adjudicative or non-adjudicative in nature.

2.3 Adjudicative and non- Adjudicative ADR Procedures

ADR processes tend to fall into one of two categories namely *adjudicative and non-adjudicative.* The former involves an independent third-party reaching a decision on the merits of a dispute[301]. This entails that the adjudicative procedures, which include arbitration, adjudication and binding expert determination among others, are determinative and lead to a binding decision. The latter, which include mediation or conciliation is facilitative in nature as it focusses on assisting the two parties to negotiate a settlement[302] without adjudication.

In view of the foregoing, ADR, arguably, represents a different paradigm of justice. According to Robert Coulson:[303]

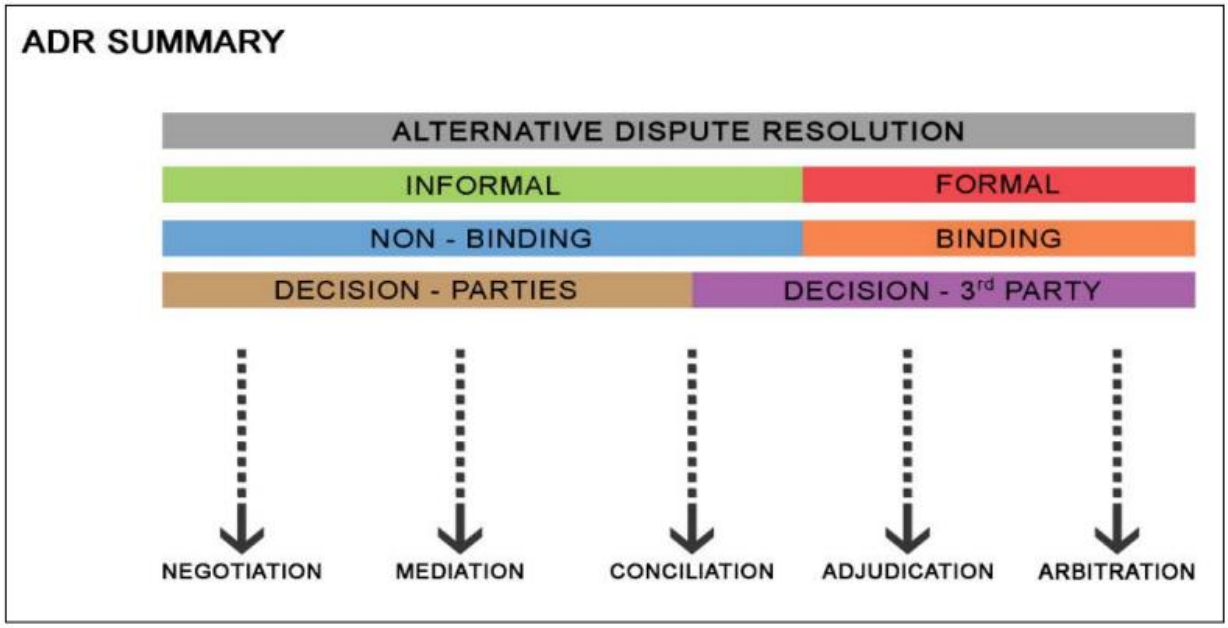
> *"Litigation has not kept up with modern, fast-moving society… there have been revolutionary changes in the business practices since the basic court structure was adopted from English Common Law… Compared to modern business, Civil Courts have changed very little… Alternative Dispute Resolution (ADR) allows the lawyers to use new processes, encourages problem-solving attitude and an openness to compromise"*

As indicated, ADR processes manifest in different ways. Each process is distinct and separate, having its unique form, function and method of transforming a dispute[304]. Outwardly, this represents a diverse collection of disjunctive processes.[305] Although there are many different

[300] Ibid. p 6
[301] Herbert Smith Freehills, (2021). ADR in construction disputes: arbitration and dispute boards are not the only answer. https://www.lexology.com/library/detail.aspx?g=6dd60162-37d0-4536-b0a7-58c3aa098863. Last visited March, 2021
[302] Ibid
[303] Robert Coulson, (1987). The Immediate Future of Alternative Dispute Resolution, 14 Pepp. L. Rev. Issue. 4 Available at: https://digitalcommons.pepperdine.edu/plr/vol14/iss4/3. 773
[304] John Andrew Faris. (1995), an Analysis of the Theory and Principles of Alternative Dispute Resolution.
[305] Gary Slapper & David Kelly, (2006). The English Legal System, - London: Cavendish.

methods and procedures of ADR, the Figure below shows a summary of the cited processes in the preceding sections and their effect.

Figure 4: ADR Processes and their Effect



Source: UFS (2019)[306]

2.4 Mediation and Conciliation

The term conciliation is often used interchangeably with mediation.[307] Conciliation is where a third party, the conciliator, simply structures and leads the negotiations.[308] The conciliator does not deal with the substantive matter of the issue but rather acts to bring the parties together and facilitate their discussions.[309] In most jurisdictions, an Ombudsman[310] also acts as a conciliator who, in most cases, also play a key role in other ADR processes. [311]

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307 Winnie. S. Mwenda, (2006) P. 41.

308 Herbert Smith Freehills, (2021). ADR in construction disputes: arbitration and dispute boards are not the only answer. https://www.lexology.com/library/detail.aspx?g=6dd60162-37d0-4536-b0a7-58c3aa098863. Last visited March, 2021

309 Ibid

310 According to Mirlinda Batalli (2015) Role of Ombudsman Institution Over the Administration). SSRN Electronic Journal. DOI:10.2139/ssrn.2699061. https://www.researchgate.net/publication/314539863_Role_of_Ombudsman_Institution_Over_the_Administration An ombudsman is an official, usually appointed by the government, who investigates complaints.

311 Note: Whilst an Ombudsman is a key part of the ADR landscape, there are certain features of an Ombudsman scheme that differentiates it from other ADR models. This is particularly the case in private sector schemes which offer a genuine alternative to court action. An Ombudsman's remit is wider than the dispute before it and whilst

Mediation, on the other hand, is the facilitation of a negotiated agreement between disputing parties by a neutral third party who has no decision-making power.[312] In this process, a neutral, trained mediator works to help disputants come to a consensus on their own. [313] Therefore, the mediator, rather than imposing a solution, will try to engage the parties more deeply on issues at hand stake. Therefore, the mediator takes an active role in assessing the merits of the dispute but does not impose a decision, although he or she may indicate which arguments might be considered particularly strong by a court or arbitral tribunal. [314]

The main role of the mediator is to facilitate discussion between the parties and help to identify common ground or areas where one or both parties could compromise.[315] When performed well, and when the parties are willing to reach a settlement, this approach can lead to the negotiation of an agreement on some or all of the issues in dispute.[316] The role of a mediator distinguishes mediation from mere Conciliation. Conciliation is often viewed as being more facilitative and non-interventionist while mediation is seen to allow for more mediator pro activism.[317] However, the reverse can also be true. The accompanying process in conciliation may be less structured than in mediation but a conciliator still endeavors to bring disputing parties together to assist them to focus on the key issues.[318]

Historically, labour disputes were the first significant area in which mediation was used.[319] Attempts at mediating labour disputes were made in the 19th Century both in England and the United States. In the US, mediation dates from 1913 when Commissioners of Conciliation were appointed to deal with labour related matters.[320] Resort to mediation increased in the 1930's

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all ADR schemes offer dispute resolution, an Ombudsman has been held out as a "*gold-plated service*". In addition to the dispute, however, an Ombudsman has a role to improve standards in the sector under its jurisdiction by providing feedback, training and identifying themes. Another key difference is the inquisitorial approach that an Ombudsman takes. Not just considering the evidence before it, an Ombudsman will seek that which is missing and assist the parties to gather the evidence they need to support their claim. When considering a case, an Ombudsman will have regard to the relevant law. Delaware Department of Justice Attorney General - Kathy Jennings https://attorneygeneral.delaware.gov/fraud/cpu/ombudsperson/alternative-dispute-resolution/

[312] Ibid
[313] Katie Shonk. (2021). what is Med-Arb? The pros and cons of med-arb, a little-known alternative dispute resolution process. Blog July 12th, 2021. https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/ . Last visited August 2021
[314] Herbert Smith Freehills, (2021).
[315] Ibid
[316] Ibid
[317] Winnie .S. Mwenda, (2006) p. 41.

[318] Ibid p. 39
[319] Ibid p. 40
[320] Ibid p. 41

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.[321]

Across the mediation field, mediation is generally understood as an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement[322]. This common formulation captures some of the major features of the process, especially its informality and consensuality. [323] It also reflects the view that the most significant effect of the process is the production of a voluntary settlement of the dispute[324]. Settlement is often seen as the primary or even sole value of mediation in institutional settings like the courts, where disposition of cases is the main motivation for using mediation[325]. Therefore, with the aid of their mediator, disputants ideally reach a sustainable, voluntary, and often nonbinding agreement.[326]

2.5 Negotiation

According to Chambers English Dictionary, negotiation is defined as a bargain or to confer for the purpose of mutual agreement or to arrange for by agreement.[327] It has also been defined as the process used to satisfy the needs of someone when someone else controls what that person want.[328] Negotiation normally occurs because one has something the other wants and is willing to bargain to get it.[329]

It is therefore, 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. Temitayo, notes that negotiation act as a tool for structural commercial agreement, resolving conflicts, managing operational problems as well as social relationships.

[321] Ibid p. 42
[322] Robert A. B. Bush and Joseph P Folger, (2005) the promise of Mediation: the transformative approach to conflict. United States of America. Jossey-Bass A Wiley Imprint.
[323] Ibid p. 8
[324] Ibid p. 8
[325] Ibid p. 8
[326] Katie Shonk. (2021). what is Med-Arb? The pros and cons of med-arb, a little-known alternative dispute resolution process. Blog July 12th, 2021. https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/. Last visited August 2021
[327] Bello Adesina Temitayo. (2014) Negotiation as a tool for Dispute Resolution and Conflict Management in a changing world. Journal Babcock University School of Law/. P. 6.N
[328] Winnie .S. Mwenda, (2006) p. 46. Also see Robert Maddoc (1988). Successful Negotiations.
[329] Ibid. p. 46

[330] It is well established that the traditional method of resolving conflict is through the court process, but attention is not given to the relationship of the parties in disputes. [331] Mwenda further contends that the parties to a dispute negotiate or talk among themselves to resolve the conflict or to work out a compromise.[332] This was seen to be a simplest and quickest way of settling commercial disputes.[333] This was because the parties themselves were in the best position to know the strengths and weaknesses of their own cases. [334]Thus, disputants are in the best position to discuss and work out a compromise.[335]

Temitayo further notes that it was well established that the traditional method of resolving conflict was through the court process, but attention was not given to the relationship of the parties in disputes.[336] The conflict may be resolved but the parties will be left with resentments towards each other, thereby barring any form of future dealings which may be beneficial to the both of them. [337] Negotiation, on the other hand, employed skills and strategies that would maintain the status quo between the parties. [338]

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. Wang notes that 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.[339] Negotiation offers the advantage of allowing the parties themselves to control the process and outcome in that no third party or neutral is involved.[340] The parties decide what the important facts are and they decide together on the best solution. [341]An agreement or solution reached after negotiation is obviously more satisfying to the parties than one reached after the intervention of a third party.[342]

[330] Bello Adesina Temitayo. (2014) Negotiation as a tool for Dispute Resolution and Conflict Management in a changing world. Journal Babcock University School of Law/. P. 6.
[331] Ibid P. 6.
[332] Winnie .S. Mwenda, (2006) p. 47
[333] Ibid p. 47
[334] Ibid
[335] Ibid
[336] Bello Adesina Temitayo. (2014) Negotiation as a tool for Dispute Resolution and Conflict Management in a changing world. Journal Babcock University School of Law/. p. 7.
[337] Ibid. p. 7.
[338] Ibid. p. 7.
[339] 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.

[340] Winnie. S. Mwenda, (2006) p. 47
[341] Ibid p. 47
[342] Ibid p. 48

2.6 Arbitration

Arbitration is also one of the most widely known forms of ADR and there is no confusion about the term arbitration. Through the centuries, arbitration has been a term familiar in ancient systems of law as a legal proceeding. And its evolution has received mixed positions. Judge Paul Hays, a former arbitrator and labor law professor, launched a massive attack on the entire institution of labor arbitration. His view, as fully quoted below, was that arbitration systems were not founded on law. [343]

> *"Labor arbitration has fatal shortcomings as a system for the judicial administration of contract violations… An arbitrator is a third party called in to determine a controversy over whether one of the parties to the collective bargaining agreement has violated that agreement... he does not in fact have any expertise in these matters and is not actually expected to have any, since it is expected that he will listen to the evidence presented by the two parties and decide on the basis of that evidence whether the charge of contract violation is or is not sustained. For his task he requires exactly the same expertise which judges have and use every day… "There are only a handful of arbitrators who, like Shulman and Cox, have the knowledge, training, skill, and character which would make them good judges and therefore make them good arbitrators… A system of adjudication in which the judge depends for his livelihood, or for a substantial part of his livelihood or even for substantial supplements to his regular income, on pleasing those who hire him to judge is per se a thoroughly undesirable system… "I believe that the courts should not lend themselves at all to the arbitration process. Labor arbitration is a private system of justice not based on law and not observant of law. There is no reason why it should be able to call upon the legal system to enforce its decrees… We know that a large proportion of the awards of arbitrators are rendered by incompetents, that another proportion, we do not know how large but are permitted by the circumstances to suspect that it is quite substantial, are rendered not on the basis of any proper concerns, but rather on the basis of what award would be best for the arbitrator's future."*

The response to the views expressed by Judge Hays was instantaneous. Bernard Dunau tersely, observed that it was unfortunately true that the level of judging, whether judicial,

[343] Paul Hays, (1965). The Future of Labor Arbitration, 74 Yale L.J.

administrative or arbitral, was in the overall quite mediocre, but for those who had worked in all three forums, the arbitrator did not suffer by comparison.[344]

Scholars, like Professor Bernie Meltzer have contested Judge Hays' claim that arbitrators' economic self-interest linked with future acceptability, will distort adjudication. He opined that;

> *"The principal question for an arbitrator, assuming for the moment that he is ruled by a greedy desire for more customers, is how to reduce the risk implicit in the fact that one party generally will lose. I can think of no better answer to that question than conscientious workmanship, for such workmanship appears to be the best protection against the veto that labor and management will each be able to exercise in the future. The need for future acceptability would thus appear to bring the arbitrator's self-interest and disinterested adjudication into harmony rather than conflict. Consequently, even if one accepted a devil's view of arbitrators as a group ruled by love of money, it would not follow that the pressure for future acceptability would corrupt the decisional process".*

Additionally, Judge Edwards notes that arbitration is superior to litigation in comparable cases. To this effect he raises two suggestions. Firstly, he argues that the results in arbitration were, on the average, qualitatively better than judicial decisions[345]. Secondly, he contends that the adversaries in a case were generally more satisfied with arbitration opinions than with those issued by courts.[346] It is rather reckless for a judge to issue such as sweeping statement and draw conclusions based solely upon subjective impressions. However, Judge Edwards justifies his position by arguing that judicial processes were heavily steeped in procedures.[347] Many cases may be won or lost on procedural technicalities which have nothing to do with the merits of the case. These procedural rules often are vitally important to preserve the integrity of the judicial process, but they also may obscure the real dispute between the parties[348]. In complex litigation, involving difficult public law issues, it makes good sense to channel a case pursuant

[344] Bernard Dunau, (1966). Review of Hays, Labor Arbitration: A Dissenting View, 35 The American Scholar 77 4-76
[345] Harry T. Edwards, (2016). Advantages of Arbitration over Litigation: Reflections of a Judge. Member, National Academy of Arbitrators; Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, Washington, D. C. p.23
[346] Ibid. p 24
[347] Ibid. p 24
[348] Ibid. p 24

to rigid rules of procedure. But this, according to Judge Edwards, should not be the case for civil or private law. However, it must be noted that, although procedural processes, are recognized in arbitration, they are not nearly as pervasive as in litigation.

In view of the foregoing, therefore, arbitration could be said to have been developed as a flexible procedure to obviate the cumbersome and time-consuming processes of the ordinary courts. Notably, the procedure before an arbitrator is similar to that before a court.[349] 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.[350].

Arbitration has a number of advantages over litigation. Firstly, this hinges on expertise. Selection of Arbitrators is normally from, a pool of professionals. Typically, these are those with experience in the particular field and may provide a greater level of expertise and judgment than a judge[351]. However, such persons should have a greater capability to comprehend with legal and project issues and documents and to scrutinize liability and damages claims common to the particular matter. [352]. Secondly, when in court, judge's decisions are constrained by statutory and case law and the conduct of the trial is governed by established rules of evidence. In contrast, an arbitrator has considerable flexibility to consider any evidence deemed relevant and may issue an award based upon perceptions of fairness or equity and not necessarily on the evidence or rules of law. Thirdly, in relation to jointer of parties to the proceedings, it must be noted that parties, in an arbitration procedure, may be compelled to participate in the proceedings only by agreement[353]. Thus, if any additional parties are necessary for complete relief, those other parties either must have agreements requiring such participation or otherwise must consent to their joinder in the proceedings[354]. In contrast, court proceedings, all persons and entities involved in a dispute typically can be joined as parties.

Fourthly, in terms of appeal rights, an arbitration award is final and binding and, in many

[349] Winnie .S. Mwenda, (2006) p. 42
[350] Ibid. p 42
[351] Harry T. Edwards, (2016). Advantages of Arbitration over Litigation: Reflections of a Judge. Member, National Academy of Arbitrators; Circuit Judge, United States Court of Appeals for the District of Columbia Circuit, Washington, D. C.
[352] Ibid
[353] Tucker Arensberg Attorney: The Advantages and Disadvantages of Arbitration vs. Court Litigation. https://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation/. Last visited 25th June. 2021
[354] Ibid

jurisdictions, there is a limited right of appeal, even if the arbitrator makes a mistake of fact or law. On the other hand, although trial court verdicts are not easily reversed, judges sometime make mistakes and the ability to request a review of a decision by an appellate panel is an important procedural safeguard.

Fifthly, arbitration often is less costly than court litigation, primarily due to the compressed schedule for the completion of discovery and trial[355]. In court litigation, significant expenses are devoted to pre-trial discovery processes, such as written interrogatories and depositions of witnesses. [356] However, the discovery process that is prevalent in litigation increasingly has become a regular part of arbitration as well, thus increasing costs. Sixthly, appeal rights. An arbitration award is final and binding and, in many jurisdictions, there is a limited right of appeal, even if the arbitrator makes a mistake of fact or law.[357] Although trial court verdicts are not easily reversed, judges sometime make mistakes and the ability to request a review of a decision by an appellate panel is an important procedural safeguard.[358]

Further, costs are in most cases lower than litigation costs and offers quicker resolution of disputes.[359] However, the benefits of less costs and quicker resolution of disputes associated with arbitration may not be realised in cases involving complex issues against reluctant respondents as such cases may take long periods to dispose of thereby increasing the costs. When in court, judge's decisions are constrained by statutory and case law and the conduct of the trial is governed by established rules of evidence.

2.7 Adjudication and adjudicative tribunals

Adjudication refers to the process by which the judge decides the case before him her.[360] Adjudication may be defined as a process where a neutral third party gives a decision, which is binding on the parties in dispute unless or until revised in arbitration or litigation.[361]

[355] Ibid
[356] Ibid
[357] Winnie .S. Mwenda, (2006) p. 42
[358] Ibid p. 43
[359] Ibid p. 42
[360] Nicholas Gould, (2007). Adjudication and ADR: an overview. Fenwick Elliott LLP. https://www.fenwickelliott.com/sites/default/files/nick_gould_-_adjudication_and_adr_-_an_overview_matrics_paper.indd_.pdf last visited. 24th July, 2021.
[361] Ibid

Mwenda notes that Adjudication mainly involves an independent third party considering the claims of disputing parties and making a decision.[362] The adjudicator, just like a mediator, is usually an expert in the subject matter in dispute. Mwenda notes that an adjudicator is an expert or a group of people chosen based on their appropriate experience and technical capacity.[363] Faris, observes that adjudication is a process similar to expert determination and involves a neutral and independent third party, an adjudicator, who uses his or her own knowledge and investigations, whilst also weighing the evidence presented by the parties, in order to reach a legally binding decision. [364]

In some jurisdictions, adjudicators perform their function through forums called adjudicative tribunals. Adjudicative tribunals refer to independent administrative bodies that are created by statutes to resolve disputes between conflicting parties by performing quasi-judicial functions that are otherwise fulfilled by the formal judicial system.[365] These adjudicative tribunals are premised on the need to provide simple, cheap and speedy justice[366]. Their introduction is part of legal reforms to address the challenge of inundation by the traditional court systems. In the Commonwealth administrations, there has been rapid multiplication of adjudicative tribunals[367]. And Zambia has copious adjudicative Tribunals[368] covering various jurisdictions i.e., social, political, and economic matters. These are discussed in the subsequent chapters.

With the foregoing, therefore, it is clear that an adjudicator is appointed to the case and examines the evidence of the parties and investigates the dispute fully. The Adjudicator will decide how the dispute is to be resolved based on the agreed standard at law. The hearing is confidential and sometimes public. The net outcome of this process and procedure is cheaper and speedy adjudication.

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

[362] Winnie .S. Mwenda, (2006) p. 42
[363] Ibid. p. 42.
[364] John Andrew Faris. (1995), an Analysis of the Theory and Principles of Alternative Dispute Resolution.

[365] Sossin, Lorne, and Steven J. Hoffman Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. (2012). Journal of Health Economics, Policy and Law 7: 147-174.
[366] Josi K.C "Constitutional Status of Tribunals" (1999). Journal of Indian law school. Vol 41, No 1 pp 116 -119
[367] Hoffman, Steven J. and Sossin, Lorne, "Evaluating the Impact of Remedial Authority: Adjudicative Tribunals in the Health Sector" (2009).Osgoode Legal Studies Research Paper Series. 143.
[368] These include, the Lands Tribunal, Tax Appeals Tribunal, Local Government Elections Tribunal etc.

effectively 'mini-arbitration'.[369] Sometime the panel is composed with members with limited knowledge on judicial matters - save for their experience in the subject matter. Further, some adjudicative processes and their outcomes are not legally binding. This entails that, the result of adjudication, may not be directly enforceable. This entails that one can use the result to seek judgment, but one cannot use the results as if it were a judgment.

2.8 Other Hybrid processes of ADR

While the types of ARD procedures described above provide basic alternatives to formal adjudication, ADR also encompasses a variety of hybrid dispute resolution processes that use neutrals in ways that represent variations on the basic alternatives.[370] Some of these hybrid processes are binding.

2.8.1 Med- Arb

Med-Arb is an ADR concept that is an amalgamation of mediation and arbitration. Its development and evolution is founded on the understanding that 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.[371]

In med-Arb the parties try to reach an agreement through mediation and when that fails, they resort to arbitration.[372] As such, it is thought to get the best of both worlds.[373] In this process, parties first reach agreement on the terms of the process itself.[374] And unlike in most

[369] Winnie. S. Mwenda, (2006) p. 44. Also see. 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.
[370] Robert Mnookin. (1998). Alternative Dispute Resolution. Robert Mnookin. Harvard University. Last visited. July, 2021. p. 8
[371] Winnie .S. Mwenda, (2006) p. 44
[372] Ibid
[373] Ibid
[374] Katie Shonk. (2021). what is Med-Arb? The pros and cons of med-arb, a little-known alternative dispute resolution process. Blog July 12th, 2021. https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/ . Last visited August 2021

mediations, the parties must first agree in writing that the outcome of the process will be binding.[375]

Following this, Shonk further argues that, the parties are, therefore, encouraged to negotiate a resolution to their dispute with the aid of a mediator.[376] As in a traditional mediation, the mediator may encourage each party individually to discuss possible proposals in addition to bringing disputants together to air their views and brainstorm solutions.[377]

In med-arb, if the mediation ends in an impasse, or if issues remain unresolved, the process isn't over. [378] When such a situation arises, Mwenda notes that parties can resort to arbitration. The mediator can assume the role of arbitrator and render a binding decision.[379] The precondition for this take over should be that the mediator should have experience in Arbitration. Alternatively, Shonk notes that a different, arbitrator can take over the case after consulting with the mediator.[380]

The advantage of med-arb is that the same neutral acts as mediator and if necessary, as arbitrator.[381] The neutral in these circumstances will obviously have the advantage of knowing the facts of the case well at the arbitration stage and this may lead to an efficient handling of the dispute.[382] Further, med-arb can also be cost-effective.[383] This is because, when disputants hire one person to serve as mediator and arbitrator, they eliminate the need to start the arbitration from square one if mediation fails.[384]

However, there are caveats to factor in when considering med-arb. Brown and Marriot[385] notes that there are serious questions which arise from a combination of roles. This was being raised form the context that if the mediation process does not succeed and arbitrators reassume their role with same mediator, conflict of interest may arise.[386] Shonk further notes that when disputants are aware that their mediator could ultimately make a binding decision about the case, they may feel inhibited about sharing confidential information hinging on their interests. In view of this reasoning, if the mediation moves to arbitration, it could be difficult for the

[375] Ibid Last visited August 2021
[376] Ibid Last visited August 2021
[377] Ibid Last visited August 2021
[378] Ibid Last visited August 2021
[379] Winnie .S. Mwenda, (2006) p. 44
[380] Katie Shonk. (2021). Last visited August 2021
[381] Supra. p. 44
[382] Ibid. p. 44
[383] Katie Shonk. (2021). Last visited August 2021

[384] Ibid. Last visited August 2021
[385] Henry J. Brown, and Arthur L. Marriot (1993). *ADR Principles and Practice.* p.5.
[386] Ibid p.5.

mediator turned arbitrator to forget the confidential information presented before him or her and focus exclusively on jointly shared information.[387] Disputants might avoid this possibility by having different individuals serve as mediator and arbitrator, though this solution requires additional time and cost. [388]

2.8.2 Mini- Trial

A Mini-Trial is a form of mediation in which the parties select a neutral advisor, who orchestrates for the benefit of an executive from each disputant an abbreviated formal hearing where the lawyers from each side present the core legal arguments and evidence that will be presented in court.[389] In some instances, mini-trial, the parties may not be represented by attorneys.[390] Thereafter, the advisor works with parties to negotiate for a resolution.[391] And if the process is successful, the settlement is often set out in a legally enforceable written document.[392] However, if an agreement is not reached, a recommendation would be made for the case to go to court.[393] The parties then use this additional information to discuss settlement.[394] If settlement is not reached, the procedure has no evidentiary effect and the case goes to court.[395]

Among the cited advantages of a mini trial include reduced lengthy trials and cases are not subjected to formal rules of procedure or evidence. Additionally, Morgan summarizes the key advantages as follows;

- It allows principals from both parties to make decisions. Any agreements that come out of the Mini-Trial process will be a joint decision made by the principals, not dictated terms from a third-party arbitrator or judge;
- Permits greater flexibility in final settlements. Instead of the winner or loser concept

[387] Ibid p.5.
[388] Ibid p.7.
[389] Robert Mnookin. (1998). Alternative Dispute Resolution. Robert Mnookin. Harvard University. Last visited. July, 2021. p. 8
[390] Winnie .S. Mwenda, (2006) p. 49
[391] Supra. p. 8
[392] Supra. p. 49
[393] Henry J. Brown, and Arthur L. Marriot (1993). *ADR Principles and Practice.* p.5.
[394]
[395]

found in litigation, the parties can jointly decide on a variety of satisfactory outcomes where both sides can claim victory;

- Allows for continued relationships. Because both parties play a role in the final outcome, they generally feel good about the decision and the opposing party. A win-win situation fosters continued working relationships;
- Allows for significant cost and time savings. Major litigation can take months or even years, which translates into enormous legal fees. Mini-trials limit the time for discovery, presentations, and the number of key witnesses, thereby, reducing the cost involved in resolving the dispute;
- Focuses both parties on best case presentations. Since the length of presentations and number of exhibits are often limited, the Mini-Trial forces parties to present their strongest arguments up front; and,
- Allows for candid communications. Due to its informal, non-litigative environment and confidentiality, parties often feel more comfortable in openly discussing issues and possible solutions that would not have been discussed in formal litigation.

Despite the indicated advantages, numerous disadvantages exist. [396] Morgan further notes that, the following disadvantages;

- The Mini-Trial is one of the most time consuming and costly ADR methods; however, it is far less time consuming when compared to formal litigation;
- Since Mini-Trials are not performed in a court of law, there is no protection against parties making false or misleading statements. This drawback is present in most ADR settings and most attorneys are capable of protecting their clients from misleading statements. Informal cross-examinations and rebuttals by parties in the Mini-Trial process also help protect against misleading statements;
- Second guessing of the principal's decision can be a problem since few members of his organization are actually present. The principal makes the best decision based on both parties' cases. More than a few principals have been accused of "giving away the store"

[396] Steven A. Morgan (1997). The Mini-Trial: A Valuable Alternative Dispute Resolution Tool for the United States Navy. Naval Postgraduate School Monterey, California N PS Archive 1997.12 Morgan, S. p. 24

during the mini-trial. If Senior Management has confidence in their principal's ability, this should not be a major problem;

- The principal's decision can have a demoralizing effect on lower levels of management. Since lower management was not part of the final decision, they may feel that the principal gave the dispute only a brief, cursory review prior to settling. This possible resentment by lower management can be overcome by providing a tactful debrief that explains the reasoning and rationale for the decision; and,
- The Mini-Trial can tie up inordinate amounts of Senior Management's time. Although the Mini-trial is relatively short in duration, intensive preparations and the actual trial will absorb most of the senior manager's valuable time.

2.8.3 Private Judging or Rent a Judge

Private Judging or Rent a Judge involves a neutral expert who is appointed to preside over the disputed matters. The name rent a judge has been given to this form of alternative dispute resolution, mainly because most of the individuals who are hired for the private judging of disputes are retired judges. Arnold and Schuurman[397] define Private Judging or Rent a Judge as;

> *A court-annexed process available when statutes or local court rules permit court referral of cases to neutral third parties typically meaning: (i) a fairly formal case presentation as in a court trial commonly following traditional formalities and procedural and evidentiary rules; (ii) presented by counsel, witnesses, and documentary evidence essentially as in regular trial; (iii) to a privately selected and privately paid neutral, usually a retired judge, who presides over the proceedings as a judge, and who has the same powers as a trial judge; (iv) wherein a record of the proceedings is usually made by a privately retained court reporter; (v) wherein the private judge reports his decision to the referring court and judgment is entered on the decision as if the action had been decided by a court; and (vi) the parties' rights to appellate review and enforcement of the decision are the same as if the judgment had been entered by a district court.*

[397] Tom Arnold & Willem G. Schuurman, (1991) Alternative Dispute Resolution in Intellectual Properzy Cases, in PATENT, at 437, 506-07 (PLI Pat., Copyrights, Trademarks, and Litig. P. Handbook Series No. 321, 1991)

Therefore, the judge or neutral expert is typically a third party with expertise on the subject matter.[398] He or she may be selected either by the parties voluntarily or by a Court.[399] However, for one to have an understanding of the ADR procedure in detail, there is need to breakdown the above definition. Therefore, by breaking down this definition into its constituent elements and explaining those elements in a bit more detail, the processes and concepts involved in private judging will become clearer. [400] First, a private judge proceeding generally follows the format of a trial in the traditional litigation format. The rules of trial procedure apply and the judge exercises the authority of a normal judge, but the parties can also agree to relax the rules of procedure and eliminate some of the normal formality of the process.[401] One limitation and difference from the normal context of civil litigation is that both parties must waive any right they have to a jury trial in order to have a private judge hear their dispute.[402] This provision helps to make the rent a judge system more expeditious, because in traditional litigation, an enormous amount of time can be spent in selecting a jury. This lack of a jury in private judging can actually be seen as one of the system's benefits, because much of the litigation that is normally referred out of the court system for private judging involves very complex or technical issues of substantive law.[403] In these situations, a private judge will be chosen who has expertise in a particular field, thus eliminating much trial time that is normally spent simply explaining to the jury the background of the specific area of law. [404]

Second, even though the procedure can be less formal if the parties agree, the need for the representation of counsel is as important in a private proceeding as in a public one.[405] Indeed, for the initial processes in a private judging, such as choosing the judge and agreeing upon the procedures to be used, representation by counsel is essential to ensure that one party is not being taken advantage of by another party. [406]Also, as provided for in the definition and discussed above, the rules of evidence apply and witnesses and documentary evidence must be presented in conformity therewith.[407]

[398] Winnie. S. Mwenda, (2006) p. 50
[399] Supra. p. 24
[400] Tom Arnold & Willem G. Schuurman, (1991). 495
[401] Ibid. p.495
[402] Ibid. p.495
[403] Ibid. p.495
[404] Ibid. p.496
[405] Ibid. p.496
[406] Ibid. p.496
[407] Ibid. p.496

Thirdly, the third element contained in the third definition of the private system has two distinct parts. The first, and perhaps more troublesome or controversial part, is the provision for payment of the private judge by the parties themselves.[408] Private compensation would aid the currently overloaded court system by allowing present funding to be spread over fewer cases, but it also presents the danger of discrimination on the basis of wealth. The second part of this element is what differentiates the private judging system from the system of reference, which could be viewed as a precursor to the private judging system. Under the reference system, parties agree to assign certain issues to a referee, who makes a decision on the issue and then submits an advisory opinion to the trial judge. The referee's opinion is not final and can be disregarded by the trial judge if he finds that it was not well supported by the facts of the case. Conversely, a private judge is autonomous in his decisions, which are final and binding on the parties.

In the fourth element of the definition, since parties will want a full record for review if an appeal is filed on the decision, a private court reporter is usually hired to make the record of the private trial. [409] The fifth element is basically a formality for the private judge, who must enter his order of judgment in the court which had original jurisdiction. The sixth element reinforces the power of the private judge by providing that his decisions will have the same enforcement value as if the judgment had been entered in court. Perhaps more than any other provision or element of the private judging system, this finality and enforcement value of the private judge's decision is the major differentiating factor between private judging and most forms of arbitration.[410]

In some jurisdictions, the private judge is authorised by statute to render a judgment that has same finality, precedent and appealability of a judicial decision. [411] Typically, this entails that the expert is asked to conduct an investigation and then write a report that may contain findings of fact.[412] While usually not binding on the parties, the report may sometimes be used in negotiation for a settlement. And if not, the report can, sometimes, be admissible in court.[413]

[408] Ibid. p.497
[409] Ibid. p.497
[410] Ibid. p.497
[411] Winnie. S. Mwenda, (2006) p. 50
[412] Steven A. Morgan (1997). p.24
[413] Ibid. p. 24

2.8.4 Summary Jury Trial

A summary jury trial involves a non-binding process in which a mock-jury is impaneled by the court, and each party has an opportunity to present its case in abbreviated form. [414] It 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. [415]After the mock-jury renders its advisory verdict, the adjudicator attempts to facilitate a negotiated resolution.[416]

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.[417] 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. [418]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.[419]

2.9 General Key limitations of ADR

Notably, ADR processes can play an important role in many development efforts. However, Brown notes that they are ineffective, and perhaps even counterproductive, in serving some goals related to rule of law initiatives. As noted earlier, ADR programs are tools of equity rather than tools of law. [420]They seek to resolve individual disputes on a case-by-case basis, and may resolve similar cases in different ways if the surrounding conditions suggest that different results are fair or reasonable according to local norms.[421] Secondly, ADR processes do not work well in situations where there is extreme power imbalance between parties.[422] In such situations, ADR processes do not include legal or procedural protections for weaker parties. A

[414] Robert Mnookin. (1998). Alternative Dispute Resolution. Robert Mnookin. Harvard University. Last visited. July, 2021. p. 8
[415] Winnie. S. Mwenda, (2006) p. 50
[416] Ibid. p. 51
[417] Ibid. p. 51
[418] Ibid. p. 51
[419] Ibid. p. 52
[420] Scott Brown, Christine Cervenak, David Fairman, (2017). P.20
[421] Ibid p. 20
[422] Ibid. p 21

more powerful or wealthy party may press the weaker into accepting an unfair result, so that the settlement may appear consensual, but in fact result from coercion[423]. Thirdly, ADR processes may not be an appropriate means to use to handle cases with multiple interested parties. This is true because the results of most ADR programs are not subject to standards of fairness other than the acceptance of all the participants. [424]When this happens, the absent stakeholders often bear an unfair burden when the participants shift responsibility and cost to them. ADR is more able than courts to include all interested stakeholders in disputes involving issues that affect many groups, such as environmental disputes. When all interested parties cannot be brought into the process, however, ADR may not be appropriate for multi-stakeholder public or private disputes.[425]

2.10 Conclusion

It is clear from this chapter that dispute resolution outside of courts is not new. Society's world over have long used ADR methods to resolve disputes. What is new is the extensive promotion and proliferation of ADR models, wider use of court-connected ADR, and the increasing use of ADR as a tool to realise goals broader than the settlement of specific disputes.

More prominently, it has been observed that ADR is touted as more efficient and effective system than the traditional courts in providing justice, especially in countries in which the judiciary has lost the trust and respect of the citizens.[426] Moreover, ADR is seen as a means to increase access to justice for populations that cannot or will not use the court system, to address conflicts in culturally appropriate ways, and to maintain social peace[427].

Despite this wider recognition of ADR, what is, however, more prominent is the recognition that ADR should not been seen as a separate entity from the court-based arrangements for civil justice but rather should be seen as an integral part of the entire system[428]. Secondly, ADR processes cannot be a substitute for a formal judicial system. Rather, they are instruments for the application of equity, than the rule of law. As such, ADR processes, cannot be expected to

[423] Ibid. p 21
[424] Ibid. p 21
[425] Ibid. p 21
[426] Scott Brown, Christine Cervenak, David Fairman, (2017). Alternative Dispute Resolution Practitioners Guide. Conflict Management Group (CMG). p.7
[427] Ibid. p 5.
[428] Winnie. S. Mwenda, (2006) p. 44

establish legal precedent or implement changes in legal and social norms.[429] However, ADR programs can complement and support judicial reforms.

In view of the forgoing, the chapter, further, notes that several of the hybrid examples suggest that a dispute resolution system often involves the possibility of linking several different procedures. When parties negotiate, either through assisted or not, a resolution of a dispute, they do so in the shadow of some process or procedure that might ultimately conceive a resolution. Notably, various forms of ADR are now sometimes embedded into the formal system of adjudication. Whether by agreement of the parties or by the imposition of law, procedures are often sequenced. In such cases, parties may first negotiate on their own. They then may be obligated to mediate before having a case adjudicated or arbitrated. In other words, various procedures in ADR can be used in conjunction with the formal dispute resolution process.

Lastly and given the nature and variety of ADR processes that exist, it is important to note that the amount at stake, complexity and novelty of the issues, are among the key considerations used when deciding on the kind of ADR procedure to use. Granted that resolution of all disputes should be cheaper and speedy, but some disputes, due to the amounts involved or the magnitude of the case, will require a dispute resolution process based on traditional legal procedures. Political economic and power relationships between the parties is another factor which used when choosing the ADR process to use. 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.

[429] supra

CHAPTER THREE

Zambia's Judiciary: Context, Performance and Application of ADR

3.0 Introduction

Discussing ADR, in any form, requires understanding the existing legal landscape of the traditional judicial system which is the bedrock of any ADR process. As observed in the preceding chapter, ADR, should not been seen as a separate entity from the court based dispute settlement arrangements but rather as an integral part of the judicial justice system. [430] Therefore, ADR processes are key and should contribute towards meeting the constitutional purpose of any judiciary. An effective and efficient judiciary has been described as one that is predictable, resolves cases in a reasonable time frame, and is accessible to the public. Eminently, there has been, historically, widespread dissatisfaction with the performance of the Zambian judiciary. However, efforts are being made to reform the judiciary so as to align its functions to the growing societal demands. Among the notable reforms include the Constitutional amendment process which ensued in 2016 which resulted in the enactment of the Constitution of Zambia (Amendment) Act, 2016. The Act proposed new legal and institutional judicial reforms. This chapter, therefore, looks at the sufficiency of the present traditional justice delivery system[431] and the institutionalized ADR process in addressing the challenge of inundation and delay experienced by ordinary courts in Zambia;

3.1 Legal Framework for Zambia

Zambia's legal framework is based on the pluralist legal system. Gagnon and Sauca define a pluralist system as the existence of different institutional normative orders applied simultaneously in the same territory or jurisdiction and to the same society. [432] Pluralist legal system has also been defined as circumstances in the contemporary world which have resulted from the transfer of whole legal systems across cultural boundaries. [433] Notably, such system are common in countries that are former colonies. And these pluralist systems intended to provide a hybrid framework where colonial law managed some matters while others were

[430] Winnie .S. Mwenda, (2006) p. 44

[431] Hereunto referred to as the Court System

[432] Alain-G. Gagnon and José-Maria Sauca. (2002) Negotiating Diversity - Identity, Pluralism. ISBN:978-3-0352-9579-5and Democracy

[433] Hooker, M. (1975) An Introduction to colonial and neo-colonial laws. Oxford: Clarendon Press. p.1

settled by local forms of dispute resolution.[434]

As a former protectorate of Great Britain,[435] Zambia's current legal framework has roots both in the English common law and indigenous customary law.[436] This, therefore, entails that Zambia's legal and judicial framework is originally based on the British system. However, prominence is also given to customary law. [437] Therefore, as a result of the colonial legacy, Zambia has a dual legal system made up of general law which include: English common law and principles of equity; precedents; the Constitution; Acts of Parliament; subsidiary legislation; and customary law.[438] To qualify the foregoing, the Section 7 of the Constitution of Zambia (Amendment) Act of 2016 states that the Laws of Zambia consist of the Constitution; Laws enacted by Parliament; Statutory instruments Zambian; customary law[439] that is consistent with the Constitution; The laws and statutes, which apply or extend to Zambia, as prescribed.[440] The latter hinge on common law,[441] precedent and Acts which were passed before the enactment of the British.[442]

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[434] Tinenenji Banda (2019). Access to Justice: Court efficiency in Zambia. Occasional Paper Series. Institute for African Development. Cornell University. P.25. Also see... Ige, R. (2015) Legal Pluralism in Africa: Challenges, Conflicts and Adaptation in a Global Village. Journal of Law, Policy and Globalization. (34). p. 59

[435] Institute for Security Studies. (2009). Criminal Justice System in Zambia - Enhancing the Delivery of Security in Africa. Monograph No 159, April. https://issafrica.org/chapter-5-the-courts

[436] Supra. P.17

[437] Mulela Magarete Munalula, (2004). Legal Process: Cases, Legislation and Commentaries (University of Zambia Press) page 85

[438] Institute for Security Studies (2009). https://issafrica.org/chapter-5-the-courts

[439] Customary laws are in the main, unwritten, and as such the phrase 'customary law' does not refer to a single system but instead a set of rights, liabilities and duties across diverse ethnic groups. Despite having undergone considerable change in the last century, likely due to increased proximity of state law and institutions, customary law, in its living and authentic form, is not a creation of the state. In the main, customary law in Zambia tends to be administered by traditional authorities and local courts, although higher courts can and do administer it. See Tinenenji Banda (2019). p. 28 and Institute for Security Studies (2009). https://issafrica.org/chapter-5-the-courts

[440] The Constitution of Zambia (Amendment) (2016) Chapter No 2 of 2016 of the Laws of Zambia: https://www.parliament.gov.zm/sites/default/files/documents/amendment_act/Constitution%20of%20Zambia%20%20(Amendment),%202016-Act%20No.%202_0.pdf Accessed June 2021.

[441] Note. Common Law is applied within multiple current and former British colonies across several continents. This system follows the doctrine of precedent. Within this system, judges are bound for the most part, by decisions and doctrines developed over time by judges in earlier and more superior courts. As such, judges determine the answers to legal questions through a review of previous judicial decisions and accordingly use analogical reasoning in the case before them. This process involves the retention of some facts and the dismissal of others depending on their relevance. Zambia's common law is administered in the Subordinate and Superior courts. See. See Tinenenji Banda (2019). p. 28. Church, W. (1974) Chapter 1. The Common Law and Zambia. In: Ndulo, M. (ed.), Law in Zambia. Lusaka, East Africa Publishing House. pp. 1-46. Available from: http://saipar.org/wp-content/uploads/2013/10/CHP_01_Law_in_Zambia.pdf

[442] Note: the application of English Law in Zambia is governed by the English Law (Extent of Application) Act. Before amendments were made to the Act, section 2(2) of the English Law (Extent of Application) Act provided that*: "the application of English Law was limited to (a) Common Law, (b) Doctrines of Equity, (c) Statutes which were in force in England on the 17th August 1911 and (d) Any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which shall apply to the Republic by an Act of Parliament or otherwise."*

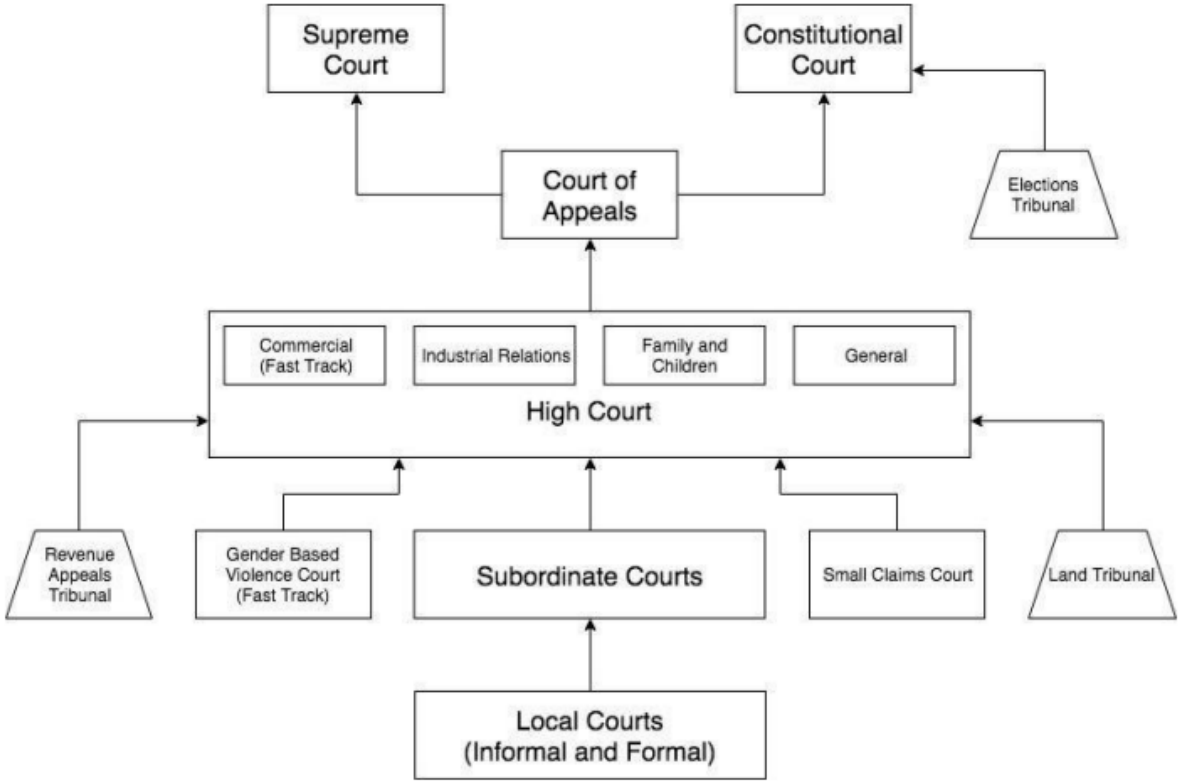
3.2 Court System and Structure in Zambia

Understanding of the present Zambian courts system, is dependent, in large measure, upon an understanding of its history.[443] Notably, Zambian courts are a product of their history[444], and this, therefore, entails that their present elements, characteristics and function is founded on their historical underpinnings. However, despite the significant weight history has in presenting a realistic view of the existing court system, concentration of this section is based on the present structure which is symbolic to the history.

Therefore, the exiting court system in Zambia, is the function of the Constitution. Part VIII of the Constitution of Zambia (Amendment) Act of 2016 provides provisions which creates the Judiciary and bestows it with the legal personality to function as an Authority to hear civil and criminal matters[445] and hear matters relating to, and in respect of, the Constitution.[446] In terms of Court hierarchy, the court system in Zambia approximately forms a four-tier hierarchy, consisting of first instance courts, specialized courts or ADR platforms and fast-track courts, appellate courts and the highest instance courts. See figure below.

[443] Earl L. Hoover, John C. Piper and Francis O. Spalding. (2013). the Evolution of the Zambian Courts System. http://saipar.org/wp-content/uploads/2013/10/CHP_02_Law_in_Zambia.pdf . Last Accessed 23rd May, 2021.
[444] Ibid. 47
[445] Section 119 (2) (a) of the Constitution of Zambia (Amendment) (2016) Chapter No 2 of 2016 of the Laws of Zambia
[446] Section 119 (2) (b) of the Constitution of Zambia (Amendment) (2016).

Figure 5: Court Structure in Zambia



Source: Tinenenji Banda (2019)[447]

Besides the cited constitutional provisions, a number of Acts of Parliament provide for the establishment of some of these courts, especially those which are bestowed with the quasi-judicial function.[448] For example, the Tax Appeals Tribunal Act, 2015 under section 3 provides for the establishment of Tax Appeals Tribunal. Section 67 of the Competition and Consumer Protection Act of 2010, on the other hand, provides for the establishment of the Competition and Consumer Protection Tribunal. The Tribunal Act of 2010 under section 3, also provide for the establishment of the Lands Tribunal. Therefore, the subsequent subsection discusses the court structure using the four-tier hierarchy discussed above.

3.3 Highest Courts of Instance

[447] Note: Other than the lands tribunal, there are other tribunals and ADR processes which are discussed subsequently.
[448] The Tax Appeals Tribunal Act, 2015

Within the Zambian jurisdiction, two key Courts are credited to be Courts of high instance. These include the Supreme and Constitutional Court.

*3.3.1 **Supreme Court***

Article 92 of the Constitution of Zambia[449] and the Supreme Court Act, 1973,[450] delineate the Supreme Court as the final court of appeal. It has appellate jurisdiction to hear civil and criminal appeals from the Court of Appeal as well as jurisdiction conferred on it by the Constitution and other pieces of legislation. [451]

*3.3.2 **Constitutional Court***

The Constitution of Zambia, under Article 127, and the Constitutional Court Act of 2016 give the Constitutional Court original and final jurisdiction to hear matters related to the interpretation of the Constitution; violation or contravention of the Constitution; the President, Vice-President or an election of a President; Appeals relating to election of Members of Parliament and councilors; and any matter that falls within the jurisdiction of the Constitutional Court.[452]

Article 128 (2) demands that constitutional matters which may arise during the course of hearing or determining any matter shall refer the question to the Constitutional Court. Further, any legislation, action, measure or decision taken under law or an act, omission, measure or decision by a person or an authority, which contravenes or boarders on the constitution should be brought before the Constitutional Court[453]

Having addressed the two Courts of high instance, it is also important to note that both Courts rank equivalently as espoused under Article 128 (3). Therefore, a decision of the Constitutional Court is not appealable to the Supreme Court.

[449] Hereunto referred to as the Constitution means the Constitution Amendment Act No 2 of 2016
[450] The Court of Appeal Act (2016) Chapter No 7 of 2016 of the Laws of Zambia. https://zambialii.org/zm/legislation/act/7-14 Accessed April 2021.
[451] Tinenenji Banda (2019). Access to Justice: Court efficiency in Zambia. Occasional Paper Series. Institute for African Development. Cornell University. P.33
[452] Article 128 (1) of the Constitution of Zambia (Amendment) No 2 of 2016.
[453] Article 128 (3)

3.4 Appellate courts

*3.4.1 **Court of Appeal***

The Court of Appeal Act 2016[454] is the key legislation which lays-out the foundational imperatives Court of Appeal. The Court of Appeal, whose introduction is constitutionally provided for under Article 130 and 131 of the Constitution of Zambia, is the second highest Superior Court of Record after the Supreme Court and the Constitutional Court.[455] It has jurisdiction to hear appeals from judgments of the High Court, other courts.[456] This is, however, in exception for matters under the exclusive jurisdiction of the Constitutional Court. [457]

*3.4.2 **The High Court***

The High Court is provided for in Article 94 of the Constitution and the High Court Act of 1960 as amended by the High Court (Amendment) Act of 2016.[458] Article 133 of the High Court (Amendment) Act details its unlimited and original jurisdiction in civil and criminal matters, appellate and supervisory jurisdiction and its jurisdiction to review decisions.[459]

The High Court (Amendment) Act, 2016 also provides for multiple sub-divisions of the High Court which include: Industrial Relations Court: Commercial Court: Family Court: Children's Court.[460] It also includes any such other specialised court as the Chief Justice may prescribe by statutory instrument.[461] These sub-divisions exist as specialized courts in their particular field and gain their jurisdiction from the Chief Justice via statutory instrument.[462]

[454] The Court of Appeal Act (2016) Chapter No 7 of 2016 of the Laws of Zambia. https://zambialii.org/zm/legislation/act/7-14. Accessed April 2021.
[455] Tinenenji Banda (2019). p.32
[456] Ibid. p.32
[457] Ibid. p.32
[458]High Court Act (1960) Chapter 27 of the Laws of Zambia. https://zambialii.org/zm/legislation/consolidated_act/27 Accessed April 2021 and High Court (Amendment) Act (2002) Chapter No 16 of 2002 of the Laws of Zambia. https://zambialii.org/system/files/legislation/act/2002/16/hca2002201.pdf Accessed April 2021
[459] Tinenenji Banda (2019). p. 32.
[460] High Court (Amendment) Act (2002) Chapter No 16 of 2002 of the Laws of Zambia
[461] Ibid.
[462] Tinenenji Banda (2019). 32.

3.5 Court of First Instance

3.5.1 ***Subordinate Court***

This is a Court of first instance. Article 120 (a) is a functional provision which provides for the establishment of the *subordinate court*. Further, the Subordinate Courts Act[463] details functions and jurisdictional coverage for the Court. Notably, there are three classes of court, each with its own general and territorial civil and criminal jurisdiction.[464] As courts of first instance they decide all matters except for the offences of treason, murder, aggravated robbery, election petitions and all matters that involve the interpretation of the Constitution.[465] Subordinate Courts have appellate jurisdiction from the Local Courts but can also order that proceedings are transferred to a Local Court if they have the appropriate jurisdiction.[466]

3.5.2 ***Local Courts Local***

The Local Court is another court of first instance. Article 120 (c) provides for the establishment of the *local court.* The Local Courts Act of 1966[467] further provides for the functions and jurisdiction of the Local Court. Other than detailing the territorial limits of the court, it also details the instances in which a Local Court must refer to a higher court.[468] Local Courts mainly administer customary law but also have authority to administer some written laws, which are detailed in the Schedule of The Local Courts Act, again with some exceptions.[469]

3.6 General Performance of Ordinary Courts

In understanding performance of Courts, a number of studies have been written. Prominent among these include a paper by Tinenenji Banda focusing on Access to Justice: Court efficiency in Zambia. Generally, his examination of the legal framework and court structure exposes elements that may impact on delay. One example he cites is that there existed no mechanism to control, manage and monitor complex litigation. [470] In justifying the foregoing, Banda notes that Zambian courts are courts of record. However, while the court registrar has

[463] Subordinate (Amendment) Courts Act of 2018 https://zambialii.org/zm/legislation/act/2018/4/surbordinate-courts-act-no-4-2018.pdf. Last visited May 2021. Subordinate Courts Act of 1933. Last visited May 2021
[464] Tinenenji Banda (2019). 31.
[465] Ibid. p.31.
[466] Ibid. p. 31.
[467] The Local Courts Act. (1994) Chapter No 13 of 1994 of the Laws of Zambia. http://www.parliament.gov.zm/sites/default/files/documents/acts/Local%20Courts%20Act.pdf Accessed May 2021.
[468] Tinenenji Banda (2019). p. 31.
[469] Ibid. p.31
[470] Ibid. p. 37

been computerised, judges still frequency take notes by hand and few staff have the necessary computer literacy to maintain and update the records, resulting in delays. [471]Issues with administrative infrastructure are noticeable and lost files and problems with case management compound delays.[472] This is particularly problematic due to the divided responsibility of sentencing between the Subordinate Courts and High Courts, which has itself been criticized. He observed that the transfer of cases for sentencing between the two is said to be outdated and an unnecessary drain on the resources of the judiciary.[473]

Professor Muna Ndulo further notes that an effective judiciary acts as an essential check and balance on the legislative and executive branches of government, ensuring that the laws of Parliament and the acts of the executive comply with the Constitution and the rule of law.[474] And Maria adds that only a competent, independent, and efficient judiciary can perform these functions. An effective and efficient judiciary has been described as one that is predictable, resolves cases in a reasonable time frame, and is accessible to the public.[475] Banda, therefore, found that, valuable court time is often wasted with magistrates frequently correcting litigants and witnesses on how to properly conduct themselves in proceedings. Further, Delays associated with counsel were significant (17.6% of observed cases). In several recorded cases, Banda noted that legal representatives were late, absent, or requested adjournments. [476]There also appeared to be in several instances, poor communication between counsel and the accused.[477] Delays associated with a lack of representation were also a major issue. In some cases, a litigant's lack of representation caused a delay due to unfamiliarity with court procedure.[478] Court associated delay was observable in about 10% of observed cases. [479]There were some instances in which participating parties were allegedly misdirected by officials or signs at court, and consequently did not arrive in a timely fashion or went to the wrong location. Several of these cases incurred delays of greater than an hour. In some instances, a court room was not available. This was mainly due to the assignment of cases to visiting magistrates who do not have designated court rooms in Lusaka. The time spent on finding an available court room not only created a delay on its own, but also

[471] Ibid. p. 38
[472] Ibid. p. 38
[473] Ibid. p. 38
[474] Ndulo, Muna (2013) "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System," Zambia Social Science Journal: Vol. 2: No. 1, Article 3. Available at: http://scholarship.law.cornell.edu/zssj/vol2/iss1/3
[475] Dakolias, Maria (1999) "Court Performance Around the World: A Comparative Perspective," Yale Human Rights and Development Journal: Vol. 2: Iss. 1, Article 2. Available at: http://digitalcommons.law.yale.edu/yhrdlj/vol2/iss1/2. Also see. Tinenenji Banda (2019). p. 5.
[476] Tinenenji Banda (2019). p. 81
[477] Ibid. p.81
[478] Ibid. p.82
[479] Ibid. p.82

required a shift in the scheduling of other cases.[480]

Among the necessitating factors of the aforementioned scenario at the Judiciary include the following challenges as espoused in the Judiciary 2019 Annual Report[481].

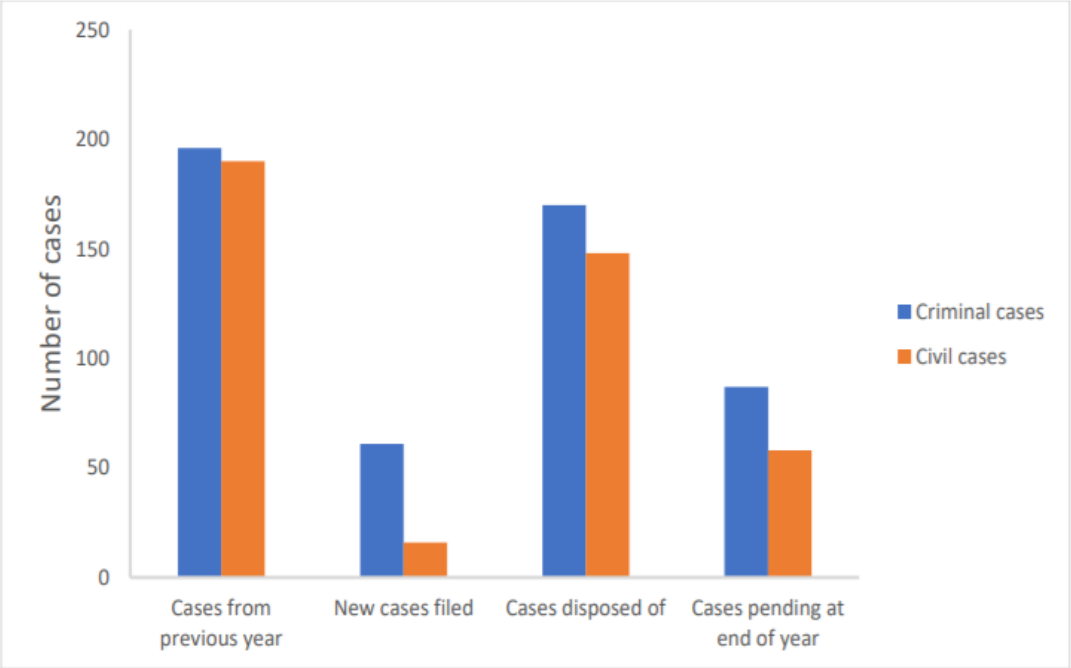
- Inadequate budgetary allocation, which hampered the institution's ability to construct new courthouses and rehabilitate old and dilapidated ones. Most critically affected by the challenge of infrastructure were the Constitutional Court, the Court of Appeal and the Local Courts, as explained below: (a) From the time the Constitutional Court was established in 2016, it has had no infrastructure of its own. Therefore, the Court had to share courtrooms and office space, among others, with the Supreme Court; (b) The Court of Appeal, despite having its own infrastructure at the former IRC building, had no holding cell and was, therefore, restricted to hearing civil appeals in its premises. Criminal appeals had to be heard at the Supreme Court, thereby exerting more pressure on the already stretched Supreme Court resources. In addition, given the criminal jurisdiction of the Court, the security of Judges was compromised by the Court's location in a busy area with a consequently high concentration of potential wrongdoers; and (c) Poor or lack of infrastructure affected the operations of the Local Courts;
- Low staffing levels, especially at the Local Courts. Due to non-grant of treasury authority, the Judiciary was unable to fill vacancies and create additional positions in all the units;

Despites the above challenges, notable positive development seem to be eminent. The Annual Report for the Judiciary for 2019 notes the following positive progress. All Courts, except the Local Courts, continued to record a reduction in backlog. The Local Courts closed with 31, 557 pending cases in 2019, compared with 30, 057 pending civil cases at the close of 2018, representing a difference of 1,500 pending cases. This was attributable to closure of some of the courts due to lack of infrastructure and low staffing levels.[482]

[480] Ibid. p.85
[481] Judiciary (2019) Annual Report. https://www.judiciaryzambia.com/wp-content/uploads/2020/10/The-Judiciary-of-Zambia-Annual-Report-2019-Approved.pdf Last Access July 2021.
[482] Judiciary (2019) Annual Report. https://www.judiciaryzambia.com/wp-content/uploads/2020/10/The-Judiciary-of-Zambia-Annual-Report-2019-Approved.pdf. Last Access July 2021.

Reportedly, the Supreme Court had a total of 257 criminal cases. Out of these cases, 196 were brought forward from 2018 and 61 were filed in 2019. [483]A total of 170 cases were disposed of and 87 cases were carried forward the subsequent year. As for civil cases, 190 were brought forward from 2018, while 16 were filed during the year bringing the total number to 206. Out of these, 148 were disposed of, leaving 58 cases at the close of 2019.

Figure 6: Supreme Court Case Load 2018 - 2019

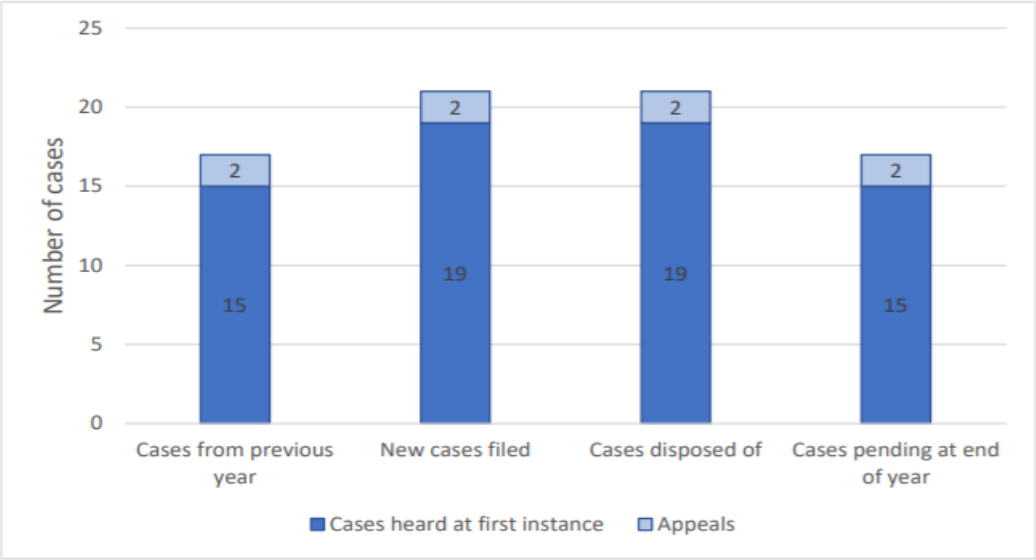


Source: Annual Report – Judiciary (2019)

Further, the Supreme Court, the Constitutional Court and the Court of Appeal successfully held all the gazetted sessions for the year under review.[484] The Constitutional Court had a total of 38 cases. Of these, 17 were brought forward from 2018 and 21 were filed in 2019. The Court disposed of 21 cases, leaving 17 cases pending.

[483] Ibid. p.9
[484] Ibid. p.23

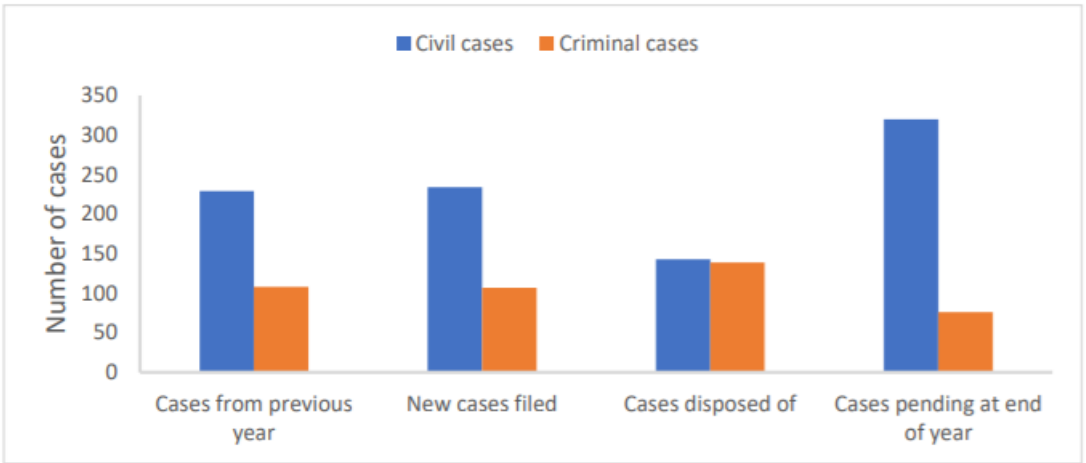
Figure 7: Constitutional Court Case Load 2018 - 2019



Source: Annual Report – Judiciary (2019)

With regards to the Court of Appeal, a total of 337 cases were brought forward from 2018, of which 229 were civil and 108 were criminal. [485]Cases filed in 2019 were 341. Of this number, 234 were civil and 107 were criminal. The court disposed of 143 civil cases and 139 criminal cases totaling 282. At the end of 2019, 320 civil and 76 criminal cases were pending, translating into a carry-over of 396.

Figure 8: Court of Appeal Case Load 2018 - 2019



Source: Annual Report – Judiciary (2019)

[485] Ibid. p.10

It is clear that progress was seen to be made in 2019. However, the back-loge is still eminent. And thus, there has been, as noted by Professor Ndulo, widespread dissatisfaction with the performance of the Zambian judiciary. Therefore, understanding the role and extent to which ADR has been crystalized in the Zambian legal framework and how it was complementing justice delivery system in Zambia is necessary.

3.7 Specialised Courts or Alternative Dispute Resolution (ADR) in Zambia

ADR practice, in Zambia, can be traced back to the days before independence in 1964.[486] Before the Arbitration Act of 2000, Zambia had in place an Arbitration Act.[487] Over the years, the practice of ADR has continued to grow both in numbers of ADR practitioners and practice.[488] In March, 2019, the late Chief Justice, Irene Mambilima, during the Open Day of ADR organised by the Zambian branch of the Chartered Institute of Arbitrators, noted that**;**

> *"the court processes often take too long to conclude, causing congestion in our judicial system. And in many instances, we have found that not all of these disputes require court intervention. As the Judiciary, we recognised this deficiency….measures to promote ADR as an alternative to litigation can be stepped up so that courts can be left to deal with deserving cases. Globally it is accepted that ADR mechanisms such as reconciliation, adjudication, mediation and arbitration are effective and efficient in resolving disputes. The mechanism provides a much more sustained and mutually beneficial resolution of conflicts through negotiation,"*

The Chief justice's assertion is underwritten by Article 118 (2) (b)[489] of the Constitution (Amendment) Act No. 2 of 2016 of the Laws of Zambia which places emphasis on justice not being delayed and (d)[490] which promulgates the necessity and relevance of ADR. Notably, there are copious ADR processes that exist in Zambia.[491] These have been as a result of

[486] Mary Mutupa. (2019) ADR practice in Zambia: exploring legislative reforms and future prospects to further enhance the practice. https://www.ciarb.org/resources/features/adr-practice-in-zambia-exploring-legislative-reforms-and-future-prospects-to-further-enhance-the-practice/ . Last visited June 2021.
[487] Ibid. Last visited June 2021
[488] Ibid. Last visited June 2021
[489] Article 118 (2) (b) justice shall not be delayed
[490] Article 118 (2) (d) alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted. Note: 1. ADR processes should not contravene the Bill of Rights or should be inconsistent with the provisions of the Constitution or other written law.
[491] Note: Most ADR processes come to be in place before the promulgation of the Constitution (Amendment) Act of 2016

Legislative reforms that have been undertaken even before the promulgation of the Constitution (Amendment) Act of 2016. Some of these reforms, as cited by Mutupa, include:

- The Arbitration Act, No. 19 of 2000 enacted to replace the ancient Arbitration Act which was enacted before Zambia got independence. The new Act was promulgated based on United National Commission on International Trade Law (UNCITRAL) Model Law[492] with modifications.[493]
- Part IX of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia which was enacted on 30 April 1993, provides for Conciliation of collective disputes in the labour and employment.
- Introduction of Statutory Instrument (SI) No. 71 of 1997 which is part of the High Court (Amendment) Rules 1997 introduced the Court Annexed Mediation (CAM). In 2012 the High Court Rules were again amended making it a requirement for parties to be referred to CAM during the Scheduling Conference.
- In 2002, the Arbitration and Mediation Procedure Rules 2002 were introduced which resulted in the Industrial Relations Court (IRC) introducing CAM.
- The Subordinate Court (Amendment) Rules, 2018 i.e. Statutory Instrument Number 73 of 2018 was passed to introduce Court Annexed Mediation in the Subordinate Court.
- Statutory Instrument Number 72 of 2018 was passed to amend some provisions to the High Court Rules on Mediation.

Notably, the above reforms which have ensued over time illustrate the recognition and crystallization of ADR in Zambia. Most prominently, Conciliation, Arbitration and Mediation have dominated with considerable legal backing. Further, the 2018 law reforms clearly indicate a progressive shift in the practice.[494] Statutory Instrument No. 73 of 2018, introduces CAM, in the Subordinate Court. This development signifies the important role ADR plays in enhancing access to justice delivery in the Country.[495] Enhancing justice remains at the core of the Justice

[492] UNCITRAL. Model Law on. International Commercial Arbitration. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf
[493] Mary Mutupa. (2019) ADR practice in Zambia: exploring legislative reforms and future prospects to further enhance the practice. https://www.ciarb.org/resources/features/adr-practice-in-zambia-exploring-legislative-reforms-and-future-prospects-to-further-enhance-the-practice/ . Last visited June 2021.
[494] Ibid
[495] Ibid

system and this position remains a fundamental narrative littered in the narrative of evolving jurisprudence in Zambia. In the case of Shilling Bob Zinka v Then Attorney-General[496] it was noted that

> *"the principles of natural justice must be observed by the courts, tribunals, arbitrators and all persons and bodies having the duty to act judiciary except where their application is excluded or by necessary implication. A presumption that natural justice must be observed will arise more readily where there is an express duty to decide only after conducting a hearing or enquiry or where a decision entails for determining of disputed questions of law and fact.*

Besides emphasizing on the importance natural justice in the dispensation of justice, the court have also dealt with the issue of delayed justice. *Delayed justice*, the well-known, frequently used aphorism in principle in Article 118 (b) implies that faster justice is better justice. This aphorism has been a subject of debate and litigation since time immemorial. *Godfrey Miyanda v. Matthew Chaila,* a high court judge who had delayed disposing of a case in which Miyanda had sued the Attorney General conjures relevant learnings. In seeking remedies, Miyanda wanted a declaration that the refusal by the *Justice Chaila* to adjudicate or to determine the said action was wrongful and unconstitutional. In delivering judgement, presiding judge Justice Hon Earnest Sakala held that a judge cannot be taken to court for delaying in adjudicating on the case[497]. Despite the ruling not being in favour of the appellant, the underlying facts of the case hinged on delayed justice of which Article 118 Subsection (2) (b) of the 2016 Constitution of Zambian addresses. The debate on whether, judges are immune from litigation or not on delayed disposal of cases varies from jurisdiction to jurisdiction. Canada presents good insights

[496] SCZ Judgment No. 9 of 1991

[497] ***Godfrey Miyanda V Matthew Chaila.*** *(JUDGE OF THE HIGH COURT) (1985) Z.R. 193 (H.C.) Particulars of this case were that Miyanda, was a litigant in a civil suit commenced by writ of summons on 10th September, 1981 in the High Court for Zambia entitled 1981/HP/1244- Godfrey Miyanda v The Attorney-General. The hearing of the action commenced before the Hon. Mr Justice Chaila on 22nd August, 1983. On the same day, the petitioner closed his case. The defendant who adduced no evidence, then made his final submissions. The plaintiff's final written submissions were filed on 7th September, 1983. According to the Miyanda (petitioner) the respondent Mr. Justice Matthew Chaila, refused to adjudicate or to determine the action and to deliver judgment in reasonable time or at all. Miyanda, claimed that by virtue of the unwarranted and unreasonable delay in determining this action, the he suffered great emotional distress and anxiety and great inconvenience." In seeking remedies, Miyanda wanted a declaration that the refusal by the Hon. Mr Justice Chaila to adjudicate or to determine the said action was wrongful and unconstitutional; and he also sought a declaration that the respondent's failure to perform his functions, namely refusing or failing to determine the said action was a denial of justice. The other remedies sought was a declaration that the delay in determining the said action was unreasonable and in breach of a statutory duty. In delivering judgement, the sitting Judge Justice Earnest Sakala held that a judge cannot be taken to court for delaying in adjudicating on the case. He also held that the public had a right to have the independence of the judiciary preserved and that the absolute freedom and independence of judges is imperative and necessary for the better administration of justice.*

and two cases can be cited for this purpose i.e. *R. v. Askov and R. v. Jordan*. In the case of R. v. Askov[498], the appellants were charged with conspiracy to commit extortion. The trial took place almost three years after the original charges were laid. The Supreme Court found the delay excessive and unreasonable and ordered a stay of proceedings. As a result of this precedent, almost 50,000 other criminal charges in Ontario were dismissed because of "unreasonable delay."

In the case of R. v. Jordan[499], on the other hand, the Supreme Court dismissed the analysis developed in the Askov case and blasted the culture of *complacency towards delay* after a simple dial a dope drug prosecution dragged on for over four years. As a result, the court set ceilings beyond which a delay is presumptively unreasonable. The courts opined if the total delay exceeds 30 months in superior courts and 18 months in provincial courts then delay would presumptively be unreasonable.

Such case law and jurisprudential developments remain key sources of legal reforms. In the present legal narrative in Zambia, emphasis is being placed on the need to reduce case processing time and increase efficiency through introducing certain processes and procedures. Notably, both the above cited Statutory Instruments No. 73 and 72 of 2018 have recognized party autonomy which is an important principle in ADR. [500]The law now requires that parties be given a chance to choose their Mediator from a list of accredited mediators. This changes the old practice in which the Mediation Office appointed the Mediator for parties. [501] This has been amended as provided for in 2018 Statutory Instrument 72 of the High Court Rule (4) and Statutory Institution 73 of the Subordinate Court rule 17 (2) respectively.[502] Another important development in the ADR process is the introduction of **pre-trial protocols in the Court system.** According to Order 31 Rule 4 (1) of the High Court Rules, it is mandatory that at scheduling conference and before setting an action down for trial, a Judge shall refer any action amenable to mediation to CAM, except for a case involving a constitutional issue, the liberty of an individual, an injunction or where the trial Judge considers the case to be unsuitable for referral.[503] Further, Order 43 Rule 17(1) of the Subordinate Court Rules provides that a Court

[498] R. v. Askov, [1990] 2 S.C.R. 1199
[499] R. v. Jordan [2016] 1 SCR 631
[500] Mary Mutupa. (2019) ADR practice in Zambia: exploring legislative reforms and future prospects to further enhance the practice. https://www.ciarb.org/resources/features/adr-practice-in-zambia-exploring-legislative-reforms-and-future-prospects-to-further-enhance-the-practice/ . Last visited June 2021.
[501] Ibid. Last visited June 2021
[502] Ibid. Last visited June 2021
[503] Ibid. Last visited June 2021

may at any time before the hearing of a civil matter, but after the defendant has filed a defence, refer the matter for mediation.

Another development in the ADR process is the harmonisation of timeframes and provision of sanctions for people who fail to attend a mediation process. The introduced Statutory Instruments 72 and 73 of 2018 for the High Court and Subordinate Court respectively have harmonised the time limit for conducting a mediation process. The time limit is set for forty-five (45) days and clarity has been provided that the time limit covers the period between when the Mediator collects the records.[504] Further, Order 31 Rule 8 (3) of the High Court Rules the Court provide for sanctions to be imposed on a Party that fails to attend the Mediation process. The Order grants the Court authority to make an order as to costs to a party which fails to participate without reasonable cause. The cost are expected to be from the date of referral of the proceedings to mediation in favour of the party in attendance.

Besides the above cited ADR processes, a number of other processes exist. Among these processes include administrative tribunals which are of two kinds. There are those, which are established on a permanent basis with permanent staff as discussed subsequently.[505] There are others, which are established on ad hoc basis, as and when there is a matter to be investigated.[506] An example of this is the tribunal, which is established by the Chief Justice pursuant to section 14 of the Parliamentary and Ministerial Code of Conduct Act.[507] The Parliamentary and Ministerial Code of Conduct Act establishes a Code of Conduct for Members of Parliament[508]. The Tribunal is established whenever a Member considers that a statement made in the press or other media alleges directly or by implication that he has violated Part II of the Act.[509] The Member may write to the Chief Justice giving the particulars of the breach alleged and request

[504] Ibid. Last visited June 2021
[505] John P. Sangwa. (2004). Control of Administrative Actions in Zambia. Lecture Notes. Last Accessed June 2021. p.36
[506] Ibid. p.37
[507] Parliamentary and Ministerial Code of Conduct Act, No 16 of 1994https://www.parliament.gov.zm/sites/default/files/documents/acts/Parliamentary%20And%20Ministerial%20Code%20of%20Conduct%20Act.pdf . Last Access July 2021.
[508] Section 4 Parliamentary and Ministerial Code of Conduct Act, No 16 of 1994 https://www.parliament.gov.zm/sites/default/files/documents/acts/Parliamentary%20And%20Ministerial%20Code%20of%20Conduct%20Act.pdf . Last Access July 2021.
[509] Section 13 (3) of the Parliamentary and Ministerial Code of Conduct Act, No 16 of 1994https://www.parliament.gov.zm/sites/default/files/documents/acts/Parliamentary%20And%20Ministerial%20Code%20of%20Conduct%20Act.pdf . Last Access July 2021.

that a tribunal be constituted to investigate the allegations.[510] Any member of the public can lay a complaint before the Chief Justice against any Member of Parliament or Minister who has breached Part II of the Act. Part II of the Act provides a Code of Conduct applicable to all Members.[511] The tribunal depending upon its findings may recommend such administrative actions; criminal prosecutions or such other actions as it may deem fit.[512] The Act is silent on the effect of the recommendations.[513] From experience in the case involving the late Dr. Remmy Mushota and Patrick Katyoka, the recommendations of the Tribunal are binding upon the National Assembly and the President.[514] This is an interesting development in the administration's efforts to curb possible abuse of power by Members of Parliament and Ministers.[515]

Tribunals which are established on a permanent basis are administrative in nature and perform adjudicative function. Chirwa, adds that tribunal are specialist judicial bodies which decide disputes in a particular area and sphere of law.[516] These adjudicative Tribunals, according to Lorne and Hoffman, are independent administrative bodies that are created by statutes to resolve disputes between conflicting parties by performing quasi-judicial functions that are otherwise fulfilled by the formal judicial system.[517] In line with this reasoning, Curzon defines tribunals as judicial bodies outside the hierarchy of the courts with administrative or judicial functions. [518] These adjudicative Tribunals are premised on the need to provide simple, cheap and speedy justice[519]. Sir Frank[520] observes that:

> "Tribunals are not ordinary courts, but neither are they appendages of government departments. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of

[510] Section 13 (2) of the Parliamentary and Ministerial Code of Conduct Act, No 16 of 1994 https://www.parliament.gov.zm/sites/default/files/documents/acts/Parliamentary%20And%20Ministerial%20Code%20of%20Conduct%20Act.pdf . Last Access July 2021.
[511] John P. Sangwa. (2004). Control of Administrative Actions in Zambia. Lecture Notes. Last Accessed June 2021. p.36
[512] Ibid. p.36. Also see Section 14 (8) of the Parliamentary and Ministerial Code of Conduct Act, No 16 of 1994
[513] John P. Sangwa. (2004). p.36
[514] Ibid. p.36
[515] Ibid. p.36
[516] Joseph Chirwa. (2020). Commentary on Public Law in Zambia: Law, Politics and Governance. Juta and company (Pty) LTD. P.139.
[517] Sossin, Lorne, and Steven J. Hoffman. (2012). Empirically Evaluating the Impact of Adjudicative Tribunals in the Health Sector: Context, Challenges and Opportunities. Journal of Health Economics, Policy and Law 7: 147-174.
[518] Curzon Dictionary of Laws (Pearson 1994). P. 387
[519] Josi K.C "Constitutional Status of Tribunals" (1999). Journal of Indian law school. Vol 41, No 1 pp 116 -119
[520]Sir Oliver Frank. (1957). Report of the Committee on Administrative Tribunals and Inquires. Cmmd. P.40

administration."

Their introduction is part of legal reforms to address the challenge of inundation by the traditional court systems. In the Commonwealth administrations, there has been rapid multiplication of adjudicative tribunals[521]. And Zambia has copious adjudicative Tribunals[522] covering various jurisdictions i.e. social, political, and economic matters.

3.7.1 **The Land Tribunal**

The Lands Tribunal is established under the Act Lands Tribunal Act of 2010.[523] Initially, the Lands Tribunal was created under the Lands Act of 1995.[524] It is a specialised court instituted to administer disputes pertaining to land.[525] It hears disputes under a number of statutes as well as disputes arising under customary land tenure. Any appeals from this court are to go to the High Court.[526] Appointments of the Lands Tribunal members are done by the Minister of Lands.[527] The composition of the members include the Chairperson and Vice Chairperson, who should be a legal practitioner with not less than seven years of legal experience.[528]

The composition of the team is expected to include a representative of the Attorney General (AG) who should be an advocate of not less than seven years legal experience. [529] The aforementioned Members are expected to be appointed in consultation with the Judicial Service Commission (JSC).[530] Further, a member of the Law Association of Zambia (LAZ) is expected to be on board and he or she should be an advocate of not less than seven years of legal experience. [531] Besides the forgoing cited members, it is also a requirement that there should

[521] Hoffman, Steven J. and Sossin, Lorne, "Evaluating the Impact of Remedial Authority: Adjudicative Tribunals in the Health Sector" (2009).Osgoode Legal Studies Research Paper Series. 143.
[522] These include, the Lands Tribunal, Tax Appeals Tribunal, Local Government Elections Tribunal etc.
[523] Section 3 of the Lands Tribunals Act of 39 of 2010. https://www.parliament.gov.zm/sites/default/files/documents/acts/The%20Lands%20Tribunal%20Act%202010A.PDF Last Accessed June 2021.
[524] The Lands Act Chapter 184 of 195. https://www.parliament.gov.zm/sites/default/files/documents/acts/Lands%20Act.pdf
[525] Section 3 of the Lands Tribunals Act of 39 of 2010. https://www.parliament.gov.zm/sites/default/files/documents/acts/The%20Lands%20Tribunal%20Act%202010A.PDF Last Accessed June 2021.
[526] Ibid.
[527] Section 5 (1) of the Lands Tribunals Act of 39 of 2010.
[528] Section 5 (a) and (b) of the Lands Tribunals Act of 39 of 2010.
[529] Section 5 (c) of the Lands Tribunals Act of 39 of 2010.
[530] Section 5 (2) of the Lands Tribunals Act of 39 of 2010.
[531] Section 5 (d) of the Lands Tribunals Act of 39 of 2010.

be a representative of the House of Chief, a planner,[532] a land surveyor,[533] a valuation surveyor, [534] and not more than three from the public and private sectors. The Lands Tribunal Act of 2010 also provides for appointment of a Registrar by the JSC[535] who should be a legal practitioner of not less than five years.[536] The functions of the Registrars shall include among others issuance of summonses, hearing and determining interlocutory application, and keeping record of all proceedings.[537]

Sangwa notes that the popularity of the tribunal is steadily increasing.[538] And this was likely to continue provided it promptly decides the cases and remains impartial in its decisions, especially in cases involving the Government.[539] There are, however, serious challenges facing the lands tribunal. Mushinge, [540] notes the tribunal has not performed to expectation due to a number of factors. These include among them delayed delivery of judgments. According to Section 12 of the Lands Tribunal Act of 2010, the tribunal shall deliver judgment within sixty days after the conclusion of the hearing of the case. However, Mushinge notes that significant number of judgments were delivered way beyond the indicated threshold. The paper, however, does not quantify the extent of the delay despite citing the necessitating factors which included low funding and lack of awareness. [541]

Sangwa further notes that performance is affected due to contradictions in the procedure of the Lands Tribunal and also in the supervising ministry.[542] Section 24 of the Lands Act confers power upon the Chief Justice to make regulations to govern the procedure of the Tribunal and for summoning witnesses to appear before the Tribunal. [543]The regulations issued by the Chief

[532] Note. He or she should be registered under the Urban and Regional Planners Act No 4 of 2011. See Section Section 5 (e) of the Lands Tribunals Act of 39 of 2010
[533] Note. He or she should be registered under the Land Surveyor Act Chapter 88. See Section Section 5 (g) of the Lands Tribunals Act of 39 of 2010
[534] Note. He or she should be registered under the Valuation Surveyor Act. See Section Section 5 (h) of the Lands Tribunals Act of 39 of 2010

[535] Section 7 (1) of the Lands Tribunals Act of 39 of 2010.
[536] Section 7 (4) of the Lands Tribunals Act of 39 of 2010.
[537] Section 7 (2) of the Lands Tribunals Act of 39 of 2010.
[538] John P. Sangwa. (2004). Control of Administrative Actions in Zambia. Lecture Notes. Last Accessed June 2021. p.38
[539] Ibid p.38
[540] Anthony Mushinge, (2012) 'An Evaluation of the Lands Tribunal in Resolving State Land Disputes in Zambia. Master Thesis, University of Technische Universität München https://core.ac.uk/download/pdf/234676084.pdf Last accessed August 2019. p. 21
[541] Ibid. p. 21
[542] John P. Sangwa. (2004). Last Accessed June 2021. p.38
[542] Ibid p.38
[543] Ibid p.38

Justice in 1996 appear to limit the jurisdiction of the Lands Tribunal. For instance, regulation 3(1) provides: *"An appeal to the Tribunal against any directive or decision may be instituted by sending the Secretariat, in duplicate, a written notice of appeal."* The rules are framed on the assumption that the Lands Tribunal is an "appeals tribunal" and not a tribunal with jurisdiction to hear any matter arising under the Lands Act. According to Rule 3(1) for the Lands Tribunal to be moved there must be a decision or directive made under the Lands Act and one must be aggrieved by such a decision or directive. The role of the Lands Tribunal is therefore to review such a decision or directive. This is contrary to section 22 of the Lands Act. The Act does not make reference to appeals. The Lands Tribunal has the power to hear any matter concerning land provided it can be related to some provision of the Lands Act. This is not the case from the Regulations. According to the regulations, the Lands Tribunal cannot entertain a dispute between two chiefs over the extent of their customary lands. This is so since no decision has been made in the matter. This is contrary to section 22. The said section employs the expressions such as the Tribunal shall "inquire into and make awards and decisions in any disputes", "inquire and adjudicate". They connote original jurisdiction on the part of the Lands Tribunal to hear and determine any matter covered by the Act.

3.7.2 **The Tax Appeals Tribunal**

The Tax Appeals Tribunal (TAT), formally the Revenue Appeals Tribunal (RAT)[544], is established by the Tax Appeals Act of 2015. [545] The purpose of the TAT, as espoused in section 5,[546] are to is to hear and determine appeals under the Customs and Excise Act in a variety of circumstances outlined in the Act. The composition of the TAT members is expected to include three legal practitioners of ten years or more standing recommended by the JSC and who have sufficient knowledge of, and experience in, tax matters.[547] The team is also expected to include two qualified accountants certified by the Zambia Institute of Chartered Accountants

[544] Revenue Appeals Tribunal Act of 1998. No 11 of 1998 of the Laws of Zambia. https://zambialii.org/zm/legislation/act/11-5

[545] Section 3 of the Tax Appeals Tribunal Act, 2015. https://www.parliament.gov.zm/sites/default/files/documents/acts/The%20Tax%20Appeals%20Tribunal%20%20Act,%202015.pdf. Last Accessed. June 2021.

[546] Section 5 of the Tax Appeals Tribunal Act, 2015 states the functions to include hearing and determining (a) appeals from decisions of the Commissioner-General under the Customs and Excise Act, the Income Tax Act, the Property Transfer Tax Act, the Value Added Tax Act and other tax legislation; and (b) any matter prescribed by the Minister, by statutory instrument, to be a matter against which an appeal may be made under the Acts referred to in paragraph (a).

[547] Section 4 (1) (a) of the Tax Appeals Tribunal Act, 2015.

(ZICA);[548] and two persons from the business community.[549] The Minister of Finance appoints all the Members including those recommended by the JSC.[550]

Sangwa observed that the authority of the Tribunal was limited. In the relation to matters arising under the provisions of Customs and Excise Act the Tribunal can hear and determine an appeal in three situations. First where an importer of goods feels that the goods he has imported are incorrectly classified by the Commissioner under the Customs Tariff.[551] Before the tribunal can be moved the importer must pay the duty as demanded by the Commissioner or furnish security to cover the amount of the duty due and payable. The importer must appeal within three months from the date of the payment of the duty. The essence of the appeal is to allow the Tribunal to review the decision of the Commissioner to classify the item in issue in the manner it is been classified. If the Tribunal finds that the classification is wrong, it will make such a declaration. The effect of the finding is that the duty paid will have been improperly paid and a refund will be ordered. [552]

The second situation arises where a person intends to import or manufacture an item, which he is of the opinion that the Commissioner General has wrongly classified it.[553] In such a situation the intention is to secure the correct classification of the item in the Customs Tariff. The third situation applies where the Commissioner General has determined the value of the goods intended for importation into Zambia or manufactured within Zambia for purposes of taxation and the party involved is aggrieved by the value fixed by the Commissioner General.[554] In relation to the provisions of the Value Added Tax Act, the Tribunal has authority to hear appeals stemming from the decision by the Commissioner General on the registration, or cancellation of registration of a supplier. The decision to refuse the registration of a supplier can be a subject of appeal to the Tribunal. The Tribunal has authority to hear and determination an appeal on the tax assessed on the supply of goods and services or on the importation of any goods. Any person aggrieved by the decision of the Commissioner General on the amount of the input tax that may be credited to him as a supplier can appeal to the Tribunal. [555]The decision to allow or disallow the apportionment of input tax is founded on the application of

[548] Section 4 (1) (b) of the Tax Appeals Tribunal Act, 2015.
[549] Section 4 (1) (c) of the Tax Appeals Tribunal Act, 2015.
[550] Section 4 (2) of the Tax Appeals Tribunal Act, 2015.
[551] John P. Sangwa. (2004). Control of Administrative Actions in Zambia. Lecture Notes. Last Accessed June 2021. p.46
[552]Ibid. p.46
[553] Ibid. p.46
[554] Ibid. p.46
[555] Ibid. p.46

various administrative rules. Where a person is dissatisfied with the rules applied in his case, he has the right to appeal to the Tribunal.[556]

3.7.3 **The Competition and Consumer Protection Tribunal (CCPT)**

Created by the CCPA No 24 of 2010, this body is granted dispute resolution powers to hear appeals from consumers and businesses of the decisions of the CCPC. The commission can also refer cases to the competition adjudicative body for action after completing the investigations. As an adjudicative tribunal, it is an integral component of Zambia's economic governance system. Section 67 of the CCPA gives effect to the establishment of the Tribunal and dictates that the members, who are appointed by the Minister responsible for commerce, shall be five. Among the conditions prescribed by the Act indicate that;

- *There should be a legal practitioner of not less than ten years' legal experience, who shall be the Chairperson;*
- *There should be a representative of the Attorney-General, who shall be the Vice-Chairperson; and,*
- *There should be three other members who shall be experts, with a minimum of five years' experience and knowledge in matters relevant to the Act.*

The aforementioned requirements expressed in the CCPA under Section 67 demonstrate deliberate efforts made to ensure there is hybrid of legal and auxiliary expertise to preside over Tribunal matters. The questions that, therefore, ensues is whether these parameters are sufficient enough to safeguard the efficacy of the Tribunal. This particular matter is discussed in detail in the subsequent chapter. However, what is worth noting is that the powers to appoint the tribunal members are vested in the Minister and the Office of the Attorney General seconding an officer who assumes the position of Vice Chair. Whereas a threshold of 10 year experience has been given for the Chairperson, Ministerial appointments are essential but are not immune of having appointments based on political patronage and appeasement. India's S.P *Sampath Kumar v Union of India* [557] decision presents key fundamental lessons which the

[556] Ibid. p.46
[557] S.P Sampath Kumar V Union of India. Supreme Court Of India/1983

Zambian jurisdiction can draw from. In this case, it held in the S.P *Sampath Kumar v Union of India* [558] that the appropriate rules should be made to recruit members, vice Chairman and Chairman of the Tribunal after consulting the Chief Justice. Similarly in the Zambian jurisdiction, it is important to ensure that the powers of the appointment vested in the Minister are vetted by the Chief Justice or the Judicial Service Commission as it is the case with the Lands Tribunal and Tax Appeals Tribunal (TAT). This entails having a procedural provision in the CCPA that requires that once the Minister appoints the Tribunal, the names should be sent to the Chief Justice or the preferred institution for consideration and endorsement. This will be a great step towards giving the required legal weightage to the appointment system and process.

3.8 The Conclusion

This chapter sought to look at the sufficiency of the present traditional justice delivery system and the institutionalized ADR process in addressing the challenge of inundation and delay experienced by ordinary courts in Zambia. Notably, significant levels of legal reforms have been noted overtime which present an opportunity for a strengthened legal regime for dispute settlement. The enshrining of ADR principles in the present Constitution was one great attempt to signify the importance of ADR in complementing traditional court processes in dispute settlement. Notably, other reforms which have ensued over time illustrate the recognition and crystallization of ADR in Zambia. Most prominently, Conciliation, Arbitration and Mediation have dominated with considerable legal backing. Further, the 2018 law reforms clearly indicate a progressive shift in the practice. Statutory Instrument No. 73 of 2018, introduces CAM, in the Subordinate Court. This development further signifies the important role ADR plays in enhancing access to justice delivery in the Country.

The chapter also notes that the formal court system has recorded some improvement in the case handling processes. All Courts, except the Local Courts, continued to record a reduction in backlog. The Local Courts closed with 31,557 pending cases in 2019, compared with 30,057 pending civil cases at the close of 2018, representing a difference of 1,500 pending cases. This was attributable to closure of some of the courts due to lack of infrastructure and low staffing levels. Reportedly, the Supreme Court had a total of 257 criminal cases. Out of these cases, 196 were brought forward from 2018 and 61 were filed in 2019. A total of 170 cases were

[558] S.P Sampath Kumar V Union of India. Supreme Court Of India/1983

disposed of and 87 cases were carried forward the subsequent year. As for civil cases, 190 were brought forward from 2018, while 16 were filed during the year bringing the total number to 206. Out of these, 148 were disposed of, leaving 58 cases at the close of 2019.

Despite the observed positive developments covering 2018 and 2019, there has been dissatisfaction with the performance of the Zambian judiciary. Despite the marginal improvement recorded the cited major challenges facing the Zambian judiciary has been that of inefficiency and inordinate delays in the processing of cases. One eminent example that is dotted in literature is the absence of a mechanism to control, manage and monitor complex litigation.

Chapter Four

Administrative and institutional factors of dispute resolution that affect performance of adjudicative tribunals in Zambia

4.0 Introduction

This chapter discusses the existing legal, administrative and institutional factors which underpin performance of administrative bodies, with adjudicative functions. This discussion roots its foundation in administrative law. Administrative law is the law which governs the powers and procedures of agencies. It is concerned with public authorities. It is concerned with the way power is acquired, where the public authorities get their powers from and the nature of those powers. It determines whether the exercise of a power subject to any particular procedure, or whether it must be exercised in any particular form. The CCPA of 2010, for instance, confers on CCPT, the powers to hear appeals from the decision of the CCPC. The role of the CCPT, as an independent institution, in providing checks on the exercise of powers of the CCPC, just like the Court would perform such on the CCPT, is the concern of administrative law. The courts are concerned with the legality of the administrative actions. Therefore, performance of any adjudicative tribunal is dependent on the extent to which its statutory powers and the general legal environment was supportive to its existence.

4.1 Setting the legal basis for administrative law and functions within the lenses of Constitutionalism and rule of law

Administrative law is concerned with public authorities. It is concerned with the way power is acquired, where the public authorities get their powers from and the nature of those powers.[559] It determines whether the exercise of a power subject to any particular procedure, or whether it must be exercised in any particular form. [560]If so, it addresses the effect of failing to do so. It focuses on how to ensure that power is used only for the purpose for which it is. [561]Further, Administrative law is concerned not only with power but also with liabilities both of authorities and of their employees. [562]It is concerned with the bodies, which exercise these powers: central

[559] Mulenga Besa (2019). Administrative Law and Process: Cases and Commentaries. Chribwa Publishers. p.1
[560] Ibid. p.1
[561] John P. Sangwa. (2004). Control of Administrative Actions in Zambia. Last Accessed June 2021. p.2
[562] Ibid. P.2.

government departments, public corporations, local authorities and other institutions. [563] The role of the courts, as independent institutions, in providing checks and balances on the exercise of public powers is the concern of administrative law.[564] The courts are concerned with the legality of the administrative actions.[565] Administrative law must be seen as an instrument of control of the exercise of administrative powers. Administrative law, like any other branch of law is not an end in itself but a means of getting things done by creating through the legal process, institutions, and granting them powers and imposing on them duties.[566] The decision maker is subject to the law, but at the same time, he sees the law as something to use to achieve some end which society has chosen. Administrative law is a concern of a lawyer as much as for the public officers. [567]There is need for public power, but there is also need for protection against its abuse.[568] Administrative law attempts to address the age-old problem of abuse of power.

Having discussed the periphery and coverage of Administrative law generally, it is important to discuss its functionality within the broader framework of law. This discussion, therefore, is looked at its applicability and relation with parent laws such as the constitution. Notably, there is a distinction between constitutional law and administrative law. Constitution law refers to the formal rules, in the case of Zambia, embodied in one single document referred to as the constitution, which establish the main institutions of the state, prescribe their powers, their relation with each other and their collective position vis-à-vis the citizens.[569] Administrative law on the other hand focuses on the powers vested in these institutions and how they use them.[570]

For instance, the CCPA of 2010[571], confers on CCPT[572], the powers to hear appeals from the decision of the CCPC. The role of the CCPT, as an independent institution, in providing checks on the exercise of powers of the CCPC, just like the Court would perform such on the CCPT, is the concern of administrative law. Similarly, the Lands Tribunal Act, 2010, confers on the Lands Tribunal, the powers to administer disputes pertaining to land. Tax Appeals Act, 2015,

[563] Supra. P.2.
[564] Ibid. p.3
[565] Ibid. p.3
[566] Joseph Chirwa. (2020). Commentary on Public Law in Zambia: Law, Politics and Governance. Juta and company (Pty) Ltd. 139
[567] John P. Sangwa. (2004). P.3
[568] Ibid. p.4
[569] Mulenga Besa (2019). Administrative Law and Process: Cases and Commentaries. Chribwa Publishers. p.5
[570] Joseph Chirwa. (2020).. 138
[571] Competition and Consumer Protection Act No. 24 of 2010
[572] Competition and Consumer Protection Tribunal

on the other hand, is deposited with the responsibility to hear and determine appeals under the Customs and Excise Act.

The Acts establishing these institutions and the regulations made pursuant thereto are not themselves of concern of administrative law. [573] However, administrative law would touch on the authority of these tribunals and the extent to which they operate within their periphery. Administrative law tends to focus on three aspects of administration: rule-making procedure, where the public institutions or officers are conferred powers to make rules, adjudicative procedure where there is power to make decisions and judicial review, which focuses on the power of the court to review decisions of public institution to ensure that they are intra-vires the empowering legal instruments, and to declare them *ultra-vires,* where they are not

There is a close connection between a country's constitutional order and the principles and theories underlining that order or framework and administrative law. There are a number of concepts in constitutional law, which have an impact on administrative law. The most important concepts are those of supremacy of the constitution, separation of powers and rule of law. These three ideas affect how power vested in various administrative agencies and officers is exercised. They define the limits of power or authority and ensure that those entrusted with the responsibility to manage public affairs on behalf of the people do so within the confines of the law.

The concept of constitutional supremacy and legislative subordination remains a key topical issue in the academic legal narrative. It confers highest authority in a legal system on the constitution[574]. The principle of supremacy of the constitution also concerns the institutional structure of the organs of the State such as the courts, the parliament and the executive. As for the executive the importance of the provisions is that the President and his Ministers or any other public officer can do only that which is permitted by the Constitution.[575] The President cannot do or take action, which cannot be justified within the framework of the constitution. The same is true for Ministers in the exercise of powers conferred by Acts of Parliament, like the power to issue instruments with legal force such as statutory instruments.[576] The position of any statutory instrument must comply with the empowering legislation and with the constitution. [577]Where the provisions of the statutory instrument are in conflict with the

[573] John P. Sangwa. (2004). p.3
[574] Limbach Jutta, The concept of Supremacy of the Constitution (Vol. 64, No. 1 (Jan., 2001), pp. 1-10
[575] John P. Sangwa. (2004). p.15
[576] Ibid p.15
[577] Ibid p.15

provisions of the empowering legislation then, such an instrument is to extent of the inconsistency ultra-vires the relevant provision of the empowering legislation. Similarly, if a statutory instrument is in conflict with the constitution, that instrument shall also be invalid to the extent that it is inconsistent with the constitution.

The same is true for the judiciary. Although Part VIII of the constitution provides that Judges, Magistrates and justices of the local courts are and must be independent and impartial, it does not follow that they are independent from the law. They are subject only to the constitution and the law. They are bound to operate within the law as established from time to time. This is true even for the Supreme Court.[578] It is bound to follow its decision in earlier cases unless there are compelling reasons in a given situation to go against its own earlier decision.[579]

The concept of separation of powers is another concept, which has an impact on administrative law in Zambia. The concept of separation of powers is one of the features of the Zambian constitutions since independence.[580] The concept calls for the division of the authority of government into three main organs of government: the legislature, executive and judiciary. In its modern application the consequence of the concept is not that, there must be a rigid three-fold division or classification of power. Its value lies in the emphasis on the checks and balances, which are essential to prevent the abuse of enormous powers vested in the rulers and this is important from administrative law standpoint.[581] In modern times, the concept has been expanded and has to come mean a number of things to scholars and other interested parties. However, in its original context, as formulated by Montesquieu, the concept meant: (1) that the same people should not form part of more than one of the three organs of government. For instance, a Judge of the High Court should not be a member of the executive by holding a ministerial position. [582] The real value of the concept lies in maintaining the balance of power between the various organs through checks and balances. There is, however, something to note as a feature of the constitutional order of Zambia. [583]There is no rigid application of the concept.

[578] Joseph Chirwa. (2020). p.1
[579] Ibid. p.1
[580] Ibid. p.1. Also see. Kenneth Ward, Legislative Supremacy, 4 Wash. U. Jur. Rev. 325 (2012) and Ronald Dworkin, Freedom's Law: The Moral Reading of The American Constitution 16, 34 (1996).
[581] Mark Tushnet, (1999).Taking the Constitution Away From the Courts.
[582] For example the appointment of Mr. Justice Bobby Bwalya, a sitting Judge of the High Court as Chairman of the Electoral Commission, and other like in the past to offices in the executive branch of government was seen by many legal scholars as a violation of the concept of separation of the powers. This was not seen as a problem in the eyes of the appointing authority because those appointed did not see anything wrong with such appointments, as they were a source of great reward. Second, there was no immediate and visible victim of this practice. What was affected is the quality of government
[583] John P. Sangwa. (2004). p.19

Ministers are chosen and appointed by the President from among Members of Parliament. The President himself is part of Parliament. The National Assembly acting together with the President in the legislative process make up Parliament.[584] The Judges of the Supreme Court are appointed by the President subject to ratification by Parliament. [585]The Judges of the High Court are appointed by the President, after consultations with the Judicial service Commission, but the appointment is subject to ratification by Parliament. This has led to some difficulties which have been translated in the actual working of the constitutional order.

Although the constitution has embodied the concept of separation of powers to some extent, in practice the executive branch of government has greater control and influence on the activities of both the legislature and the judiciary.[586] In the case of the legislature, although the constitution has conferred on it the power to make laws, which must be exercised independently without regard to the views or sentiments of the executive, in reality the legislature has become more of an extension of the executive.[587] Members of the Parliament have greater allegiance to their party and not to the Parliament as an institution. Motions and Acts of Parliament receive the required number of votes on the strength of the party, which sponsored it and not necessarily on merit. [588]Unpopular legislation and motions are affirmed by Parliament purely on partisan lines. Appointments to constitutional offices are ratified by Parliament, just because they emanate from the President, even in the face of evidence to against such decisions.

In the case of the judiciary, some judges are openly partisan and are holding judicial offices not because they are of value to the judiciary as an institution, but because they are useful to the executive branch of government when necessary. Whenever they are called to resolve any issue of political significance involving the government, they invariably decide in favour of the government. [589]

Assessing institutional supremacy i.e. the three arms of government, is outside the scope of this paper. However, there are a number of academic discussions around this subject especially from the context of who resolves disagreements about constitutional doctrine. Arguments that have ensued hinge on the supremacy of each institution. For example, Ronald Dworkin argues by defending an expansive conception of judicial authority because of his expectations that

[584] John P. Sangwa. (2004). p.19
[585] Ibid. p.19
[586] Ibid. p.20
[587] Ibid. p.20
[588] Ibid. p.20
[589] Ibid. p.20

judges will make better decisions than legislators regarding the conditions necessary to secure equal status for citizens[590]. On the opposite side of the political spectrum, old theorists Robert Bork [591]and Mark Tushnet[592], argue that judicial review should be significantly curtailed or eliminated based on their assessments of the values that judges are likely to advance. The position advanced by Bork and Tushnet of contest. Kenneth Ward[593] has questioned the ideological quality of the arguments by the two theorists. He argues that such kind of reasoning reinforces the tendency to confuse the question of what authority judges should have and the question of how judges should interpret the Constitution. He argues that Bork and Tushnet attack judicial supremacy in order to advance a particular conception of constitutional law and this distracts attention from important structural considerations that should inform assessments of whether to limit judicial authority by assigning priority to legislative interpretations of constitutional law.

Additionally, Muna Ndulo argues that constitutionalism is premised upon the separation of powers of the three arms of the government i.e executive, legislative, and judiciary[594]. This is supported by the ***Donoghue v. US.*** The court stated that:

"it was important to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others - independent not in the sense that they shall not co-operate to the common end of carrying into effect the purposes of the constitution, but in the sense that the acts of each shall never be controlled by, or subject directly or indirectly, to the coercive influence of either of the other department."

This decision conjures the need to maintain independence among the arms of Government by ensuring that there is no undue influence when they are exercising their appointed powers. This judgment is devoid of any mention of supremacy but on separation of powers. The Constitution of Zambia (Amendment) Act No. 2 of 2016 has attempted to address the supremacy issue by

[590] See Kenneth Ward, Legislative Supremacy, 4 Wash. U. Jur. Rev. 325 (2012) and Ronald Dworkin, Freedom's Law: The Moral Reading of The American Constitution 16, 34 (1996).
[591] Robert H. Bork, Slouching Towards Gomorrah 117–19 (1996); Mark Tushnet, Taking The Constitution Away From The Courts (1999).
[592] Mark Tushnet, Taking the Constitution Away From the Courts (1999).

[593] Kenneth Ward, Legislative Supremacy, 4 Wash. U. Jur. Rev. 325 (2012).
[594] Muna Ndulo, Judicial Independence and the Supreme Court's Decision in the matter Of the three Judges, (Opinion – Zambia Reports) https://zambiareports.com/2013/07/12/prof-ndulo-disputes-supreme-court-judgement-on-mutuna/

emphasising separation of powers and independence. Part VIII of the Constitution of Zambia (Amendment) Act No. 2 of 2016 addressed the issue of Judicial Authority, System of Courts and Independence. Under, 118 subsection (1), the judicial authority is derived from the people of Zambia[595] and not any other organ of Government. Similarly Part V Article 61 gives legislative Authority to Parliament and this derived from the people of Zambia and shall be exercised in a manner that protects the Constitution and promotes the democratic governance of the Republic. Further, the Constitution also gives authority to the Executive authority through Part VII. This Authority, according to Article 90, is also derived from the people of Zambia and shall be exercised in a manner compatible with the principles of social justice and for the people's well-being and benefit.

Therefore, the debate that has ensued over the years that Parliament or the Executive are supreme on constitutional matters owing to the mere fact that Members of Parliament, who form part of the Executive, are elected is a nullity. Therefore, the authority vested in the three arms of Government is drawn from the people. In support of this constitutional reasoning, some scholars reject the supremacy question. Constitutional jurists[596] endorse coordinated approach to dealing with the supremacy question. It is the considered view of the constitutional jurists that members of the legislature who are elected should be under no obligation to defer to judicial interpretations of constitutional law when exercising their own independent authority[597]. The main argument here is that most Constitutions are designed in such a way that judges and elected member of legislature will sometimes advance conflicting views of what the Constitution means. When such conflicts arise, these officials, have an incentive to appeal for public support of their favoured view according to the jurists.

Ndulo further adds the dimension of operational peculiarities of the three arms of Government. With respect to Parliament, he argues that courts have the power, and indeed the duty to see to it that there is no infraction of the exercise of legislative powers, whether substantive or procedural, as laid down in the relevant provisions of the Constitution. If such infraction exists,

[595] Part VIII Article 118 (1) of theConstitution of Zambia (Amendment) Act No. 2 of 2016 states. "*The judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability".*

[596] Larry Kramer and Neal Devins and Louis Fisher….See Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 58 (2004); Neal Devins & Louis Fisher, The Democratic Constitution 217 (2004).

[597]Ibid

the courts must declare any legislation passed pursuant to it unconstitutional and invalid[598]. The constitution is premised on the exercise by the judiciary of its power of judicial review which means that the judiciary must see to it that the other arms of the government act within the provisions of the Constitution[599].

It is the duty of the Executive to give effect to all judgments given by the Judiciary regardless of the executive's view of the correctness of the judgments[600]. Where the executive is dissatisfied with the judgment of a lower court, the proper and constitutional way is for the executive to exercise its rights of appeal[601]. The Judiciary, on the other hand, is expected to undertake judicial review and interpret statutes based on the intentions of the Legislature. It is outside the scope of the Judiciary to expunge constitutional provisions unless provisions in subsidiary legislations which are in contrast with the aspiration of the Constitution[602] .

Having given this abridged, albeit, exhaustive account of the key principles and summative arguments around constitutional supremacy among the three arms of government, it is important to look at the issue of constitutional supremacy and legal subordination.

The effect of a written constitution depends on whether the constitution is expressed or implied to be supreme law[603]. The legal consequences of a constitution being the supreme law is that any other law that is inconsistent with it cannot operate[604]. Such a law must be regarded as void and of no effect to the extent of the inconsistency[605]. Usually this legal consequence is expressly stated in that provision which declares the constitution to be the supreme law[606].

In many constitutions of the Sovereign States, there is an express statement in the constitution itself that the constitution is the supreme law of the country. For example, supremacy question is underwritten in Chapter 1 section 5[607] of the Constitution of Malawi. It states that that any

[598] I discuss the unconstitutional and invalidity of subsidiary legislation in the *Bribery Commissioners v Ranasinghe* ..infra pp. 5.
[599] Muna Ndulo, Judicial Independence and the Supreme Court's Decision in the matter Of the three Judges, (Opinion – Zambia Reports)
[600] Ibid
[601] Ibid
[602] I discuss the issue of obliteration of constitutional provisions in the Wright Musoma and team Vs Electoral Commission of Zambia, Attorney General. infra pp. 5
[603] Supra
[604] University of South Pacific: Relationship between a Written Constitution and other Laws (Course Materials Unit 7) (2013)
[605] Ibid
[606] Ibid
[607] Note: Section 5 states that any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.

act of Government or any law that is inconsistent with the provisions of the Constitution shall, to the extent of such inconsistency, be invalid. This is also the case with Zimbabwe and Kenya. Chapter 1 Article 2 (1) of the Zimbabwe's Constitution expressly gives legal effect to the supremacy question. It states:

> "*This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency".*

In Kenya, Chapter 1 Article 1 subsection (1[608]) and (4[609]) also addresses the supremacy issue. This gesture is also replicated in most constitutions of countries outside the African continent. For example, constitutions of Fiji (section 2 (2)) Kiribati (section 2), Marshall Islands (include 1 (2)), Nauru (article 2(2)), Samoa (article 2(2)), Solomon Islands (section 2), Tonga (clause 82) and Tuvalu (article 3 (1)) an express or implied statement that the constitution is supreme[610].

Under Zambia's legal system, as is the case with many other common law jurisdictions, the Constitution is the supreme law of the land. This argument is expressly underwritten by clauses (1) and (4) of Article 1 of the Constitution of Zambia (Amendment) Act No. 2 of 2016. Clause (1) emphasises the supremacy of the constitution and nullifies any other written law or practice that is inconsistent with its provisions, while clause (4) explicitly accentuates on the validity and legality of the constitution. It states that the validity or legality of the constitution is not subject to challenge by or before a State organ or other forum[611].

Therefore, this entails that the constitution binds all organs of the State and persons. This concept of the Constitution as the supreme law of the land entails the subordination of all persons, organs and legislation in the country to the Constitution of the State. This implies that the existence of some independent and impartial organ that ensures respect of the Constitution and the Constitutional order.

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[608] Chapter 1 Article 1 (subsection (1)): (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
[609] Chapter 1 Article 1 (subsection (4)): Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
[610] University of South Pacific (n2)
[611] See: Article 1 (4) of theConstitution of Zambia (Amendment) Act No. 2 of 2016

4.1.1 Constitutions which are not stated to be supreme Law

Constitutions exists which are note stated supreme. These have been source of conflict. The question which arises, when a constitution is not stated to be supreme, is as to whether legislation which is enacted after the constitution came into force but in conflict with it is void. The other question is whether such legislation can have the effect of overriding the terms of the Constitution and avoid or repeal these terms with which it is inconsistent[612]. The normal rule is that subsequent laws override earlier laws.[613]

These scenarios have been discussed in the following three cases;

M^{c}Cawley v The King[614]*, The Queensland Constitution Act 1867* provided, by sections 15 and 16 that judges of the Supreme Court shall hold office during good behaviour, but could be removed on an address from parliament. This Act was not stated to be supreme and no special procedure was specified for the amendment of sections 15 and 16. In 1916 the *Industrial Arbitration Act 1916* was passed by the Queensland Parliament which provided in section 6 that judges of the Industrial Arbitration Court, who were also to hold office as judges of the Supreme Court, were to be appointed for terms of seven years.

Proceedings were taken to remove Judge M^{c}Cawley on the ground that section 6 was in conflict with the sections 15 and 16 of the Constitution Act and since these were sections of the Constitution Act, section 6 was void. The Privy Council held that there was nothing in the Constitution Act to protect sections 15 and 16 from amendment by legislation in the ordinary way, and consequently section 6 of the 1916 Act, being subsequent in time, had the effect of amending the earlier sections 15 and 16 of the Constitution Act 1867. Thus, the normal rule of statutory interpretation was applied to the Constitution. But an exception was noted in the following case.

Bribery Commissioners v Ranasinghe[615]. The Ceylon (Constitution) Order 1946, which was not stated to be supreme law, provided by section 55 that the appointment of judicial officers was vested in the Judicial Service Commission. Section 29 of the Order provided that

[612] University of South Pacific (n19) supra
[613] Ibid
[614] M^{c}Cawley v The King [1920] AC 691 (Readings 6) … Note this case is assessed through University of South Pacific (19) Supra
[615] *Bribery Commissioners v Ranasinghe* [1965] AC 172 (Readings 6/). Note this case is assessed through University of South Pacific (n19) Supra

Parliament could enact an Act to amend any provision of the Order, provided that the Speaker certified that the Bill has been approved by at least two-thirds of the members of the House of Representatives. In 1958 Parliament enacted the Bribery Amendment Act which established bribery Tribunals, the members of which were, under section 41, to be appointed by the Governor-General on the advice of the Minister of Justice. This Act contained no Speaker's certificate to show that it was approved by two-thirds of the members of the House of Representatives.

The Privy Council held that section 41 of the Act was in conflict with section 55 of the Constitution, and since section 29 of the Constitution provided that amendments of the Constitution could only be made by an Act certified to have a two-thirds majority, and since there was no such certificate on the Bribery Amendment Act 1958, it could not amend the Constitution, and so must be held to be void. *M^cCawley*'s case (above) was distinguished on the ground that no special procedure was prescribed by the Constitution Act for its amendment.

More recently in Zambia, in a case between Wright Musoma and team Vs Electoral Commission of Zambia, Attorney General and others, the petitioner wanted provisions of the Constitution to be expunged. The high Court held that it was a creation of the Constitution and therefore it cannot be called upon to expunge or remove provisions from the supreme law of the land. The judgment also emphasised that the courts were not vested with power to alter or amend provisions of the Constitution.

Thus, it appears from these three decisions that if a constitution is not stated to be supreme, its provisions may be amended by ordinary legislation which is inconsistent with them. Using *M^cCawley's* case as a yardstick this will happen if there is no provision in the Constitution stipulating any special procedure to be followed. If, on the other hand the Constitution prescribes some special procedure that must be followed to amend the Constitution, as in the *Bribery Commissioners* and Wright Musoma's case, then any subsequent Act which is inconsistent with the Constitution, and has not been enacted by that special procedure, will be void.

4.1.2 Tracing the vertical relationship between the CCPA and the Constitution

The fundamental interface between the constitution and other subsidiary legislations is expressed in Article 272 of the Constitution of Zambia (Amendment) Act No. 2 of 2016. Under this Article, parliament retains powers to enact legislation to give effect to an Article or

provision in the Constitution. The Competition and Consumer Protection Act of 2010 (CCPA) is one such legislation which gives effect to Article 10 of the Constitution. Under Article 10, two key principles are promulgated. Government, under this Article intends to create an enabling environment which encourages individual initiative and self-reliance among the people, so as to promote investment, employment and wealth[616]. Government also envisages promotion of local and foreign investment[617]. The role of the CCPA is aiding realisation of the statutory purpose of these two provisions is key. It is, therefore, important to reflect on the general concept and linkages between competition law and investment promotion.

The issue of competition law enforcement, investment promotion *vis a vis* wealth creation has been a subject of legal debate but more intensely economic debate. Competition laws are generally conducive to both foreign direct investment and local investment, given their role in improving transparency in the regulatory system[618]. Investment is generally a gamble about future outcomes[619]. Hence, investors would prefer to have an opportunity to predict the future outcome of their investment[620]. Debate, however, continues with no apparent consensus on the generalisation that markets under conditions of competition are more conducive to investment than markets under conditions of monopoly. Competition policy and law writers have used an "***inverted U-relationship model[621]"*** to reconcile the two school of thoughts. *Dube* further unpacks the ***inverted U-relationship*** by suggesting that it can be as a result of what is described as the ***'ability' and 'compulsion' factors.*** The latter is based on the notion that competition compels firms to invest more in order to stay ahead of their rivals while the former is based on the notion that a monopoly is more poised to invest due to monopoly profits.

The ***compulsion argument***, according to *Dube*, stems from the view that under competition, it will be difficult for firms to use pricing as a tool for profit making, as increasing prices might drive prospective buyers away to rival firms. *Jérôme and Wilfried*[622] adds that competition

[616] Article 10 (1) of theConstitution of Zambia (Amendment) Act No. 2 of 2016

[617] Article 10 (3) of theConstitution of Zambia (Amendment) Act No. 2 of 2016

[618] Dube Cornelius, The Relationship between Competition and Investment (CUTS- Viewpoint) #3/2009
[619] Ibid
[620] Ibid
[621] The *Inverted-U* model (also known as the Yerkes-Dodson Law), was created by psychologists Robert Yerkes and John Dodson as long ago as 1908. It deals with the the **relationship** between changes in arousal and motivation which are often expressed as an **inverted-U** function. The basic concept is that, as arousal level increases, performance improves, but only to a point, beyond which increases in arousal lead to a deterioration in performance
[622] Jérôme Mathis and Wilfried Sand-Zantman, Competition and Investment: What do we know from the literature? (March 2014) file:///C:/Users/simon.ng'ona/Desktop/Judgement/Competition_and_Investment.pdf

may, therefore, provide firms with incentives to innovate and escape from competition in the product market. This is also known as ***"escape competition.*** One sector that has been prone to escape competition is the mobile handset and telecommunications. Producers of mobile handsets are always innovating and producing new brands which are being developed continuously, and they are adding new technologies to accommodate value added services, such as *internet connections, video facilities,* etc. Further, product competition among mobile service providers through a numbers of *packages i.e. voice calls, free sms, data bundles etc.* are also part of the equation of ensuring that they are afloat in their relevant markets. Companies, have therefore, been, constantly reinvesting in new innovations, production technologies, new production processes and new products[623].

The "***ability argument[624]"*** is that firms under conditions of competition would not have the ability to invest, given that competition would erode their profits, which is a critical source of investment. *Jérôme and Wilfried*[625] adds that strong product market competition decreases profits and then lowers incentives to innovate. At the core of the ability argument is market power which is prevalent in some monopolies. Market power is associated with profits, it is generally the expectation of some form of temporary *ex post* market power that incentivises investment[626]. Such investments, in most cases, depend on capital markets for reinvestment. When capital markets are imperfect, or if borrowing is difficult or costly, it is the rent from market power that provides firms with the much-needed resources for innovative activities[627]. Possession of market power also helps in reducing some of the uncertainty associated with competition, which reduces the incentives to invest due to fear of freeriding[628].

[623] Ibid
[624] Note: Also referred to as Schumpeterian hypothesis by Joseph Alois Schumpeterian
[625] Jérôme Mathis and Wilfried Sand-Zantman, Competition and Investment: What do we know from the literature? (March 2014) file:///C:/Users/simon.ng'ona/Desktop/Judgement/Competition_and_Investment.pdf
[626] Dube supra (n. 33) p.2
[627] Ibid
[628] Jamaican case is one good example. If the relevant market is broadly defined as the telecommunications sector: covering both the mobile and fixed line telephony. Privatisation in the sector brought about a private monopoly, Cable & Wireless (C&W) of the UK which operated in the Jamaican market from 1987 until 1996, when competition was ushered in. Results show that there was significant investment and a vast increase in net assets in the industry during the period of the monopoly, attributed to the monopoly rents earned by C&W. When competition was ushered in, lower prices and a vast increase in subscriber base were experienced, with teledensity increasing by about 1200 percent between 1994 and 2005. However, in 1995 the total gross investment in the telecommunication system was higher than the real value of gross investment in 2005. Thus, the private monopoly was doing more in spurring investment in the telecommunications industry than the opened up sector, even though the opening up to competition did better in providing access to consumers and driving prices down4.

Therefore, what is, however, clear is that the not all sectors are amenable to competition. The relationship between competition and investment cannot be generalised across sectors. If the objective was investment, promotion in a particular sector, the decision on whether to open up the sector for competition will depend on the sector-specific characteristics[629]. However, both arguments above do not suggest that competition policy and law cannot have jurisdiction over sectors with natural monopoly characteristics. In fact, the law is necessary to check concentration and ensuring that monopolies are not abusing their market share. Further, monopolies are consumers of key inputs from other sectors. The potential of the input sector engaging in anticompetitive practices cannot be overruled and thus the need to have a law that prohibits anti-competitive practices cannot be nullified. This buttresses the reason why the CCPA was enacted to give effect to Article 10 (1) and (3) of the Constitution of Zambia (Amendment) Act No. 2 of 2016. Two institutions namely the Competition and Consumer Protection Commission (CCPC) and The Competition and Consumer Protection Tribunal CCPT are mandated to implement the Act.

4.1.3 Administrative justice – oversight of superior courts on tribunals

As earlier noted, administrative tribunals are specialised governmental agencies established under to implement legislative policy. Some public boards and public decision makers also have had powers of decision making conferred upon them by statute.[630] Such powers of decision making are conferred upon administrative tribunals, boards or other decision makers in order to provide a more expeditious, less formal and sometimes less expensive method than the courts for resolving certain types of disputes or issues.[631]

Notably, most tribunals are required, by common law or statute, to follow some basic rules of procedure. The procedure to be followed by a tribunal may be found in the enabling statute or related regulation and in rules, guidelines, or directives formulated by the tribunal. Procedures may also be set out in a notice issued for a particular proceeding or they may be a matter of unwritten tribunal policy or practice.[632] When there is breach of these procedures, however, judicial review can be institution through the higher courts. Further, a legal decision can be

[629] Ibid.
[630] Fasken Martineau DuMoulin. (2018). Administrative tribunals and judicial review. http://www.lexology.com/library/detail.aspx?g=f59b0866-8483-44ba-8bd6-16276f886c15 . Last Accessed April, 20121)
[631] Ibid
[632] Ibid.

overturned through the appellate process, as higher court have power to reverse the lower court decision entirely or in part.[633]

Courts have supervisory jurisdiction over the actions of public tribunals.[634] Parties affected by decisions of tribunals, may appeal to court to have the administrative decision reviewed. This is called judicial review.[635] There are two broad categories of judicial review: procedural judicial review and substantive judicial review. Procedural judicial review involves an allegation that an impugned administrative decision was reached in a manner not in compliance with procedural fairness.[636] This may mean that here was a denial of natural justice, or the decision was otherwise procedurally unfair.[637] Substantive judicial review challenges the decision itself, either on the basis that the decision-maker in question did not have the power to make the decision he or she purported to make. This may mean that one acted outside his or her jurisdiction or on the basis that the decision was either incorrect or unreasonable.[638]

In Zambia, there are situations where the tribunal rulings have been overturned by the highest court of record, the Supreme Court. Below are the key cases that have been heard at the highest court structure in Zambia, the Supreme Court. And key to note is that the prescribed standard for appeal process for cases emanating from the tribunal is as per ordinary standard. Firstly, when a disputant receives an unfavourable decision from the tribunal, he or she may appeal that decision to the High Court[639] and all the way to the Supreme Court.[640] This involves formally filing a notice of appeal with a lower court, indicating one's intention to take the matter to the next higher court with jurisdiction over the matter and then actually filing the appeal with the appropriate appellate court.[641] The appealing party files a petition for a writ of certiorari, a formal request for the higher court to review the lower court's decision.[642] If certiorari is granted, the tribunal provides the higher court with a record of all prior proceedings.[643]

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[633] Ibid.
[634] Bruce, Richard. Success in Law (2nd ed.). England: John Murray, 1988.
[635] Fordham, Michael. (2001) Judicial Review handbook (3rd ed.). Oxford: Portland Oregon, p.209
[636] Ibid. p.209
[637] Ibid. p.209
[638] Ibid p.210
[639] Section 75 of the CCPA of 2010 deals with appeals to the High Court. 75. It states *"A person aggrieved with a decision of the Tribunal may appeal to the High Court within thirty days of the determination".*
[640] Mumba Malila SC; The Contours of a Developing Jurisprudence of the Zambian Supreme Court; Reflections of My first five years (1st Edition, 2019). p.32
[641] Nolo, (2013). Appeals and the Writ of Habeas Corpus FAQ," Last Accessed December 2020,
[642] Ibid.
[643] Ibid.

CCPC v. Tokyo Vehicle Limited.[644]

This case stemmed from the sale of a defective brand new Massey Ferguson tractor by Tokyo vehicles limited in May 2012. This was at a cost of one hundred and sixteen thousand four hundred kwacha (K 116, 400.00.) The board of Commissioners adjudicated the matter under section 49 (1) of the competition and consumer protection act no. 24 of 2010, and issued directives to the effect that, *"Tokyo vehicles limited be ordered to refund the consumer the total cost of the tractor, being K 116, 400.00."* Tokyo vehicles appealed the decision of the board to the competition and consumer protection tribunal, which found in favour of Tokyo vehicles on the basis that the Commission should have proved the case beyond reasonable doubt, considering that section 49 (1) aforesaid, was a criminal provision.

This decision was appealed by Commission to the high court which ruled in favour of the Commission. In turn, Tokyo vehicles appeal to the supreme court, which found, inter alia, that, where a contravention of section 49 (1) has been established, the commission may impose an administrative sanction under subsection (3) and (4) of the act, as such the judgment of the commission was upheld.

This particular case took over six years to be concluded which was, however, a long time. However, the clarity that has been given to the relevant sections of the act was necessary in ensuring better interpretation of any future unfair trading practices of a similar nature. It also entailed that the decision of the tribunal to entertain matters of criminal jurisdiction was ultra vires.

Puma energy Zambia plc vs CCPC[645]

The genesis of this matter stems from a conditional approval by the commission to BP Africa's takeover of Castrol Oil Corporation in 2001, requiring the maintenance of an independent distributor of Castrol branded products in Zambia, for the enhancement of competition. Dana Oil Corporation was identified as a suitable independent distributor of the Castrol oil products but along the way on 23rd may, 2002 and 4th June, 2002 BP Africa and Danatech investment limited ("dana oil") entered into a distribution agreement so as to meet the condition precedent, and the same was approved by the commission.

[644] SCZ/8/195/2015
[645] SCZ/8/195/2015

Following the acquisition of BP Zambia by Puma Energy, it was reported that BP Africa began selling the products to Dana through puma energy and puma energy was advertising itself as a Castrol products distributor in Zambia. Contrary to the conditions that were given for approving the merger in conformity with section 31(h) of the competition and consumer protection act.

The Board found Both Puma Energy and Dana wanting and fined them 2% and 0.1% of their turnover respectively. They individually appealed to the tribunal, which found the case in their favour. The Commission appealed to the high court, which found in favour of the Commission in relation to the puma case; and in favour of Dana as regards the Dana case. In turn Puma appealed to the Supreme Court and the Supreme Court upheld the decision of the Board. By Puma energy's 2011 turnover, the 2% fine translated into the sum of fifty one million two hundred, ninety two thousand, two hundred and twenty kwacha (K 51, 292,220.00.)

CCPC vs Omnia fertilizer Zambia limited and Nyiombo Investment Limited [646]

On 16th October, 2012, the Commission conducted a dawn raid at Omnia's premises in Lusaka and collected various items of evidence; prior to issuing Omnia with a notice of investigation informing them that investigations had been instituted against them. When the notice of investigation was subsequently issued to them, Omnia did not respond to the notice of investigation but instead appealed to the competition and consumer protection tribunal against the notice of investigation.

Subsequently, the Board of Commissioners rendered its decision , prompting Omnia make an application before tribunal; pursuant to rule 19 (1) of the competition and consumer protection tribunal rules, 2012 that the Commission acted in contravention of the act when it proceeded to investigate and render its decision in a matter which had been appealed against to the tribunal.

The tribunal found in favour of Omnia and the matter went through appeal all the way to the Supreme Court; which were held to the effect that the act mandates the Commission to investigate and arrive at a decision. It is only at this stage that a party aggrieved with the decision can appeal to the tribunal. In this regard, Omnia was granted leave to appeal to the tribunal against the decision of the board of commissioners dated 26th April, 2013.

[646] SCZ/AP/205/2014

Therefore, the three cases which have been appealed all the way to the highest court of record have been decided in favour of Commission. The decisions of the tribunal have been squashed. This, development, therefore questions the quality of the decisions made by the tribunal on the subject matter.

4.1.4 Institutional Design for Competition Adjudication

The scope of what one should consider to be the institutional design of a competition adjudicative framework is extremely wide as it covers every aspect of the governance of the institutions, of their internal organization and the relationship with the outside[647]. These could be government, parliament, the business community and consumers[648]. This paper does not attempt to look at all these dynamics but rather looks at them from the periphery defined by Fox and Trebilcock as explained in chapter one. As highlighted, there are three types of institutional designs with respect to competition and consumer protection adjudication[649]. The first is the bifurcated judicial model. Under this system, the competition authority does the investigations and then goes to court for enforcement. The second is the bifurcated agency/tribunal model, where the competition authority has to rely on a specialized tribunal for enforcement. This means that the competition authority will only be an investigation arm without any power to pass an order, which is the role for the Tribunal. The third is the integrated agency model, where the first level of adjudication is done by the competition authority, with the Tribunal coming in on appeals[650]. At appeals level, adversarial and inquisitorial system are options. The latter system is a legal system where the court or tribunal is actively involved in proof of facts by taking investigation of the case[651]. An adversarial system is that where the court acts as a referee between the prosecution and the defence. The whole process is a contest between two parties. The bedrock principle in both systems is that trial must precede judgment[652]. This section, therefore, attempts to understand which system is applicable to the Zambia competition and consumer protection adjudication regime.

[647] Frederic Jenny, 'The institutional design of Competition Authorities: Debates and Trends (2016) 2
[648] Ibid
[649] Fox, Eleanor M. and Trebilcock, Michael J (2012), the Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project. New York University Law and Economics Working Papers. Paper 304.
[650] Note: Whichever model is chosen, cases go to court, whether immediately or ultimately.
[651] See: Yan Yu, The Adversarial System vs. The Inquisitorial System, Nankai University, School of Law *https://www.rossmoyneshs.wa.edu.au/*
[652] Kuckes, Niki (2006) "Civil Due Process, Criminal Due Process," *Yale Law & Policy Review*: Vol. 25: Iss. 1, Article 2. Available at: http://digitalcommons.law.yale.edu/ylpr/vol25/iss1/2

Zambia's competition and consumer protection adjudication stems from the 1990s. Before the enactment of the CCPA of 2010, Zambia's competition nomenclature was under the jurisdiction of the Competition and Fair Trading Act (CFTA) of 1994[653]. The CFTA, was part of the new regulatory initiatives introduced to regulate the then ensuing market dynamics as a result of the Structural Adjustment Programme (SAP). Under the CFTA, the then Zambia Competition Commission (ZCC) was granted investigative powers to investigate cases in violation. Section 16 of the CFTA stated that any person who contravenes or fails to comply with any provision of this Act, shall be guilty of an offence and shall be liable "***upon conviction"*** to a fine not exceeding one hundred thousand penalty units or imprisonment for a term not exceeding five years or to both. Under Zambia's legal system, conviction is a criminal matter and such matters are handled by the court of law [654]. The case in support of this argument is the *CCPC v. Tokyo Vehicle Limited*[655]. In this case, which concerned whether the Competition and Consumer Protection Tribunal (CCPT) has jurisdiction to hear criminal matters under the CCPA of 2010, the High Court held that the CCPT had no jurisdiction to hear criminal matters under the CCPA as this was prerogative of the High and Subordinate Court[656]. Therefore, the used of the term *"upon conviction"* under the CFTA entailed all cases were to be heard under a body of competent jurisdiction i.e. ***either the High or Subordinate Court***. This entails that the model used during the CFTA era was **"*bufacated judicial model"*** was used under the ZCC era.

The CFTA was an effective law for about 15 years in Zambia, during which a number of problems and constraints were identified. Most of these constraints emanated from the weaknesses of the Act and the institutional design[657]. These weaknesses necessitated the reforming of the CFTA. In 2010, the CFTA was repealed and replaced by the Competition and Consumer Protection Act (No.24 of 2010). The new law renamed the ZCC to Competition and Consumer Protection Commission (CCPC) in line with its extended mandate to cover

[653] Not this Act came into force on February 15, 1995

[654] A reference to Section 5 (2) of the Criminals Procedures Act Cap 88 and Section 19 of the Subordinate Court Act Chapter 28 of the laws of Zambia shows that only the subordinate or high court have the jurisdiction to try criminal offences under the Act

[655] See: CCPC v Tokyo Vehicle Limited 2014/HP/A1018... Also see... Mumba Malila SC; The Contours of a Developing Jurisprudence of the Zambian

[656] Supra (n 50)

[657] Note: Among the identified challenges contained in the Business Licencing Regulatory Committee Report constituted under the Private Sector Development Reform Programme (PSDRP) included *Limited provisions scope for interpretation and treatment of cartels and vertical restraints; Limited clarity on the definitions of mergers and their notification process; Limited coverage and clarity of public interest in the Act; Lack of administrative powers by the Commission to impose fines on businesses and consumers in breach of the law; and Absence of an alternative dispute settlement mechanism.*

consumer issues. Part II[658] of the CCPA describes the function of the commission and these include among others to;

a) *Review the operation of markets in Zambia and the conditions of competition in those markets;*
b) *Review the trading practices pursued by enterprises doing business in Zambia;*
c) *Investigate and assess restrictive agreements, abuse of dominant positions and mergers; and,*
d) *Investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary;*

The CCPA strengthens the provisions on competition and consumer protection as envisaged in the reforms. The CCPC is given its legal mandate under Section 4 and the CCPC is given the necessary powers to investigate all the three types of anticompetitive practices, namely; restrictive business and anticompetitive practices[659], anticompetitive mergers and acquisitions (M&As) and abuse of dominance[660]. The investigation power is also augmented by the appointment of inspectors[661], who are empowered by the Act to conduct dawn raids[662].

The CCPA also introduces administrative fines for the CCPC and leniency Programme. The latter was incorporated into the new Act in order to facilitate easy identification of cartelistic behaviour. Under Section 79 of the Act, CCPC may operate a leniency programme where an enterprise that voluntarily discloses the existence of an agreement that is prohibited under this CCPA, and cooperates with the CCPC in the investigation of the practice, may not be subject to all or part of a fine that could otherwise be imposed. This is expected to help increase chances of successfully prosecuting cartels. Section 79 also provides for details of the leniency programme to be provided for under specific guidelines to be produced by CCPC. As a result, CCPC came up with such guidelines, which are now in effect since 2015. Under the

[658] See: Part II (5) of CCPA 2010
[659] See Part III – section 8-23
[660] See Part Iv – section 24-37
[661] PART II Section 7. (1)… states that The Board may appoint any suitable person to be an inspector for the purposes of ensuring compliance with this Act, on such terms and conditions as the Board may determine.

[662] PART II Section 7 (6) states that *A person who— (a) delays or obstructs an inspector in the performance of the inspector's functions; (b) refuses to give an inspector such reasonable assistance as the inspector may require for the purpose of exercising the inspector's powers; or (c) gives an inspector false or misleading information in answer to an inquiry made by the inspector; commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both.*

programme, companies that have engaged in a cartel conduct can come to the Commission and give information and evidence which can lead to the successful prosecution of the cartel. The 'first through the door' firm that participated in the cartel would be entitled to leniency for 100 percent of fines while the second firm gets a 50 percent reduction of the fine. Any other firm that comes forward after two firms have already disclosed would not be entitled to any leniency.

In terms of administrative powers, the CCPA gives CCPC power to impose fines. And there are two types of fines i.e. administrative and penal. The administrative fines are imposed by the Commission while the penal fines hinge on criminal law and can only be imposed through traditional courts. This issue is discussed further in the subsequent Chapter. Thus, CCPC only imposes administrative fines and they only become penal fines once the parties decide to challenge the decision of the Commission as well as the Tribunal and take the matter to the court. Under the CCPC Act, 2010, an enterprise that violates any provisions of the Act is liable to a fine of 10 percent of its annual turnover[663].

Besides the strengthening of the coverage and scope of anticompetitive practices to be handled under the CCPA, the Act also introduced an adjudicative the - Competition and Consumer Protection Tribunal (CCPT). The introduction of the adjudicative model was, perhaps, with anticipation that the enhanced administrative powers granted to the commission to impose fines would result in eminence of cases and disputes. This, therefore, conjured the need to introduce an institution that would perform quasi-judicial functions that are otherwise fulfilled by the formal judicial system. This development is in affirmation with Article 118 Subsection (2) (b) of the Constitution of Zambia No. 2 of 2016 which mandates the Judiciary to consider alternative forms of dispute resolution when exercising its judicial authority.

Article 118 Subsection (2) of the Constitution of Zambia No. 2 of 2016 states;

……In exercising judicial authority, the courts shall be guided by the following principles:

(a) Justice shall be done to all, without discrimination;

(b) Justice shall not be delayed;

[663] See Part III Section (9) (3) on Horizontal Agreements Prohibited *per se;* Section 10 (3) on Vertical Agreements Prohibited *per se*; Section (16) (3) on Prohibition of abuse of dominant position; Section 21 (3) on Revocation of Exemption. Other fines are under Part IV Subsection (37) (C). Under Part VII on Consumer Protection fines are under Subsection (46) (2) on Prohibition of unfair Training Practices; Subsection (47) (b) on False or Misleading Representations; Subsection (48) (2) Display of Disclaimers; Subsection (49) (2) (b) and (49) (2) (c) Prohibition of supply of defective and unsuitable goods and services; Subsection (50) (4) (b) and 51 (2) on Product labelling, Subsection (52) (2) (b) among other provisions.

(c) Adequate compensation shall be awarded, where payable;

(d) Alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted.

Principle ***B*** and ***D*** gives the constitutional foundation of the CCPT and other existing Tribunals in Zambia***. Delayed justice***, the well-known, frequently used aphorism in principle B implies that faster justice is better justice. This aphorism has been a subject of debate and litigation since time immemorial. *Godfrey Miyanda v. Matthew Chaila*, a high court judge who had delayed disposing of a case in which Miyanda had sued the Attorney General conjures relevant learnings. In seeking remedies, Miyanda wanted a declaration that the refusal by the *Justice Chaila* to adjudicate or to determine the said action was wrongful and unconstitutional. In delivering judgement, presiding judge Justice Hon Earnest Sakala held that a judge cannot be taken to court for delaying in adjudicating on the case[664]. Despite the ruling not being in favour of the appellant, the underlying facts of the case hinged on delayed justice of which Article 118 Subsection (2) (b) of the 2016 Constitution of Zambian addresses. The debate on whether, judges are immune from litigation or not on delayed disposal of cases varies from jurisdiction to jurisdiction. Canada presents good insights and two cases can be cited for this purpose i.e. *R. v. Askov and R. v. Jordan*. In the case of R. v. Askov[665], the appellants were charged with conspiracy to commit extortion. The trial took place almost three years after the original charges were laid. The Supreme Court found the delay excessive and unreasonable and ordered a stay of proceedings. As a result of this precedent, almost 50,000 other criminal charges in Ontario were dismissed because of "unreasonable delay." In the case of R. v. Jordan[666], on the other hand, the Supreme Court dismissed the analysis developed in the Askov case and blasted

[664] ***Godfrey Miyanda V Matthew Chaila.*** *(JUDGE OF THE HIGH COURT) (1985) Z.R. 193 (H.C.) Particulars of this case were that Miyanda, was a litigant in a civil suit commenced by writ of summons on 10th September, 1981 in the High Court for Zambia entitled 1981/HP/1244- Godfrey Miyanda v The Attorney-General. The hearing of the action commenced before the Hon. Mr Justice Chaila on 22nd August, 1983. On the same day, the petitioner closed his case. The defendant who adduced no evidence, then made his final submissions. The plaintiff's final written submissions were filed on 7th September, 1983. According to the Miyanda (petitioner) the respondent Mr. Justice Matthew Chaila, refused to adjudicate or to determine the action and to deliver judgment in reasonable time or at all. Miyanda, claimed that by virtue of the unwarranted and unreasonable delay in determining this action, the he suffered great emotional distress and anxiety and great inconvenience." In seeking remedies, Miyanda wanted a declaration that the refusal by the Hon. Mr Justice Chaila to adjudicate or to determine the said action was wrongful and unconstitutional; and he also sought a declaration that the respondent's failure to perform his functions, namely refusing or failing to determine the said action was a denial of justice. The other remedies sought was a declaration that the delay in determining the said action was unreasonable and in breach of a statutory duty. In delivering judgement, the sitting Judge Justice Earnest Sakala held that a judge cannot be taken to court for delaying in adjudicating on the case. He also held that the public had a right to have the independence of the judiciary preserved and that the absolute freedom and independence of judges is imperative and necessary for the better administration of justice.*

[665] *R. v. Askov* (1990) *Charge of Extortion*
[666] *R. v. Jordan (2016) Charge of drug trafficking*

the culture of *complacency towards delay* after a simple dial a dope drug prosecution dragged on for over four years. As a result, the court set ceilings beyond which a delay is presumptively unreasonable. The courts opined if the total delay exceeds 30 months in superior courts and 18 months in provincial courts then delay would presumptively be unreasonable.

Such case law and jurisprudential developments remain key sources of legal reforms. In the present legal narrative, emphasis is being placed on the need to reduce case processing time and increase efficiencies across all cases. In the milieu of competition and consumer protection which is relatively a new phenomenon in Zambia, the Judiciary has defined and appreciated their role in dispensing competition and consumer related cases. This is supported by a statement made by the Deputy Chief Justice Hon. Justice Marvin S Mwanamwambwa, during a workshop for Supreme Court Judges organised by the CCPC[667]. He said;

> *"The need to put in place correct judicial precedents as well as timely and judicious conclusions of cases dealing with consumer protection and competition issues cannot be over-emphasized. For this reason, yourselves, as honourable Judges are invaluable participants in the evolution of this relatively novel area of the law; hence the need for you to be enlightened on the conceptual framework of competition and consumer protection laws."*

And ***alternative forms of disputes*** as expressly expounded in the aforementioned principle D of Article 118 Subsection (2) of the Constitution of Zambia remain key pillars to contribute towards developing correct judicial precedents and judicious conclusions. The CCPA, under Section 67 establishes CCPT as an alternative platform for settlement of competition and consumer cases. The main function of CCPT, as provided for under Section 68 of the Act, is to hear any appeal made to it against decisions made by CCPC[668]. The Tribunal is also granted authority to perform such other functions as assigned to it under the Act or any other law[669]. This gives room for the Tribunal to also preside over cases that have not originated from appeals against the decisions of CCPC. In addition to the powers provided for under the CCPA,

[667] Training Supreme Court Judges on Competition Policy and Law 26-27 Protea Chisamba, 2017 https://www.ccpc.org.zm/index.php/media-releases/newsletter/send/17-newsletters/50-issue-no-15-july-december-2016

[668] Note: Section 68 states that The functions of the Tribunal are to *(a)* hear any appeal made to it under this Act;

[669] Section 68The functions of the Tribunal are to— (b) perform such other functions as are assigned to it under this Act or any other law.

the Tribunal's decisions are guided by Section 31 of the Statutory Instrument No 37 of 2012[670]. Section 31 (1) states;

A decision of the Tribunal shall be in writing and shall contain the following…(a) the finding of the Tribunal on each issue of fact or law raised in the proceedings.

The emphasis on the need for the Tribunal to base its decision "*on each issue of fact or law raised in the proceedings"* entails that the tribunal cannot make decision outside what has been presented before it by the disputing parties. This entails that the institutional designs adopted is that of a ***bifurcated integrated agency model,*** where the first level of adjudication is done by the competition authority, with the Tribunal coming in on appeals[671]. Drawing on the strengths and limitations of such systems, Fox and team[672] indicate that where courts are weak the bifurcated or integrated agency/tribunal models have some significant advantages. On the other hand, where courts are strong, independent, honest, and efficient, the bifurcated judicial model has some significant advantages[673]. The inclusion of principle ***D*** in the Zambian Constitution, therefore, validates the reasoning that the judicial system in Zambia faces challenges and alternative dispute mechanisms that are otherwise fulfilled by the traditional court system. It must, however, be noted that, in jurisdictions that have adopted bifurcated agency/tribunal models, experiences reveal the importance of ensuring that the members of the adjudicative tribunal have substantial legal and economic expertise of a consistent and continuous nature[674].

Section 67 of the CCPA gives effect to the establishment of the Tribunal and dictates that the members, who are appointed by the Minister responsible for commerce, shall be five. Among the conditions prescribed by the Act indicate that;

- *There should be a legal practitioner of not less than ten years' legal experience, who shall be the Chairperson;*

[670] Note: Section 73 of the CCPA
[671] Note: Whichever model is chosen, cases go to court, whether immediately or ultimately.
[672] Fox, Eleanor M. and Trebilcock, Michael J (2012), (n. 45)

[673] Note: This issue is thoroughly discussed in the next chapter on case law and jurisprudential developments ensuing from the Tribunal.

[674] Fox Supra (n. 68)

- *There should be a representative of the Attorney-General, who shall be the Vice-Chairperson; and*
- *There should be three other members who shall be experts, with a minimum of five years' experience and knowledge in matters relevant to the Act.*

The aforementioned requirements expressed in the CCPA under Section 67 demonstrate deliberate efforts made to ensure there is hybrid of legal and auxiliary expertise to preside over Tribunal matters. The questions that, therefore, ensues is whether these parameters are sufficient enough to safeguard the efficacy of the Tribunal. Between October, 2012 and December 2014, 85 appeal cases had been filed with the CCPT Secretariat, with about 75 percent of them being consumer-related[675]. CCPT passed 11 judgments, 12 appeal cases were withdrawn from the Tribunal as a result of both parties (CCPC and clients/companies/consumers) agreeing to settle the matters outside the Tribunal, while 9 cases were voluntarily withdrawn. Whether the cases heard and determined were speedily and inexpensively disposed of as envisioned under Section 71 (b)[676]of the CCPA, is a subject of another chapter in this paper. The prosecution of a case (the take-off) does not always or regularly tell us much about the effect of the case on society (the landing)[677]. Nor does an aggregate tally of activity provide insight into the doctrinal significance of individual matters, especially "small" cases whose influence on jurisprudence exceeds their seemingly modest economic stakes.

Undeniably, the efficacy of Tribunals and the legal input are essential in the dispensation of justice. Sacrificing legal input or no giving weightage would impair their efficacy and effectiveness[678]. It is clear from the Zambia context that the powers to appoint the Tribunal are vested in the Minister of Commerce and the Office of the Attorney General seconding an officer who assumes the position of Vice Chair. Whereas a threshold of 10-year experience has been given for the Chairperson, Ministerial appointments are essential but are not immune of having appointments based on political patronage and appeasement. India's S.P *Sampath*

[675] See CCPT Annual Reports, 2012, 2013, 2014 2015
[676] It states "The Tribunal may— *(b)* take any other course which may lead to the just, speedy and inexpensive settlement of any matter before the Tribunal".
[677] Kovacic W. Hollman H. and Grant P. (2011), how does your competition agency measure up? European Competition Journal.
[678] See Indian Law Institute, Adjudication by the Tribunals in India: Landmark in field of natural justice

Kumar v Union of India [679] decision presents key fundamental lessons which the Zambian jurisdiction can draw from. It was held in the S.P *Sampath Kumar v Union of India* [680] that the appropriate rules should be made to recruit members, vice Chairman and Chairman of the Tribunal after consulting the Chief Justice. Similarly in the Zambian jurisdiction, it is important to ensure that the powers of the appointment vested in the Minister are vetted by the Chief Justice or the Judicial Service Commission as it is the case with the Lands Tribunal and Tax Appeals Tribunal (TAT). This entails having a procedural provision in the CCPA that requires that once the Minister appoints the Tribunal, the names should be sent to the Chief Justice or the preferred institution for consideration and endorsement. This will be a great step towards giving the required legal weightage to the appointment system and process.

4.2 Tracing the legal process. Adversarial or inquisitorial?

These are two legal systems used in most common law systems. As indicated earlier, adversarial systems are those which empower the court act as a referee between the prosecution and the defence[681]. An inquisitorial system, on the other hand, is a legal system where the court is actively involved in proof of facts by taking investigating of the case. The efficacy of the two systems has been subject of debate resulting in scholars making clear distinctions on the differences of each system[682].

Table 3: Distinction between adversarial and inquisitorial system.

Adversarial System	*Inquisitorial System*
The adversarial system aims to get the truth through the open competition between the prosecution and the defence.	The inquisitorial system generally aims to get the truth of the matter through extensive investigation and examination of all evidence.
In an adversarial system all parties determine what witnesses they call and the nature of the evidence they give. The court oversees the process by which evidence is given.	In an inquisitorial system the conduct of the trial is in the hands of the court. The trial judge determines what witnesses to call & order in which they are to be heard.

[679] S.P Sampath Kumar V Union of India. Supreme Court Of India/1983

[680] S.P Sampath Kumar V Union of India. Supreme Court Of India/1983

[681] Note: As regard crime these two parties are the state & the person accused. In this process court takes a nonpartisan role.

[682] See: Yan Yu, The Adversarial System vs. The Inquisitorial System, Nankai University, School of Law https://www.rossmoyneshs.wa.edu.au/

In adversarial systems, previous decisions by higher courts are binding on lower courts.	There is little use of judicial precedent in inquisitorial systems. This means Judges are free to decide each case independently of previous decisions by applying the relevant statutes.
In an adversarial system, the rule of lawyers is active.	In an inquisitorial system, the rule of lawyers is passive.
The judges pronounce judgment depending on the hearing, evidence or on the basis of examination & cross-examination.	The judge plays an active rule for questioning & hearing the parties directly.
In an adversarial system the rule of the judges are merely passive in nature.	In an inquisitorial system the rule of the judges is very active.
The case management does not depend upon the judges so the judges contribution is very low for the disposal of any case.	The case management depends upon the judges so the judges contribution is very high for the disposal of any case.
In an adversarial system all references are presented by the respective lawyers of both the parties.	In an inquisitorial system references also presented by the judge & they play's an active rule.
The case management depends upon the lawyers of both the parties & they get unfettered opportunity for the case management upon their own wishes.	The case management depends upon the judges and the judge's fixe the term for the disposal of any case.
In an adversarial system, the hearing, evidence or examination & cross-examination done by the lawyer get priority.	In an inquisitorial system, documents and information about the real facts get priority.
Case management is not effective under this system because the judges cannot exchange views with the parties for taking any decision. So no initiative can be taken for speedy disposal of any case.	Case management is effective under this system & the judges sit with the parties and can exchange views for taking any decision for speedy disposal of any case.
In an adversarial system judges has discretionary power but that is not wide by the evidence.	In an inquisitorial system judges have wide discretionary power.
Repeated time petition (common practice) is permitted at the time of continuance of the case & the lawyer's take the opportunity of making time petition. So delay occurs in disposal of any cases.	The main object of this system is to reduce the time for disposing of a case and to ensure speedy justice. Judge plays an active role in deciding time petition & may honour or reject time petition.

Source; Nankai University, School of Law (2016)

This, therefore, conjures the need to understand the system used by the Tribunal. Three key Articles are pertinentin resolving this issue. The starting points is Section 68 of the CCPA which gives the Tribunal mandate to hear any appeal made to it against decisions made by CCPC. This provision gives the Tribunal legal authority to perform judicial functions. The

second provision is Section 31 of the Statutory Instrument No 37 of 2012[683]. This provision guides the tribunal to base its decision on facts and law and on arguments raised in the proceedings by the disputing parties. As earlier observed, the emphasis is on the need for the Tribunal to base its decision "*on each issue of fact or law raised in the proceedings".* This entails that the tribunal cannot make decision outside what has been presented before it by the disputing parties. Lastly, and more importantly, Section 78 of the CCPA further clarifies that matters cannot be taken to the tribunal before being investigated by the CCPC. In specific terms the Article states;

> *The Chief Justice may, by statutory instrument, make rules relating to……..— 2) Rules made under this section may, in particular, provide— (a) that before any matters are referred to the Tribunal they shall, in such manner as may be provided by the rules, have been brought before and investigated by the Commission in this respect;*

The three key provisions of the CCPA and SI 37 dictate that the system used under the Tribunal is *adversarial*. This is in contrast with other systems in the region like South Africa which uses an inquisitorial system. It is clear that the adversarial system aims to get the truth through the open competition between the prosecution and the defence.

[683] Note: Section 73 of the CCPA

4.3 Conclusion

The introduction of the CCPT represents a profound change in adjudication of competition and consumer-related disputes. And evolution of this dispute settlement mechanism, just like any sound legal regime, is a product of administrative law which define the relevance and parameters required for this and other adjudicative bodies to perform their function. Therefore, given that the establishment of the tribunal is framed within the contours of administrative law requirement and the evolving dispute settlement legal procedures which are quasi-judicial in nature, ensuring that the decision of the tribunal are of legal mind is inevitable. And thus, in answering the hypothesis that the existing legal, administrative and institutional framework of dispute resolution was insufficient in underwriting the performance of CCPT to meet its statutory purpose, it is clear from this chapter that the tribunal is a product of an Act of Parliament, and the decision have a binding effect. Notably, decisions of the tribunal can be appealed to the High Court[684] and all the way to the Supreme Court.[685] It is clear that the court's supervisory jurisdiction over administrative tribunals is inherent in any system governed by the rule of law, and thus this partly affirms that the existing legal regime was sufficient to support performance of the tribunal.

However, there are key factors and elements which require attention as these require institutional and legal reforms. Firstly and notably, it is clear that tribunal decisions which have been appealed up to the Supreme Court have taken more than six years. This defeats the very foundation of introducing ADR. Notably, the major challenge hinges on the existing layers for appeal process which include, the High Court, Appeals Court and Supreme Court. Since the nature of appeals brought before the tribunal are business in nature and are an important drivers for economic growth of the country, it is will be that appeals from the tribunal should lie straight to the Court of Appeal. One proximate justification for this proposal is that for one to be appointed Chairperson of the Tribunal, they need to have 10 years or more at the bar which is the same qualification as that of high court Judges[686]. It will in turn also enhance the status of the tribunal and it will also help with decongesting the High Court and save on the time that cases are held up in the High Court.

[684] Section 75 of the CCPA of 2010 deals with appeals to the High Court. 75. It states *"A person aggrieved with a decision of the Tribunal may appeal to the High Court within thirty days of the determination".*
[685] Mumba Malila SC; The Contours of a Developing Jurisprudence of the Zambian Supreme Court; Reflections of My first five years (1st Edition, 2019). p.32
[686] Article 141 1(1) (d). A person qualifies for appointment as a judge if that person is of proven integrity and has been a legal practitioner, in the case of the… High Court, for at least ten years.

At the core of this chapter is the classification of the institutional design and the type of judicial system used under the Tribunal model. The chapter concludes that the the institutional design adopted is that of a ***bifurcated integrated agency model,*** where the first level of adjudication is done by the competition authority, with the Tribunal coming in on appeals. In jurisdictions that have adopted bifurcated integrated agency models, experiences reveal the importance of ensuring that the members of the adjudicative tribunal have substantial legal and sectoral expertise of a consistent and continuous nature. The chapter acknowledges the attempt made in the CCPA to ensure high level participation of legal and sectoral minds[687]. However, this chapter argues that the appointment process of Tribunal members needs to be strengthened through putting up appropriate recruitment rules and ensuring that all appointments made by the Ministers are vetted by the Chief Justice as in the S.P *Sampath Kumar v Union of India* [688] case.

[687] Section 67 of the CCPA gives effect to the establishment of the Tribunal and dictates that the members, who are appointed by the Minister responsible for commerce, shall be five. Among the conditions prescribed by the Act indicate that; There should be a legal practitioner of not less than ten years' legal experience, who shall be the Chairperson; There should be a representative of the Attorney-General, who shall be the Vice-Chairperson; and There should be three other members who shall be experts, with a minimum of five years' experience and knowledge in matters relevant to the Act.

[688] S.P Sampath Kumar V Union of India. Supreme Court Of India/1983

Chapter Five

Regional dynamics: A Comparative study with the South African Competition Tribunal

5.0 Introduction

This Chapter presents the discussion of the findings from a case a case study of the South African Competition Adjudicative Regime with a view to provide a comparative legal assessment with that of Zambia. The rationale that stimulates this exploration hinges on the understanding that the South African Competition Adjudicative regime is a fairly old system in the Southern African Region. Therefore, it harbours jurisprudential developments which are essential for Zambia, and other countries in the region whose competition and consumer protection policy and legal regime are at a nascen stage, to draw from.

5.1 Contextualising the South African Competition Adjudicative Regime

South Africa's economic, social and political history remain the key fundamental drivers to the present setup of the competition legal regime which is being steered by the Competition Act 89 of 1998 Act[689]. The Act is framed by an acknowledgement that historical factors such as apartheid and other discriminatory laws resulted in excessive concentration of ownership and control in the South African economy that erected unjust barriers to economic participation by all South Africans[690]. In addition to the pursuit of efficiency, the Act, therefore, also seeks to promote competition in the interest of transforming ownership of the economy, advancing the social and economic welfare of all South Africans, and ensuring that small businesses have an equitable opportunity to participate in the economy[691]. The overall policy on competition, seeks to promote and achieve both economic welfare and non-economic welfare objectives as articulated in the 1998 Act[692]. Preceding this Act, there was no broad legislative framework for the country's competition law and according to Prins and Koornhof[693], the framework was

[689] Hereunto referred to as Competition Act 89 of 1998
[690] Katerina Barzeva and Sunél Grimbeek: The effectiveness of merger control in South Africa: Selected case studies (2016) working paper
[691] Ibid
[692][692] Ibid
[693] Deon Prins[I]; Pieter Koornhof; assessing the nature of competition law enforcement in South Africa; (2014) Law democr. Dev. vol.18 Cape Town

dotted with fragmented regulation through various Acts[694] superintended by the Board of Trade and Industry.

Attempts were made to broaden the scope of the Board through the introduction of the Undue Restraint of Trade Act. Prins and Koornhof further explain that the tenure of this Act was brief, and subject to severe criticism by the Board itself, which led to the drafting of a report suggesting its repeal and the introduction of proper legislation formulated on the basis of identified principles and objectives. This, therefore, led to the drafting to the Regulation of Monopolistic Conditions Act, which was cited by the aforementioned scholars as the first native legislation dealing with competition matters. Alas, gaps were also observed in the legislation as it had limited enforcement provisions and this resulted in repeat cases with others going unpunished[695]. Absence of provisions which criminalised pernicious anticompetitive practices, such as cartels, were also factors that conjured the repeal.

The repealed Act was later replaced with Maintenance and Promotion of Competition Act following the recommendation of the Mouton Commission of Inquiry. The Act introduced an institutionalised and specialised mechanism for adjudication and the Competition Board was set up as a body to investigate and deal with a variety of restrictive practices[696]. According to Prins and Koornhof, the Act specifically provided that such violations were to be treated as criminal offences which had to be proven beyond a reasonable doubt, with penalties upon conviction including a fine, imprisonment, or both. However, this mechanism was unsuccessful in addressing key anti-competitive conduct and behaviour due to high rates of more serious crime dominating investigative resources, and a lack of expertise in competition matters on the part of investigating and prosecuting officers[697].

Other than the observed limitation on expertise, it is clear that compliance was also an issue and this affected legitimacy of the Board. Legitimacy, as Tayler[698] explains, is a quality that is

[694][694] Note: Competition law in South Africa goes beyond the 20th Century. This dates back to Roman law in the form of the *lex iulia de annona*, as promulgated during the reign of Augustus to impose heavy fines on traders manipulating the price of grain.

[695] Note: The first time an anti-competitive practice was formally criminalised in South Africa was in 1969, when resale price maintenance was declared unlawful.

[696] Note: Restrictive trade practice, means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers' unjustified costs or restrictions.

[697] Ibid

[698] Tom R. Tyler. "Mechanisms of Legal Effect: Theories of Procedural Justice" (2009). Monograph for the Public Health Law. University Beasley School of Law

possessed by an authority, a law, or an institution that leads others to feel obligated to accept its directives[699]. Therefore, limited compliance levels, compounded by other factors which ensued before the 20th Century, necessitated the introduction of the 1998 legal framework. Staples and Masamba argue that the Competition Act of 1998 remains unique in that it is, not only the product of South Africa's economic, social and political history, but it also addresses some of the observed gaps[700].

Further, the 1998 Act provides for a broad range of economic and developmental objectives[701] and creates a three-tier institutional framework. It, on one hand, provides for the establishment of the Competition Commission which is deposited with the function of an investigatory body and, the Competition Tribunal whose function is to provide adjudicatory services, on the other. The Act also provides for the establishment of a Competition Appeals Court (CAC) whose functions are to hear appeals from the Tribunal. Both the Tribunal and the Court draws its mandate from section 34 of the 1996 of the Republican Constitution of South Africa. This constitutional provision states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial Tribunal or forum[702].

The legislative mandate of the Tribunal, on the other hand, is derived from the Competition Act of 1998 and its purpose is to promote and maintain competition in order to among others[703]:

(a) Promote efficiency, adaptability and development of the economy;
(b) Provide consumers with competitive prices and product choices;
(c) Promote employment and advance the social and economic welfare of all South Africans;
(d) Expand opportunities for South African participation in world markets;
(e) Recognise the role of foreign competition;

[699] Note: Tyler two values constituting what sociologist Max Weber called "legitimacy" are of particular importance to compliance: the individual's sense of obligation to obey authorities, and his or her sense of trust and confidence in legal authorities. While it is sometimes possible to motivate compliance by creating a risk of punishment for non-compliance, regulating behavior through threats can undermine people's own commitment to norms, rules and authorities. Voluntary healthy behavior which is motivated by a person's own attitudes and values is superior from a regulatory perspective to behavior that has to be coerced. When values are the driver of behavior, rule adherence does not need to be sustained either by enacting a credible system of surveillance and sanctioning or by developing a way to incentivize desired behaviors.
[700] Jessica Staples & Magalie Masamba; Years Later: An Assessment of the Realisation of the objectives of the Competition Act 89 of 1998, (2012)

[701] Ibid
[702] Competition Tribunal, Annual Integrated Report (2015-2016) P 1.
[703] Ibid

(f) Ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(g) Promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged people.

These broad objectives are achieved through ensuring that appeals on two core areas of coverage of the Act are disposed of speedily. These core areas are i.e ***mergers[704] and prohibited practices***. Before the enactment of the 1998 Act, the previous Competition Board had relied on picking up information on planned or implemented mergers from the press or by interested parties bringing it to their attention[705]. Marking a fundamental shift in the South African merger control regime, the Competition Act makes pre-merger notification compulsory[706]. Under the Act, all mergers above determined thresholds, calculated in terms of assets and turnover, have to be notified and therefore evaluated by the Competition Commission. The main aim of defining merger thresholds has been to screen out transactions that are unlikely to result in significant effects on competition. The table below shows the merger thresholds applicable in South Africa.

Table 4: Merger thresholds and Assets or Turnover

Description	***Merger threshold (Rnd)***
Intermediate merger	
Target firm assets or turnover	R80 million
Merging parties combined assets or turnover	R560 million
Large merger	
Target firm assets or turnover	R190 million
Merging parties combined assets or turnover	R6.6 billion

Source: Competition Commission and Tribunal (2009). Reconstructed by Author

Mergers defined as large are decided by the Competition Tribunal once the Commission has conducted investigated and made a reasoned recommendation to the Tribunal. The main test that the Competition Act requires is for the competition authorities to determine whether a merger will substantially prevent or reduce competition. This involves considering a range of factors relating to actual and potential competition in the relevant markets, as set out in Section 12A.2[707].

[704] According to the Competition Act of 1998 a merger takes place when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.
[705] Competition Commission and Tribunal, Unleashing Rivalry: Ten years of enforcement by the South African competition authorities (2009) P 13.
[706] Ibid
[707] Section 12A.2. Demands that the following factors should be considered (a) the actual and potential level of import competition in the market; (b) the ease of entry into the market, including tariff and regulatory barriers; (c)

Prohibited practices, on the other hand, are dealt with under 4, 5, 8 and 9[708] of the Act. Section 4 is concerned with direct and indirect coordinated horizontal behaviour among competitors (collusion)[709]. Section 5 deals with restrictive vertical practices, among them being minimum resale price maintenance. This is the sole restrictive practice which is a *per se* violation and so does not require any weighing up of pro- and anti-competitive effects[710]. Section 8 prohibits unilateral anti-competitive abuse by dominant firms[711] while Section 9 of the Act precludes firms from engaging in price discrimination if it has the effect of substantially preventing or lessening competition[712].

The Act also provides for administrative penalties imposed on companies that violate the Act which some scholars, like Jason and Sha'ista [713], likened them to both retributive and deterrent in nature. These two issues fall within the principal models for compliance or rule adherence. Therefore, before discussing Jason's arguments, it is important to discuss the two issues from a theoretical perspective. The first is deterrence theory, also referred to as a sanction-based or command-and-control model. The assumption underlying this theory is that behaviour is shaped by varying the risks associated with breaking rules and or the gains associated with adherence[714]. The legal system attempts to project credible risks for wrongdoing[715]. Tayler argues that it was sometimes possible to motivate compliance by creating a risk of punishment for nonadherence through fines or incentives for adherence. He, however, cautions that, instrumental approaches like deterrence are not self-sustaining and require maintenance of institutions and authorities that can keep the probability of detection for behaviour that threatens the standing of the law. The second theory and an alternative to the deterrence model, is Self-regulation. Under this model, Tayler argues that people get motivated to follow rules

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the level and trends of concentration, and history of collusion, in the market; (d) the degree of countervailing power in the market; (e) the dynamic characteristics of the market, including growth, innovation, and product differentiation; (f) the nature and extent of vertical integration in the market;

[708] Competition Commission and Tribunal, Unleashing Rivalry: Ten years of enforcement by the South African competition authorities (2009) P 37.

[709] Ibid

[710] Ibid

[711] Ibid

[712] Ibid. P 38

[713] Jason Aproskie and Sha'ista Goga, 'Administrative Penalties – Impact and Alternatives (2010), Fourth Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy

[714] Tom R. Tyler. "Mechanisms of Legal Effect: Theories of Procedural Justice" (2009). Monograph for the Public Health Law. University Beasley School of Law

[715] Ibid

because of their own values. Therefore, when values are the driver of behaviour, rule adherence does not need to be sustained either by enacting a credible system of surveillance and sanctioning or by developing a way to incentivize desired behaviour[716]. The general legal question is how to motivate everyday adherence to legal rules, or self-regulation, even when laws such as the competition Act of 1998 exist.[717]

The Competition Tribunal, in the *Commission v Federal Mogul Aftermarkets*, determined that the primary role of the administrative penalty in was deterrence rather than retribution. Going by this argument, this, therefore, implies that fines imposed serve as a deterrent to future violations of the law by both the company concerned and other companies that might otherwise consider engaging in similar conduct[718]. Jason and Sha'ista, therefore, note that this role was crucial given that anti-competitive behaviours have a high cost to the economy and society. Economically, the incentive for a company to engage in abuse of competition law is determined by a weighing up of costs and benefits of engaging in the abuse which in turn depends on the four listed areas as elucidated[719],

a) the probability of and lag in detection,
b) the probability of being found guilty,
c) the size of the penalty likely to be imposed including the reputation effects, and
d) the size of the likely benefits in this period.

It must be noted that the size of the penalty imposed, therefore, feeds directly into a company's incentive to breach competition law and hence the deterrent value of the fine. However, Jason and Sha'ista, argue that authorities would prefer to fine up to the highest legally allowable level prescribed in the legislation. Further, despite clarity being given in the *Commission v Federal Mogul Aftermarkets* by the Tribunal, the two scholars say some of the penalties serve a retributive purpose by punishing the transgressing companies for illegal conduct. This perspective is further tested in the subsequent sections and it is also coherently looked at from the context of the concept of procedural justice.

[716] Tom R. Tyler. "Mechanisms of Legal Effect: Theories of Procedural Justice" (2009). Citing Tyler, T. R. (2006a). Why people obey the law and Tyler, T. (2006b) Psychological perspectives on legitimacy and legitimation.

[717] Ibid

[718] Jason Aproskie and Sha'ista Goga, 'Administrative Penalties – Impact and Alternatives (2010), Fourth Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy

[719] Ibid

5.2 Institutional design and procedural law governing the South African Competition Adjudicative Regime

The promulgated Competition Act in late 1990s gave birth to three institutions namely, the Competition Commission, the Tribunal and the Competition Appeals Court (CAC) with a duo mandate of promoting and maintaining competition in the economy and ensuring compliance with the provisions of the Act. The Commission, being the first in the adjudication course, is, under Section 49 (b) of the Competition Act, granted powers to investigate and prosecute those that violate the Act[720]. Investigations by the Competition Commission into prohibited practices can be initiated in different ways. The Commission can initiate a complaint itself based on informants or research findings etc.[721]. The Act grants the Commission express authority to undertake dawn raids. This entails the Commission is granted power to enter and search any premises based on a reasonable suspicion of a prohibited practice taking place, or having taken place, or because there is something connected to an investigation[722] that is in the possession or control of a person on the premises[723]. This power to undertake dawn raids was first used in 2000 as part of an investigation into the cement industry[724]. The search and seizure warrant obtained by the Commission was set aside by the Competition Appeal Court because of the procedural irregularities in the Commission's executing of the warrant[725].

Anyone can also lodge a complaint with the Commission. Where the latter happens, the Commission undertakes a preliminary investigation of each complaint to ascertain whether there are in fact competition issues to be examined. Complainants can also take their issues themselves to the Tribunal in two circumstances. First, if the complainant is facing serious or irreparable damage, it can make an application for interim relief, and the Tribunal evaluates the evidence of the alleged prohibited practice, the possible harm to the applicant, and the balance of convenience in making an order as prescribed under Section 49(C) of the Act. Secondly, if the Commission undertakes an investigation of a complaint and decides not to refer the case to the Tribunal, the Act gives the complainant the latitude to file the case with

[720] Note: An investigating team is constituted which then assesses the merits of the complaint and makes a recommendation to the Competition Commission's Executive Committee to refer or non-refer the matter to the Competition Tribunal for adjudication.
[721] Competition Commission and Tribunal, Unleashing Rivalry: Ten years of enforcement by the South African competition authorities (2009) P 39.
[722] Ibid. P 38
[723] Note: Investigators may examine documents, request further information and explanations, take extracts from and make copies of all documents that are relevant to the investigation, and attach and remove evidence, including reproducing electronically stored information.
[724] Supra
[725] Ibid

the Tribunal. A party that pursues this route bears the costs of the prosecution and the costs which might ensue in situations where the party loses.

Once investigations are completed by the Competition Commission and there is satisfaction that a case has been established following its investigations, a referral is made to the Tribunal[726] for adjudication[727]. The Tribunal also has inquisitorial powers related to the hearings which enables it to request for additional witnesses and information to be heard. Where the Tribunal decides that there has been a contravention of the Act, it can make an appropriate order, including interdicting the practice, imposing an administrative penalty and ordering divestiture[728]. Administrative penalties can be imposed for a first contravention of Sections 4 (1) (b), which involve fixing a purchase or selling price, dividing markets or collusive tendering as covered under 5(2) or 8(a), 8(b) or 8(d) of the Act. If a firm structures its conduct so that it falls under another prohibited Section covered in chapter 2 of the Act (dealing with all prohibited practices), that constitutes a repeat of substantially the same conduct that was already found to be a prohibited practice by the Tribunal, the Tribunal is also entitled to impose an administrative penalty which may not exceed 10 percent of the firm's annual turnover in South Africa and exports from South Africa during the firm's preceding financial year[729]. Divestiture may further be ordered for contraventions of section 8 if the practice cannot otherwise be adequately remedied or if it is substantially a repeat of conduct previously found to be a contravention[730].

Cases heard by the Tribunal can also be appealed to CAC[731] which may or not uphold the decision of the Tribunal. The institutional design and hierarchy also involve traditional Courts which includes the High and Constitutional Courts. The High Court is deposited with, among others, mandate to award damages arising from the determination of the Tribunal on Consent Orders. The Constitutional Court, on the other hand, just like in other common law jurisdiction, hears appeals or reviews if Constitutional Matters arise during and after the Tribunal adjudicative process.

[726] Note: The decision to refer a complaint must be based on the evidence, including documents, which the investigation has yielded. Once a decision is made to refer the complaint, the Commission will prepare a complaint referral to the Tribunal, through an outside Counsel. The Tribunal will, therefore, hear the matter through allowing the accused firms to respond to the grounds through an affidavit.

[727] Competition Commission and Tribunal, Unleashing Rivalry: Ten years of enforcement by the South African competition authorities (2009) P 40.
[728] Ibid
[729] Ibid
[730] Ibid
[731] Sections 37 and 61 of the Act.

The above picture clearly shows that a variation exists between the Zambian and South African System. In the jurisdiction of the former, the first level of adjudication is the preserve of the Commission. The Commission investigates and adjudicates, and the Act gives the Commission administrative powers to impose fines of up to 10 percent of the annual turnover for erring firms. And the Tribunal only hears disputes that arise from the decision of the Commission and makes determinations. In the South African jurisdiction, the Act draws a clear distinction between the investigative and adjudicative aspects of the complaint procedure. The investigative function in the Act is carried out by the Commission while the adjudicative function is carried out by the Tribunal and the CAC[732]. Further, circumstance where the Commission would make decisions in the South African jurisdiction would only arise on matters related to applications for small and intermediate mergers, as well as exemption applications. The Commission assesses and considers the recommendation to approve or not and the Tribunal hears any appeals or reviews on the matter. In terms of procedure, the Tribunal has inquisitorial powers which allows it to identify and summons documents[733]. And where need arises, the Tribunal has power to grant requests of the Commission for further and better discovery against accused firms. Jurists such as Coatser and Raath, have observe that discovery requests are time consuming and expensive and have significant impact on general productivity of firms[734]. The need, therefore, to balance the demands of investigating a complaint properly and of avoiding unnecessary constraints on firms' productivity has been mooted.

In terms of the institutional design architecture, it is clear that the South African model is a ***bifurcated agency/Tribunal model***, where the Competition Authority has to rely on a specialized Tribunal for enforcement. As explained in preceding Chapters, the Zambian model is an ***integrated agency model***, where the first level of adjudication is done by the Competition Authority with the Tribunal adjudicating on appeals. Below is a diagram depicting an abridged design of the Southern African Model.

[732] Jessica Staples & Magalie Masamba; Years Later: An Assessment of the Realisation of the objectives of the Competition Act 89 of 1998, (2012) citing M Brassey (ed) *et al Competition Law* 1 ed (2002) 291.
[733] See Section section 49A of the Competition Act of 1998
[734] Paul Coetser and Rudolph Raath, 'A long and Expensive Wait – Assessing the Procedure for adjudicating complaints: (2014) 15082014/

Table 5: **Structural and functional overview of the competition agencies**

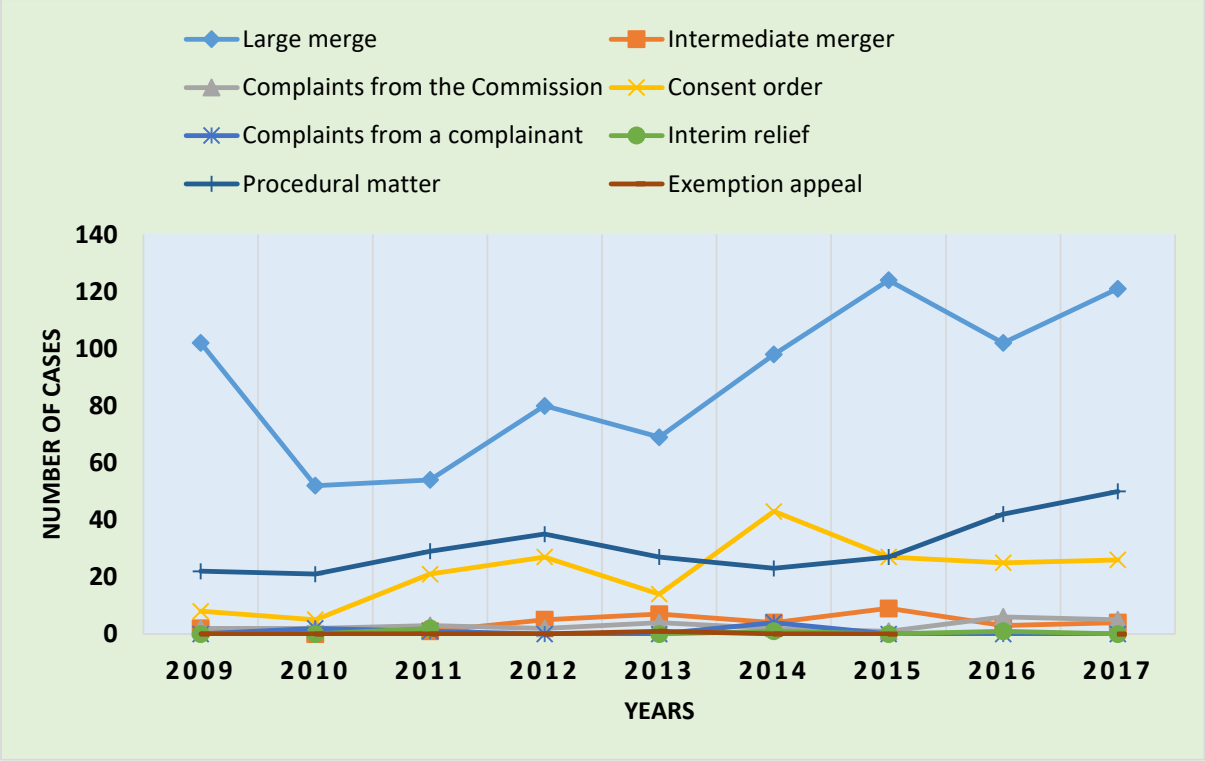
	Competition Commission	Competition Tribunal	Competition Appeal Court	Constitutional Court
Prohibited Practices	Investigates and prosecutes	Adjudicates	Hears Appeals or reviews	Hears appeals or reviews if constitutional matters arise
Interim Relief	*May assess, decide to approve or not*	Hears appeals or reviews		
Small mergers	*Assess and decides to approve or not*	Hears appeals or reviews		
Intermediate mergers	*Assesses and recommends an outcome*	Assesses recommendations and decides outcomes		
Large mergers		Arise from any of the above		
Procedural matters	Settles prohibited practices cases or non-compliance with merger regulation	Hears the settlement and decides to confirm or not	**High Court** Awards damages arsing from tribunal order	
Consent Orders				

Source: Annual Integrated Report 2015-2016. Reconstructed by Author

5.3 Cases and Cases law handled by the competition Tribunal

It has been twenty years since the Competition Act 89 of 1998 was promulgated. The Act, as elucidated in the preceding sections, is premised on the need to remedy market failures and providing a framework for regulating mergers. It aims to promote and maintain competition[735] with a view of promoting efficiency, adaptability and development of the economy[736] as well as achieving a more effective and efficient economy in South Africa[737]. Since its establishment in 1999, the Competition Tribunal has presided over numerous cases and it is important to understand the legal dynamics of the ensuing case law. The table below shows the number of cases which have been handled by the Tribunal since 2009.

Figure 9 Number of cases decided by the Tribunal from 2009 to 2017



Source: Authors Compilation

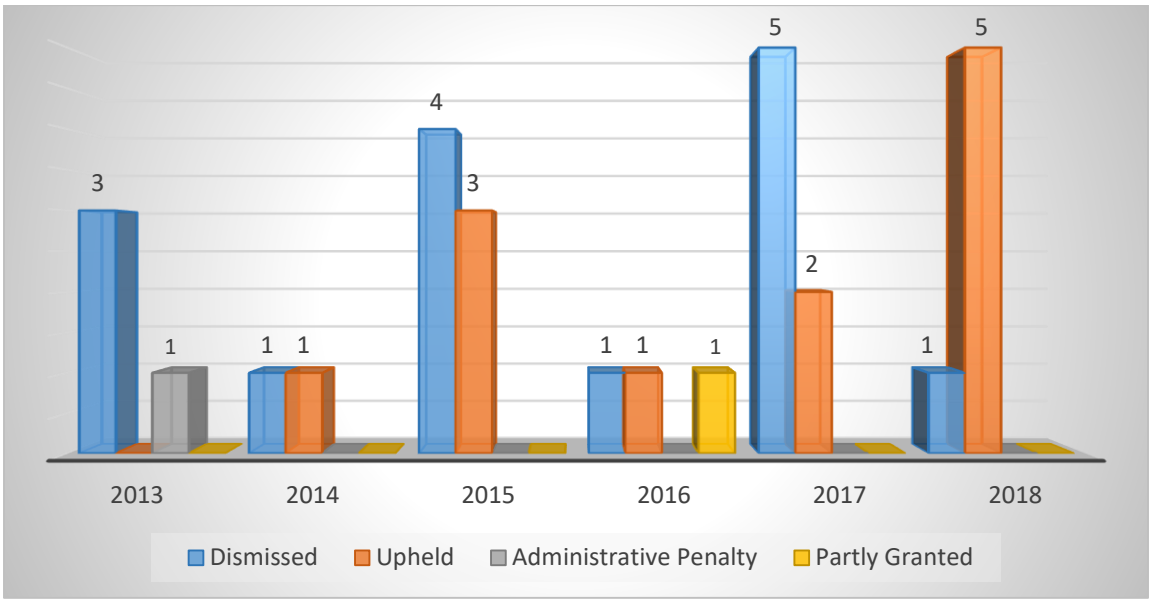
[735] Section 2 of the Act.
[736] Section 2(a) of the Act.
[737] Preamble to the Act.

The diagram above clearly shows that large merger cases dominate the case management profile of the Tribunal followed by procedural matters and consent orders in the period 2009 to 2017. In 2015, the Tribunal disposed of the highest number of large merger cases and consent orders amounting to 124 and 27 respectively. It is also evident that 2017 was a busier year for the Tribunal than the prior year which recorded about 121 large merger cases and about 50 procedural cases. The recorded large merger cases and procedural cases represent the second and the highest record in the indicated period respectively. For procedural cases, 42 and 32 were recorded in 2016 and 2012 representing the second and third highest record.

In 2016, while orders issued decreased by 4.78 percent from 2015 respectively, the Tribunals decisions on procedural matters increased by 27.50 percent. The prominence of procedural disputes handled by the Tribunal is worth noting – given that procedural justice is a precondition for fair and acceptable outcomes. As noted by Solum, procedural justice offers a theory of procedural fairness for civil dispute resolution[738] and a surge in disputes on account of procedural entails that the two principles of procedural justice are at question. The two principles as, argued by Solum, include the accuracy principle and the participation principle. The two principles require a system of procedure to aim at accuracy and to afford reasonable rights of participation qualified by a practicability constraint[739]. Therefore, whereas the participation principle can be said to be realised going by the number of application before the Tribunal, it cannot be said to be same on the accuracy principle as there were a number of disputes related to the procedure applied. And one way of appreciating the extent to which the accuracy principle has been realised is by looking at the number of appeal cases which have been upheld or dismissed by the CAC.

[738] Lawrence B. Solum, 'Procedural Justice: (2004) Revised 2017. 67 Souther California Law Review 181 (2017*)*
[739] Ibid

Figure 10: Appeals Heard by the Competition Appeals Court



Source: Authors Compilation

Between 2013 and 2018, about twenty-nine (29) appeals were filled before the Competition Appeals Court (CAC). On average, there are more cases that have been dismissed compared to those upheld and this development questions the accuracy principle. Out of the 29 cases handled by the CAC between, fifteen (15) cases were dismissed representing fifty-one (51%) percent compared to forty-one (41%) percent of cases upheld.

Looking at cases on yearly basis, it is clear that the CAC, in 2013[740], 2015[741] and 2017, recorded the highest number of dismissed cases compared to cases upheld in the same

[740] Note: Among the Cases handed in 2013: Phindiwe Kema vs Gold Circle - 125/CAC/Nov12; Competition Commission vs Computicket (Pty) Ltd - 118/CAC/Apr12; Reinforcing Mesh Solutions (Pty) Ltd and other Vs Competition Commission and others - 119/120/CAC/May201 3; Macneil Agencies (PTY) Ltd Vs Competition Commission -121/CACJul12.

[741] Note: South African Breweries Limited & Others

[741] Note: Among the Cases handed in 2015 include: Competition Commission vs South African Breweries Limited & Others- 129/CAC/Apr14; Allens Meshco (Pty) Ltd vs Competition Commission - 135/CAC/Jan15; Lekoa Fitment Centre vs Altech Netstar (Pty) Ltd - 132/CAC/Dec14; Ian Walter Buchanan vs The Health Professions Council of South Africa and The Professional Board for Optometry and Dispensing Opticians - 134/CAC/Jan2015; Caxton & CTP Publishers and Printers vs Media 24 (Pty) Ltd; Novus Holdings Ltd; Adbait (Pty) Ltd; Lambert Philips Retief and The Competition Commission - 136/CAC/Mar15; Council for Medical Schemes, Registrar of Medical Schemes vs South African Medical Association, South African Paediatric Association and Society for Cardiothoracic Surgeons - 133/CAC/Dec14;

period. In 2014[742] and 2016[743], there was an even number of dismissed, upheld and partly granted cases. The figure also shows that the number of upheld cases in 2018 (as at October, 2018) increased to five (5) from two (2) recorded in the preceding year. The increase signifies the highest number and it averages about 200% across the years under review. In the same period, it is clear that there was a variation in the number of cases dismissed and these ranged from four (4) in 2015, one (1) in 2016, five (5) in 2017 and one (1) in 2018.

Therefore, given that, on average, the number of dismissed cases outweighs the number of cases upheld, it may imply that limited efforts are being applied to ensure that a system of procedure that aims at attaining accuracy, as a principle of procedural justice is attained. Understanding the above developments based on the actual cases is essential in appreciating the ***Exante*** *and* ***Expost*** perspectives of the cases handled. Much of the cases handled by the Tribunal and subsequently the CAC hinge on two broad, but synonymous issues, namely, the nature of the penalties imposed by Authorities as expressly provided for under Section 59 of the Act, and the scope and nature of the Commission's powers when it comes to investigation and engaging in proceedings itself.

5.3.1 Nature of Penalties under Section 59 of the Act[744]

It must be noted that there has been an inconsistent approach towards penalties for cartel conduct in South Africa. Section 59 of the Competition Act, 89 of 1998 provides that the Tribunal may impose an administrative penalty not exceeding 10% of a firm's annual turnover in, and its exports from, South Africa during the firm's preceding financial

[742] Note: Among the Cases handed in 2014 include: Sasol Chemical Industries Limited vs The Competition Commission - 131/CAC/Jun14; Lekoa Fitment Centre vs Altech Netstar (Pty) Ltd - 132/CAC/Dec14; Competition Commission vs South African Breweries Limited & Others - 129/CAC/Apr14; Oceana Group Ltd and Foodcorp (Pty) Ltd vs Competition Commission - 130/CAC/May14 CC;

[743] Note: Among the Cases handed in 2016: Group Five Ltd vs The Competition Commission - 139/CAC/Feb16; Caxton and CTP Publishers & Printers Limited; The Trsutees for the time being of the Media Monitoring Project - 140/CAC/Mar16; Omnico (Pty) Ltd; Cool Heat Agencies (Pty) Ltd vs The Competition Commission & Others -142/CAC/Jun16 & 143/CAC/Jun16;

[744] Note: This part draws much input from the paper by - Deon PrinsI and Pieter Koornhof 'assessing the nature of competition law enforcement in South Africa: (2014) Law democr. Dev. vol.18 Cape Town

year.[745] Section 59 also provides that the Tribunal must consider certain specified factors when determining an appropriate penalty[746].

In 2010 in Southern Pipeline Contractors and Conrite Walls Limited vs Competition Commission, the Tribunal applied penalties of R16,882,597 and R6,192,457 on Southern Pipeline Contractors and Conrite Walls Limited, respectively, for their participation in cartel conduct in the pre-cast concrete industry. However, CAC overruled the Tribunal's decision, criticising the Tribunal for disregarding the legislative framework when determining the penalties[747]. In this regard, the CAC provided guidance on the approach to employ, but Wright and Gilfillan argue that the decision offered little predictability in relation to penalties likely to be imposed, leaving scope for vastly different penalties in future cases.

The CAC emphasised that the wording of section 59 indicates a structure to be followed, albeit that some confusion is caused by the fact that the determination provided for in section 59(3) should precede the application of section 59(2)[748]. Section 59(3) lists the relevant factors to be considered when determining an appropriate penalty, including the duration, gravity and extent of the contravention. Section 59(2) imposes a cap of 10% of the offending firm's annual turnover from South Africa and exports from South Africa. In its determination of appropriate penalties in the Southern Pipelines case, the Tribunal referred to certain factors listed in section 59(3) but not all[749]. The CAC disagreed with this approach, finding that the word 'must' indicated the legislature's intent that all the relevant factors be considered. The CAC advocated an approach whereby a percentage, calculated with reference to all of the relevant factors, should be applied to the offending firm's turnover in its preceding financial year for the purpose of determining the appropriate penalty. Only once the proposed penalty has been determined, must it be evaluated to ensure it does not exceed the section 59(2) cap. The CAC warned further that a court should pay equal attention to all of the factors listed in section 59(3).

[745] Alan Wright and Bowman Gilfillan,' It's a Fine Mess: The Approach to Administrative Penalties under the Competition Act ; http://www.bowmanslaw.com/article-documents/Administrative-Penalties-under-the-Competition-Act.pdf
[746] Ibid P 1
[747] Ibid P 1
[748] Ibid P 1
[749] Ibid P1

The CAC also referred to Woodland Dairies Limited and Another v Competition Commission, where the Supreme Court of Appeal stated that the so-called administrative penalties bear a close resemblance to criminal penalties. The CAC interpreted this dictum to mean '…*that a penalty, criminal in nature*, should be proportional in severity to the degree of blameworthiness, the nature of the offence and its effect on the economy in general and consumers in particular[750]. Relying on this interpretation and section 39(2) of the Constitution, the CAC reasoned '…that the doctrine of proportionality constitutes a further applicable factor in the determination of an appropriate constitutional penalty'. However, previous decisions have established that, administrative penalties imposed under the Act are not criminal in nature. This further consideration may appear redundant to the extent that proportionality relates to the duration, gravity and extent of the contravention in addition to the level of profit derived from the contravention, factors already taken into account in the section 59(3) analysis. Further, considering proportionality comprises the aforementioned factors, this approach may therefore be contradictory to the CAC's cautionary approach in respect of the application of *section 59(3)*[751].

Another issue of interest handled by the CAC is with regards to the total turnover or affected turnover. Therefore, despite having calculated the appellants' affected and total turnover, the Tribunal inexplicably utilized the latter as a base for the penalties in the Southern Pipelines case[752]. The CAC held that when calculating the base figure, one must consider the benefits which accrue from the affected turnover. This conclusion was based on a legislative link which the CAC identified between the damage caused by the anti-competitive conduct and the profits accrued from the contravention as the majority of the relevant factors are qualified by the phrase, the contravention. In this regard, the CAC fortified its conclusion, stating that by using the affected turnover, the implication of the doctrine of proportionality, the interest of the consumer and the legitimate interests of the offending firm can be taken into account[753].

[750] Ibid P2
[751] Ibid p2
[752] Ibid p2
[753] Supra

Further, another issue which was also considered was the matter regarding the preceding or immediate past financial year. On this matter, the CAC commented in obiter that a plain reading of section 59 supports the conclusion that the base year for the determination of the cap is the financial year preceding that in which the penalty is imposed. The CAC substantiated this, noting the congruence of this interpretation with the Act's objective to 'deter anti-competitive behaviour without destroying the offending firm's business'. The clarity in this approach is welcomed. However, the CAC regrettably introduced further uncertainty regarding the period applicable to determining the affected turnover as a base figure. Whereas the CAC limited its calculation in respect of SPC's penalty to 2008, as financial reports were only available for this year, Conrite's affected turnover was multiplied by eight, being the number of years of Conrite's participation in the cartel. The latter reflects a stricter approach, which appears to conflict with the CAC's criticism of the Tribunal's approach. Wright and Gilfillan, therefore, argue that although the CAC has provided a welcome framework for the determination of penalties, many areas of uncertainty remain. It will take more time – or the introduction of fining guidelines – before there is a predictable approach towards administrative penalties.

Further, in the Norvatis SA (Pty) Ltd v the Competition Commission[754], a complaint against a number of pharmaceutical manufacturers referred to the Tribunal was contested, among other things, on the ground that the referral by the Commission violated those firms' right to natural justice and constituted procedurally unfair administrative action. It was indicated by the Tribunal confirmed that the Commission's powers were of a preliminary and investigative nature while the Tribunal was mandated to adjudicate on prohibited practices and determine whether a prohibited practice has actually occurred. It was indicated that, only once a complaint has been referred to the Tribunal are the respondents accorded full administrative justice rights, such as, requesting information prior to the hearing as well as having their case heard. The decision indicated that at the investigation stage respondents are only entitled to the "gist" or substance of the case against them, with reference to the Supreme Court of Appeal judgment in Chairman:

[754] Norvatis SA (Pty) Ltd & others v The Competition Commission and Others (22/CRB/Jun01)

Board on Tariffs and Trade & others v Brenco Incorporated & others[755] which held that the Board on Tariffs and Trade performed both an investigative and determinative function at various times. This view was confirmed by the Supreme Court of Appeal in Simelane NNO & others v Seven Eleven Corporation (SA) (Pty) Limited & Another[756]. Shortly thereafter in Sappi Fine Paper (Pty) Ltd v Competition Commissioner & another, the Competition Appeal Court found that the Commission is only empowered to investigate a complaint alleging contraventions of specific provisions of the Act, and does not have the power to investigate conduct generally considered to be anti-competitive.

The SCA in Woodlands likened the initiation of a complaint of anti-competitive behaviour to a summons in that it must survive the tests of legality and intelligibility. As such, the Commission must at the very least be in possession of information concerning a specific alleged practice which, objectively viewed, gives rise to a reasonable suspicion of the existence of a specific prohibited practice. In the Netstar case this was later held not to mean that the initial complaint requires the level of precision demanded in pleadings, but that it must be "expressed with sufficient clarity for the party against whom that allegation is made to know what the charge is and be able to prepare to meet and rebut it.

In Loungefoam (Pty) Ltd & others v Competition Commission & others, the criminal law analogy went even further when the Competition Appeal Court explicitly compared an investigation by the Commission to police, or criminal, investigation. In this regard, Part B of the Act provides the Commission with a number of powers that are couched in the language of criminal procedure, such as the authority to enter and search under warrant76 or without warrant77. The only procedure under South African civil law that comes anywhere close to the consequences of these entry and search powers is the Anton Piller order, the purpose of which is to secure the preservation of evidence in proceedings already instituted, or to be instituted, by the applicant. The Appellate Division set out the essential requirements for such an order to be granted in a decision in 1995,78 and it has

[755] Chairman: Board On Tariffs and Trade and Others v Brenco Incorporated and Others (285/99) (2001) ZASCA 67 (25 May 2001)
[756] Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another (480/01) [2002] ZASCA 141; [2001-2002] CPLR 13 (SCA) ; [2003] 1 All SA 82 (SCA) (26 November 2002)

been described as having "draconian and extremely invasive consequences" and as being "an example of the outer-extreme of judicial power" in a recent authoritative decision on the procedure.

It is submitted that the Commission's powers of search and entry under the Act differ in two material respects from Anton Piller orders. Firstly, Anton Piller orders are always subject to judicial oversight being exercised prior to the entry and search taking place, which is not the case with searches without warrant under section 47 of the Act, which require belief on reasonable grounds that a warrant would be issued under section 46 if applied for, and that the delay ensuing from first obtaining a warrant would defeat the object or purpose of the entry and search.

Secondly, Anton Piller orders require the applicant to have knowledge of specific documents in the possession of the respondent, whereas sections 46 and 47 searches do not require such knowledge, but rather a belief on reasonable grounds that a prohibited practice has taken place, is taking place or is likely to take place, or that anything connected with an investigation in terms of the Act is in the possession, or under the control, of a person who is on or in those premises. In fact, the wording of section 47(2) of the Act is almost identical to the wording of section 22(b) of the Criminal Procedure Act.80 Accordingly, it is clear that the Commission's investigative powers, especially the power to enter and search premises without a warrant, bear the strongest resemblance to criminal procedures under South African law.

In the Senwes case[757], the question was raised as to whether the Competition Tribunal was correct in allowing the finding of a particular contravention of the Act which although related was never part of the original content and wording of the complaint referral against the respondent firm. The Competition Appeal Court held that the purpose of the Act is to ensure that the Tribunal "would not be constrained by the law relating to pleadings in the same way as would a civil court during a trial", as well as not "inflexibly constrained by an adversarial model of adjudication." On further appeal, the Supreme Court of Appeal continued the criminal analogy used in Woodlands by referring to the conduct complained of in the referral as "the charge" and to the conduct which the

[757] Senwes Ltd v Competition Commission (87/CAC/Feb09) [2010] ZACAC 6.

Tribunal found to be objectionable as "the conviction." Brand JA held that there was a difference between the charge and the conviction in the Tribunal's decision, and that the Tribunal had gone beyond the terms of the referral and its own authority. The Tribunal, it was confirmed, is a creature of statute and has no inherent powers, and in accordance with the constitutional principle of legality, has to act within the powers conferred upon it by its enabling statute. As such, the Tribunal was advised to confine hearings to matters set out in the referral to it by the Commission, and the referral constituted the boundaries beyond which the Tribunal may not legitimately travel.

5.3.2 The nature and scope of the powers of the Commission[758]

One of the cases that hinged on the nature penalties includes the Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission[759]. This case involves prohibited resale price maintenance or price fixing. It involves a supplier or manufacture of products compelling or coercing distributors to not re-sell products below a set price or a particular price level. In this case, therefore, the Competition Appeal Court was made to decide on whether administrative penalties provided for in the Act[760] were criminal in nature. The CAC held that the Act clearly draws a distinction between provisions, which conjured criminal sanctions, and administrative penalties. It was also held that the purpose and context of Section 59 proceedings was not to punish criminals by imprisonment deterrence[761]. Therefore, the administrative penalty that was imposed on the respondent in this case amounted to R3 million, six times greater than the maximum criminal fine that may be imposed upon conviction of contempt of the Tribunal or the Competition Appeal Court, but far lower than the maximum potential administrative fine that could have been levied[762]. It is submitted that this indicates that the authorities are

[758] Note: This part draws much input from the paper by - *Deon PrinsI and Pieter Koornhof 'Assessing the nature of competition law enforcement in South Africa: (2014) and Alan Wright and Bowman Gilfillan,' It's a Fine Mess: The Approach to Administrative Penalties under the Competition Act*

[759] F-M ASAfrica (Pty) Ltd v CC (2003) South Africa (33/CAC/Sep03)

[760] Section 59 of the Act

[761] Deon PrinsI and Pieter Koornhof, 'assessing the nature of competition law enforcement in South Africa: (2014) Law democr. Dev. vol.18 Cape Town

[762] Deon PrinsI and Pieter Koornhof 'assessing the nature of competition law enforcement in South Africa: (2014) Law democr. Dev. vol.18 Cape Town

not attempting to use the fines in a punitive manner, but rather as a form of equitable relief, in accordance with the provisions of section 59(3)[763].

Therefore, the above case shows that the interpretations of the Act by the Commission, Tribunal and Competition Appeal Court were consistent. However, it is important to also underscore that indeed, criminal procedure differs, just like in other common law jurisdictions, significantly differ from civil procedures. Further, the equating of the penalties in section 59 to criminal fines led to more interpretations relating to competition law enforcement being adopted at times[764]. One such case is the Southern Pipeline Contractors and Another v Competition Commission,[765] it was observed by the CAC that the approach adopted by the Supreme Court in Woodlands in the Dairy (Pty) Ltd and others Vs the Competition Commission guides those administrative penalties should be proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular.[766]

5.4 Understanding internal characteristics of good agency theory

As indicated in Chapter One, understanding internal characteristics of good agency theory is key in appreciating the operational proficiency of the Tribunal. As indicated in the said Chapter, competition authorities or Tribunals can improve their ability to attain substantive ends by strengthening their process and adopting superior administrative techniques that assist in implementing programmes that generate good substantive results and facilitate continuing improvements over time. Below is an assessment of the characteristics of good agency process against the practical realities of the existing Tribunals.

5.4.1 Formulation and clear communication of well-specified goals to agency staff and external groups and adequacy of the Tribunal

[763] Ibid
[764] Ibid
[765] Southern Pipeline Contractors and Another v Competition Commission (2011) (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6 (1 August 2011)
[766] Supra

It is argued that articulation of goals serves important aims beyond guiding the agency's staff and allocating resources to address the most serious obstacles to competition. Further, clear definition of goals increases transparency and facilitates public discussion about the agency or tribunal's performance. By articulating its aims and supporting assumptions, the agency gives better guidance to external groups.

The South African Tribunal has identified three broad strategic goals. Each goal includes strategic objectives which have key performance indicators (KPI's) and targets assigned to it. The performance of the institution is measured against these targets and the table below gives an example for the strategic goals and the assessed performance for 2017.

Table 6: Strategic Focus areas and Performance in 2017

Strategic Orientated Outcome Goal	**Goal Statement**	**No. Of Indicators**	**No. Achieved/ Exceeded**	**No. Partially Achieved**	**No. Could not be measured**
Adjudicative excellence	*To ensure effective and efficient adjudication on matters brought before the Tribunal.*	14	6	6	2
Stakeholder relationships	*To build and develop effective stakeholder relationships.*	4	3	1	0
Accountable, transparent and sustainable entity	*To ensure effective leadership, transparency and accountability in the Tribunal through capacity building, effective reporting, policy management and financial compliance.*	7	7	0	0

Source: Authors Compilation

The nature of the function is such that KPI's relating to the adjudicative process and stakeholder relationships generally remain constant over the five-year strategic period

and in many instances are actually stated in the Tribunal rules[767]. These targets are reassessed annually and, where relevant, they are adjusted based on a three-year average baseline performance. Perhaps, this exercise could be said to have been the trigger for the improved performance recorded in 2018 where the number of upheld cases increased compared to 2017 as elucidated in the figure above. However, it must be noted that the said targets are not set at 100%. According to the Tribunal, it was difficult to entirely attribute non-performance to the Tribunal as it may also be as a result of the complexity of the matter or delays requested by parties.

The Zambian Competition and Consumer Protection Tribunal, on the other hand, has also articulated four key target goals compared to the three of South African Tribunal. However, these targets are devoid of key performance indicators and this makes it difficult to make a thorough assessment of the achievement so far. Further, discussions with the Tribunal Secretariat staff revealed that the aforementioned goals and a comprehensive annual work plan were only developed in 2015, three (3) years after its establishment. The following are among the listed targets[768] and the ensuing developments on the same;

- **Speedily and fairly delivery of justice on competition and consumer matters:** It is clear that target is drawn from Section 71 of the CCPA, No. 24 of 2010 which gives the Tribunal the responsibility of hearing appeals and applications in a speedy manner. Other than the indicated parameters or stages in the adjudication process in the preceding chapter, the Tribunal encourages parties to engage in dialogue or excuria-settlement[769]. The tribunal secretariat has also set a six (6) months' timeframe as a target to finalize proceedings or trail of cases from the date of hearing of cases. However, this KPI is not backed by law. It probably explains why most cases to be disposed of have taken about eleven (11) months as reported in the previous chapters. This has to some, extent conjured, criticism

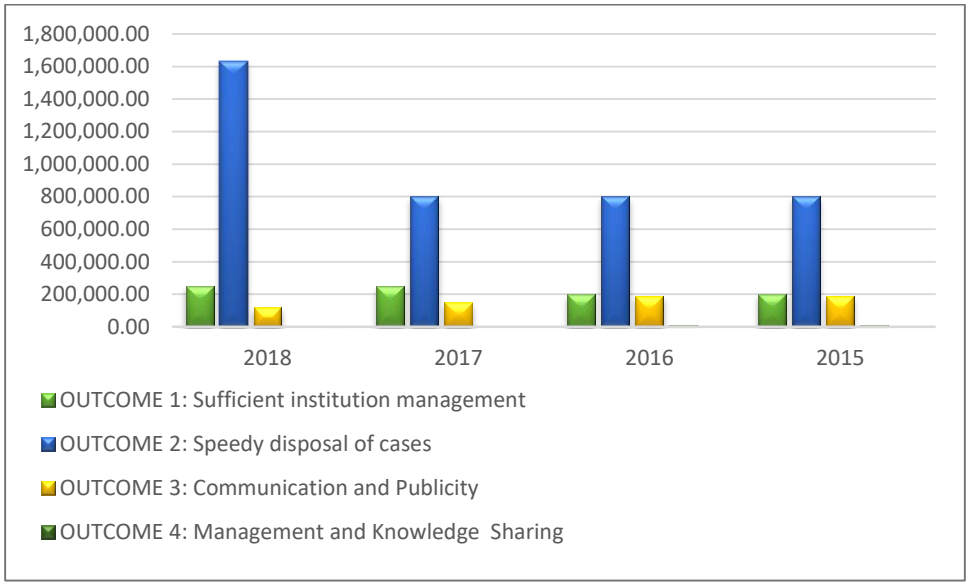
[767] Competition Tribunal, Annual Report (2017) South Africa
[768] Competition and Consumer Protection Tribunal, 'Annual Report (2017) Zambia
[769] Ibid p 6. Note excuria-settlement means cases settled Out of court; away from the court. The Law Dictionary: https://thelawdictionary.org/ex-curia/

from disputants especially consumers who by the nature of the law, cannot be compensated on the extra costs incurred during the adjudication process.

- **Building sufficient institutional and management capacity in the Tribunal:** The key developments on this are addressed in the subsequent section. However, it is essential to note that this sits at the core of the Tribunal operations. Therefore, the effectiveness and efficiency of the Tribunal is dependent on this goal.
- **Effective management and sharing of knowledge and information about the Tribunal:** Sharing information on the decisions of the Tribunal and its relevance in promoting fair trade and efficient markets is key in building public knowledge and increasing accountability of the Tribunal. Given that the use of print and electronic media is one of the effective ways of disseminating or sharing of knowledge and information about the Tribunal, there has been absence of a dedicated policy to utilize existing media platforms. Since its establishment, the Tribunal has issued less than five (5) media statements on either its judgments or functions. The Tribunal has, however, commenced the development of a website which will be used as a repository for cases and a means for shared information related to its operations. Further, not until 2015, there was inconsistent production of annual reports and this has created a void on information and cases handled before. This situation is exacerbated by the absence of an institutionalized and integrated online case management and documentation system. From 2015 to date, strides have, however, been made in documenting cases which have been disposed of using a manual system. This position is, however, at variance with the South African system which has institutionalized the case management system with all cases handled by the Tribunal since its establishment uploaded.
- **Securing additional resources for implementation of the CCPT work or strategic plans.** This target draws its legal strength from Section 69 of the Competition and Consumer Protection Act. It mandates the parent Ministry, the Ministry of Commerce, Trade and Industry (MCTI), to facilitate resources to for the operations of the Tribunal. The annual allocation of the Tribunal has been K1,2 million since 2014. The allocation was, in 2017, increase to K1.99 million. The disaggregated allocation of the funds received over the years shows that the intervention on *speedy disposal of cases* has received more funds compared to

other interventions. This, therefore, entails that there is great appreciation of the need to ensure that cases are disposed of timely hence the deliberate effort to allocate over sixty (60) percent of the budget towards the aforesaid intervention (see figure below).

Figure 11: Funding Projection for the Competition Tribunal - Zambia



Source: Authors Compilation

However, it must be noted that for the Tribunal to execute it mandate effectively, other targets should be adequately funded. According to the Tribunal Staff, low funding received in 2015 to 2016 only enabled the Tribunal to hold four (4) sittings on monthly basis and this was despite the case load at hand. In comparison to South Africa, it is evident that the Tribunal is adequately funded compared to Zambia.

Table 7: Annual Budgets for the South African Competition Tribunal

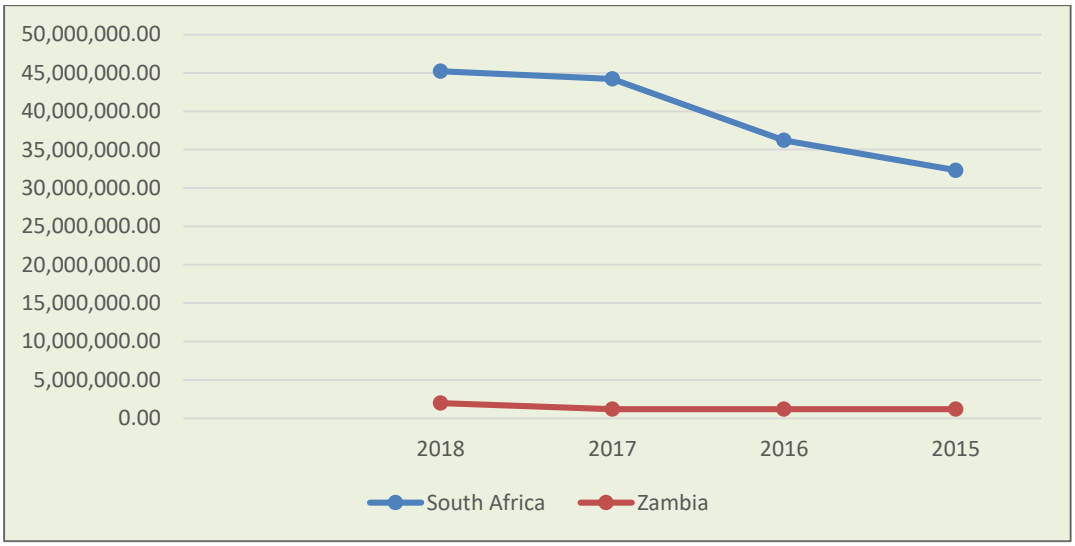
South Africa (Million)

Currency	2018	2017	2016	2015
Rand	53,471.00	52,224.00	42,770.00	38,154.00
ZMK	45,320.00	44,220.00	36,223.00	32,315.00

Source: Authors Compilation

The figure below further shows the funding trends between the two countries as of 2015.

Figure 12: Yearly Budgets for the Tribunal



Source: Authors Compilation

There are a number of factors which could have necessitated the observed variance in budget allocations. Firstly, the South African Competition Adjudicative system is a fairly old system compared to Zambia. The Zambia Tribunal became operational in 2013 while the South African Tribunal has been operational since 1999. And it is evident that its role in addressing economic inequalities necessitated by the apartheid legacy through regulating mergers and prohibited practices remains appreciated within Government hierarchy. This assumption is signified going by the allocation and the operational structure which is discussed subsequently.

Secondly, the economic status of South African is also another factor which could have necessitated the funding status. South Africa is the second largest economy in Africa, after Nigeria and has a projected Gross Domestic Product (GDP) of about US$ 340 billion dollars compared to Zambia's which stood at about USD$ 25 billion. However, despite these potential reasons, the Zambian Tribunal still handles a huge workload – given that the Competition and Consumer Protection Act of 2010 is a hybrid law. It deals with competition and consumer protection matters which are two related but complex issues. Therefore, besides hearing mergers and prohibited practices related disputes just like in the South African jurisdiction, the Zambia Tribunal also adjudicates on consumer-related disputes.

Further, given that the success of a competition tribunal in achieving its mission depends fundamentally on the capabilities of the staff who implement the Tribunal's programmes. As the staff's capability grows, the quality of the agency or tribunal's performance is likely to improve, as well as its capacity to undertake more demanding tasks. One necessary element of accumulating strong human capital is to achieve an appropriate mix of skills. Good competition and consumer protection policy and law is the synthesis of learning in economics and law. A strong staff will combine the skills of the attorneys and economists who will form the project teams that perform the agency's litigation and non-litigation projects or the tribunal's dispute resolution roles. With the forgoing, therefore, the South African tribunal has invested more in human resources compared to Zambia.

The tribunal is headed by a chairperson appointed by the President of the Republic. In addition, the Act requires the appointment of a minimum of three and a maximum of ten Tribunal members, who are also appointed by the President and may be either full-time or part-time, depending on the recommendations of the Minister of Trade. Each member of the tribunal, including the Chairperson, serves for a term of five years but may be re-appointed for the second term. The Chairperson may not serve for more than two consecutive terms. In addition, members are required to have qualifications, and or experience in economics, law, commerce, industry or public affairs. Currently, there are only nine members who include Four (4) full-time members, which includes the chairperson, and five part-time members.

In the Zambia jurisdiction, the Act provides for appointment of up to five (5) part-time members appointed by the Minister[770]. These include a legal practitioner of not less than ten years legal experience, who shall be the Chairperson[771]; a representative of the Attorney-General, who shall be the Vice-Chairperson[772]; and three other members who shall be experts, with not less than five years' experience and knowledge, in matters

[770] Section 67 (1) of Competition and Consumer Protection Act of 2010
[771] Section 67 (1) (a) of Competition and Consumer Protection Act of 2010
[772] Section 67 (1) (b) of Competition and Consumer Protection Act of 2010

relevant to this Act[773]. It is, therefore, clear that despite having a limited annual budget which limits Tribunal sittings to an average of four (4) to six (6) per annum, the scope and coverage of the Zambia law is wider compared to that of South Africa. The need, therefore, to improve the structure and ensure that Tribunal members are full-time is timely. This also applies to the Secretariat of the Tribunal. Section 69 of the Act[774] provides that the Ministry responsible for commerce shall provide the necessary secretariat and accounting services to the Tribunal to perform its functions under the Act.

Consequently, seven (7) officers have been appointed on a part-time basis from the said ministry to perform these secretarial functions. The composition of the seven (7) officers includes two economists, a Transcriber, Accountant, Registry Clerk, Office Assistant and Transport Officer. Again, this composition compared to the South Africa composition shows potential gaps. The South African Act, just like Zambia, provides for the appointment of staff or secretariat to assist the Tribunal in carrying out its adjudicative function. The secretariat, headed by the office of the chief operating officer (COO) and three divisions - namely corporate services, case management and the registry, provides the Tribunal with administrative, logistic, research and financial support. The managers of these three divisions together with the COO form the operations committee (OPCOM). The OPCOM assists the chairperson to fulfil her/his responsibilities as accounting authority and has oversight responsibilities for all operational functions. It must also ensure that the principles of good governance are established and maintained. The Tribunal's structure allows for a staff complement of twenty-six (26).

Zambia should, therefore, consider relooking at its structure. By expanding its structure and making some of the key positions for the members and secretariat, there is huge potential to increase operational efficiency as there will be more dedication from the members and staff. Effecting this proposal will, therefore, conjure reforming some of the provisions of the Act which include Section 67 (1) which expressly emphasises the aspect of part-time members. This exercise should be extended to Section 69 mainly with the

[773] Section 67 (1) (c) of Competition and Consumer Protection Act of 2010

[774] Competition and Consumer Protection Act of 2010

view to enhance the provision by clearly emphasising the independence of the Secretariat. In the present situation, both the Tribunal and the Competition authority report to the Minister of Commerce through the department of Domestic Trade and Commerce. In view of that, the Act gives the tribunal authority to uphold or dismiss the decisions of the Commission with Costs, this could potentially raise institutional political economic challenges - hence the proposal. Further, going by the economic and social importance of competition and consumer protection issues in the economy, it is imperative that Zambia should consider some of the major elements of the South African institutional architecture.

5.5 Conclusion

This chapter presents a number of jurisdictional experiences which provide key learning points. More importantly, this chapter was driven by an analogy that effectiveness of Tribunals is manifested in their ability to anticipate and prepare for increased dynamic disputes and effectively manage the case load. Therefore, it is prudent for Tribunals to design and implement the right combination of short and long-term measures if their statutory purpose is to be achieved. This is one of the core issues which was being assessed in this chapter.

It is clear from this Chapter that the two jurisdictions have some similarities but a number of positive differences exist. The first point worth noting is on the legislative coverage and institutional design. The Zambia law is a hybrid law covering competition and consumer-related issues. Therefore, besides hearing mergers and prohibited practices related disputes just like in the South African jurisdiction, the Zambia Tribunal also adjudicates on consumer-related disputes. In terms of the institutional design architecture, it is clear that the South African model is a bifurcated agency/Tribunal model, where the Competition Authority has to rely on a specialized Tribunal for enforcement. The Zambian model, on the other hand is an integrated agency model, where the first level of adjudication is done by the Competition Authority with the Tribunal adjudicating on appeals.

In terms of performance, this chapter has attempted to look at elements which might influence ***exante and expost*** developments on cases. It is clear that the South African budget is over 500% more than the Zambian budget. This, therefore, explains the variance in Tribunal members and secretariat staff composition. The South African Tribunal has a staff compliment of twenty-six (26), excluding part-time members, compared to Twelve (12) part-time Tribunal members and Secretariat staff.

Therefore, the need for Zambia to consider relooking at its structure and making some key positions permanent has been mooted. Effecting this proposal will, therefore, conjure reforming some of the provisions of the Act which include Section 67 (1)[775] which expressly emphasises part-time members. The chapter also proposes that the review exercise should be extended to Section 69[776] mainly with the view to enhance the provision by clearly emphasising the independence of the Secretariat. In the present situation, both the Tribunal and the Competition authority report to the Minister of Commerce through the department of Domestic Trade and Commerce. In view of the fact that the Act gives the Tribunal authority to uphold or dismiss the decisions of the Commission with Costs, this could potentially raise institutional political economy challenges hence the proposal. Further, going by the economic and social importance of competition and consumer protection issues in the economy, it is imperative that Zambia should consider some of the major elements of the South African institutional architecture.

Lastly, the South African experience shows that huge budgetary allocation is not a precursor to achieving procedural justice. The chapter shows that between 2013 and 2018, about twenty-nine (29) appeals were filled before the Competition Appeals Court (CAC). On average, there were more cases that were dismissed compared to those upheld and this development questions the accuracy principle. Out of the 29 cases handled by the CAC, fifteen (15) cases were dismissed representing fifty-one (51%) percent compared to forty-one (41%) percent of cases upheld.

[775] Competition and Consumer Protection Act of 2010 of Zambia
[776] Competition and Consumer Protection Act of 2010

Therefore, given that, on average, the number of dismissed cases outweighs the number of cases upheld, it may imply that limited efforts are being applied to ensure that a system of procedure that aim at attaining accuracy, as a principle of procedural justice is attained.

Chapter Six

The role of the CCPT in Providing Speedy Adjudication

6 Introduction

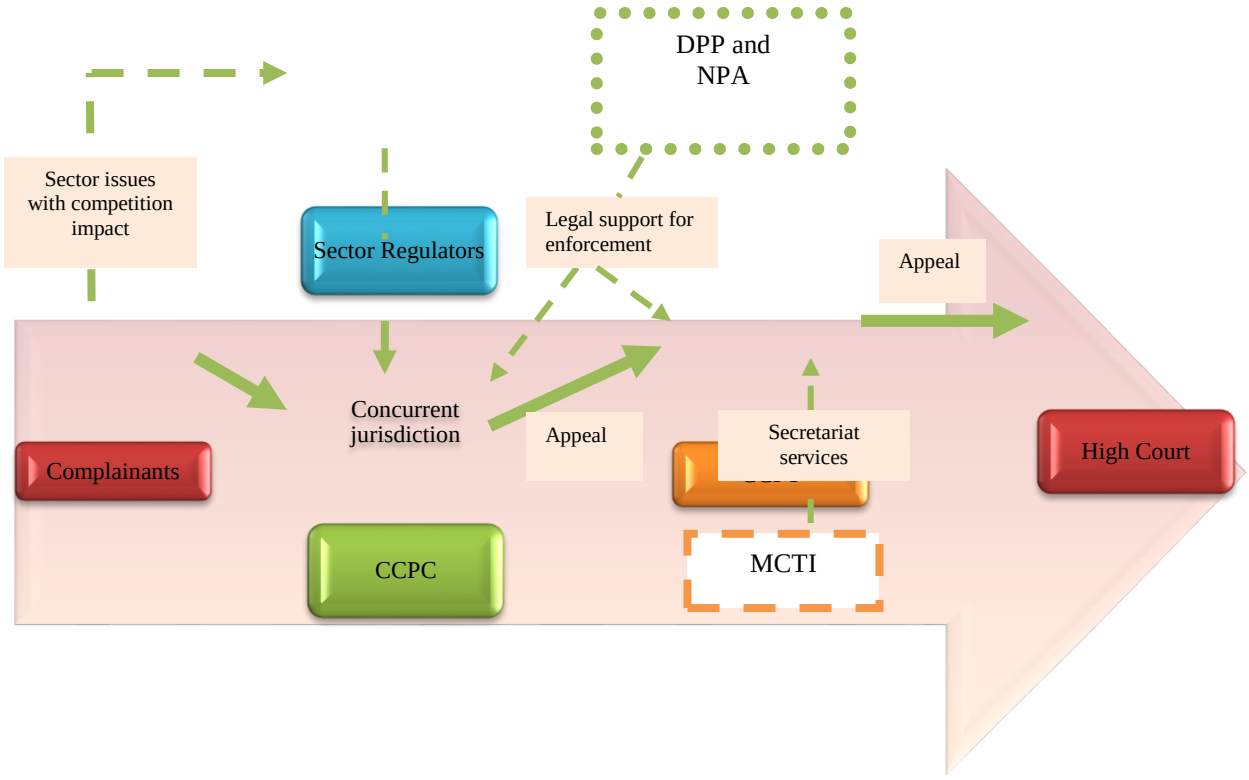
Understanding the jurisprudential developments ensuing from the decisions of the competition and consumer protection adjudicative tribunal and assessing whether these decisions are in line with its statutory purpose is at the core of this chapter. Discussions in the preceding chapters cogently show that there has been considerable body of case law that has been developed over the years. And these cases reflect the intensity of the work handled by the adjudicative body. It is, however, unclear on whether the cases have been speedily and inexpensively disposed-off as per statutory purpose. Therefore, an aggregate tally of each judicial decision based on the prescribed judicial principles, under the CCPA[777] Sections 67 to 77, and operating procedures under the CCPT[778] Rules of 2012 is necessary. This chapter looks at that, whilst taking stock of the ensuing jurisprudential developments.

6.1 Basis of Appeals under the CCPA

The institutional design adopted under the CCPA is the ***Bifurcated Integrated Agency Model[779].*** Under this model, the Competition and Consumer Protection Commission (CCPC) undertakes the first level of adjudication and the Tribunal hears any appeals[780] that may arise. However, it is important to note that there are four important institutions that primarily implement the CCPA, namely: CCPC, Tribunal, the High Court and sector regulators. In addition, there are other institutions that provide support services for the implementation of the law, which include the Director of Public Prosecutions (DDP), The National Prosecution Authority (NPA) and the Ministry of Commerce, Trade and Industry (MCTI). The relationship between these institutions is reflected in the Figure below.

[777] Competition and Consumer Protection Act No. 24 of 2010
[778] Competition and Consumer Protection Tribunal
[779] Refer to Chapter 2
[780] See Section 68 (a) of the Competition and Consumer Protection Act (CCPA) No. 24 of 2010

Figure 13: Relationship between Competition Law Enforcement Institutions



Source, CUTS (2015)

The CCPC is empowered by the CCPA to remedy any conduct that violates the Act as determined in its investigations and in some cases to impose financial penalties[781] on enterprises or individuals in violation of the Act. This legal mandate is drawn from Section 4 of the CCPA and the Act gives CCPC the necessary power to investigate anticompetitive practices. The investigation power is also augmented by the appointment of inspectors, who are empowered by the Act to conduct dawn raids at ailing companies and consumers.

[781] Note: Sanctions and Penalties under the CCPA No. 24 of 2010 are actions taken to address the violation of the Act. The fines payable under the Act are deemed to be a debt due to the state and are expected to be summarily received as a civil debt. Sections 9, 10, 16, 21, 37, 46, 47, 48, 49, 50, 51, 52, and 55 of the CCPA No. 24 of 2010 provides for offenses punishable by financial penalties to be imposed by the CCPC without any recourse or arbiter unless on appeal.

Therefore, basis of appeals under the CCPA, just like in other law jurisdictions, hinges on an aggrieved party demonstrating to the Tribunal that an error was made at the investigation and determination level by the CCPC. The error must be material or substantial. The adjudicating system used at the Tribunal appeals level is ***Adversarial***[782] ***and*** emphasis is on the need for the Tribunal to base its decision "*on each issue of fact or law raised in the proceedings*[783] *whilst following the tenets of natural justice*[784].

Since its operations started in 2012 following the issuance of the Tribunal Rules of 2012[785] the tribunal has delivered a number of judgments and rulings that have remained as precedence. These cases can be classified as follows: Judgments to guiding that the Tribunal has no jurisdiction on criminal matters; Ruling on introducing new or fresh evidence that was not introduced before the Commission at the time of investigation; Nature of computing the fines or penalties by the Commission: Ex-parte order applications**.**

6.1.1 Jurisdiction of the tribunal

In law, jurisdiction defines particular geographic area containing a defined legal authority[786].With its appellate jurisdiction to review the appeals from the commission, a number of cases have hinged on whether the Tribunal has jurisdiction to hear criminal matters or not. These cases have over the years given guidance over the matter. The *CCPC v. Tokyo Vehicle Limited*[787] was the first case to hear the matter of criminal jurisdiction. The specific article under discussion was Section 52 (1) and (2) which says:

[782] Note: Section 31 (1) (a)of Statutory Instrument No 37 of 2012 gives authority to the tribunal to base its decision on facts and law and on arguments raised in the proceedings by the disputing parties.
[783] Ibid. see (1) (a).
[784] Section 29 Statutory Instrument No 37 of 2012 indicates that the tribunal shall observe the principles of natural justice and shall hear all the evidence tendered and representations made by, or on behalf, of the parties or application.
[785]The Competition and Consumer Protection (Tribunal) Rules, 2012 (Statutory Instrument No. 37 of 2012)
[786] See Legal Dictionary: https://legal-dictionary.thefreedictionary.com/jurisdiction
[787] See: CCPC v Tokyo Vehicle Limited 2014/ HP/A1018

"(1) A person or an enterprise shall not sell any goods to consumers unless the goods conform to the mandatory safety standard for the class of goods set by the Zambia Bureau of Standards or other relevant competent body".

(*2) A person who, or an enterprise which, contravenes subsection (1) commits an offence and is liable, upon conviction—*
(a) to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both; and
(b) to pay the Commission, in addition to the penalty stipulated under paragraph (a), a fine not exceeding ten percent of that person's or enterprise's annual turnover.

The Tribunal had held that it had jurisdiction to hear and determine cases of criminal nature in the aforementioned case. The basis for its reasoning was Section 68 which espouses its functions to include among others hearing **"*any appeals"*** made to it under the CCPA. The use of the term **"*any appeal"*** was seen as outright authority for the Tribunal to hear all matters including those which were criminal in nature. However, the defining moment arose when the High Court presided over an appeal by the CCPC which sought judicial review of the court to determine jurisdiction matter. It was held, inter alia, that the Tribunal does not have jurisdiction to determine alleged criminal offenses. Therefore, the use of the term *"upon conviction"* under cases of criminal nature can only be heard by a competent jurisdiction ***the High or Subordinate Court***. The significance of this decision hinges on the fact that it has influenced subsequent determinations by the tribunal. Cases in point include the ruling in the case of the *CCPC and Hill Jam Investment Limited 2014* where it was held that once there was an allegation of criminal offence, which required criminal proceedings, it can only be determined by a competent court of criminal jurisdiction. This position was also held and replicated in the *CCPC vs Africa Supermarket Trading as Shoprite* and in the *Zambia Breweries vs CCPC*.

It is clear from the above ensuing case law that the doctrine of separation of powers within the periphery of the judiciary remains an indispensable ingredient in the dispensation of justice. Without the interpretation of the High Court on criminal

jurisdiction, wrong precedence would have been advanced within the jurisdiction of competition and consumer protection.

6.1.2 Effecting Mandatory Orders under the CCPA

Mandatory orders, in law, compel the person or institutions, in whom the order is assigned to, to take legally required acts. Mandatory orders are also relevant in relation. [788]. In relation to the CCPT, the *CCPC vs Dana Oil Cooperation Limited*[789] is the landmark judgment on this subject. The background to the matter is that the CCPC in 2002 authorised a merger of British Petroleum (BP) and Castro oil but gave conditions, based on Section 37[790], that Castro lubricants with exception of marine lubricants shall Zambia be, distributed by an independent distributer other BP. This was for purposes of preserving competition in the market. The second merger was when BP Africa and Puma Energy Zambia made a joint application seeking approval for Puma Energy to acquire 75 percent interest from BP Africa in 2010. The application was approved on condition that the distribution agreement of 2002 remains in force as previously authorised by the CCPC. In 2012, the CCPC instituted investigations against Puma Energy Zambia Limited and concluded that it was in breach of Section 37[791]. At appeal level, the tribunal, had ruled that a blanked procedure was expected to be followed on cases which affronts merger compliance under the CCPA. While interpreting Section 61[792] and 64[793], the tribunal held that this Section was a mandatory Section and its invocation was precursory to the invocation of Section 37[794] of the same Act.

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[788] Mulenga Besa (2019). Administrative Law and Process: Cases and Commentaries. Chribwa Publishers. p.62

[789] CCPT/HPC/04792014

[790] Ibid

[791] Supra

[792] Section 61 - The Commission may, where it determines after an investigation that an enterprise is a party to a merger and the creation of a merger has resulted, or is likely to result, in a substantial lessening of competition within a market for goods or services, give the enterprise such directions as it considers necessary, reasonable and practicable to— (a) remedy, mitigate or prevent the substantial lessening of competition; and (b) remedy, mitigate or prevent any adverse effects that have resulted from, or are likely to result from, the substantial lessening of competition.

[793] Section 64 - where the CCPC determines that an enterprise has failed, without reasonable cause, to comply with a direction or undertaking, it may, subject to subsection (2)[793], apply to the Tribunal for a mandatory order requiring the enterprise to make good the default within a time specified in the order

[794] Section 37 - An enterprise which intentionally or negligently— (a) implements a merger that is reviewable by the Commission without the approval of the Commission; (b) implements a merger that is rejected by the Commission; or (c) fails to comply with conditions stated in a determination or with

In short, the Tribunal had nullified the invocation of Section 37 by the CCPC due to the failure of the latter to apply for a mandatory order, as per Section 64, requiring the CCPC to remedy the observed default by Puma Energy Zambia Limited. This interpretation is open for contest. As observed in the High Court Appeal in the same case, the use of the word **"*may*"** as opposed to the word **"*shall*"** does not by any means impose a mandatory duty on the CCPC to adopt both Sections 61 and 64 of the Act as espoused by the Tribunal in its ruling. Both Sections stand on the same footing and CCPC has discretion to exercise either to follow the provisions of Sections 61 and Section 64 depending on the enterprise being investigated and the circumstances at play. These factors and others could have led to the High Court finding the Tribunal to have erred both in law that it is obligatory for the CCPC to apply for a mandatory order.

6.1.3 The role and importance of evidence in judicial matters

Evidence is described as the material placed before a Court for the purpose of assisting a Judge to reach a decision in the matter. A Judge's decision is limited to the evidence placed before them; therefore, it is important that a party provide as much relevant evidence as possible to support their case.

The Zambia Breweries vs CCPC[795] is one of the key cases that have addressed the issue of evidence. Although this case was appealed to the High Court and ruled that the Tribunal had no jurisdiction to hear criminal matters, the finding remains of interest to the subject matter. This is a case in which Zambia Breweries (ZB) PLC appealed against the CCPC Board which had found ZB to have breached Section 52 (1) of the CCPA. The background to this appeal is that, on a named date, CCPC received a complaint from a consumer who claimed to have found a foreign particle *(identified as a sachet labelled Brandy)* in a bottle of castle larger beer which the consumer claimed to have purchased from a place called Tall Trees.

undertakings given as a condition of a merger approval; commits an offence and is liable to a fine not exceeding ten percent of its annual turnover.

[795] CCPT/004/CON/2014

The CCPC, therefore, after subjecting the bottle to investigations from other competent bodies, i.e. the Zambia Bureau of Standards (ZABS) and the Food and Laboratory Department at the Lusaka City Council which found that the bottle was not opened, concluded that ZB was in breach of 52 (1) of the CCPA and therefore should be prosecuted. Dissatisfied with CCPC's directive, ZB appealed to the Tribunal and cited 10 grounds of appeal. The CCPC lost on all the 10 grounds presented by ZB with costs. Among the reasons for this development advanced by the Tribunal included lack of proper preparations on the part of CCPC (both the legal team and their witnesses). For example, one of the grounds of appeal included an observation by ZB that CCPC failed to interpret the results from ZABs correctly. On this point, ZABS in its report indicated that the measurement of the bottle top diameter *(28.8+/-0.1)* mm were partly within and outside the limits of the prescribed diameter G diameter *(28.80+/-0.01)* mm and crimp No Go diameter *(28.50+/-0.01)* mm. Given these results, ZABS concluded by indicating that the *"measurement did not show proof that the bottle was tempered* ***with or not".*** In its final decision, the CCPC omitted part of the narrative in ZABS results. The words "***or not"*** in ZABS submission were omitted by the commission and this implied that the Castel beer bottle passed the sealage test. The tribunal cited this as a serious professional misconduct on the part of CCPC staff to deliberately misinterpret the ZABS report and manipulate the results so as to skew the Board's decision in favour of aggrieved consumer. The Tribunal urged the CCPC to take measures to curb such abuses by its officers as well as ensure that the rights of consumers, persons and enterprises are respected on an equal footing.

Another ground of appeal presented by ZB was failure by the Commission to conduct physical inspection on the origin of the Castle Lager beer bottle given that no receipt was availed to the CCPC by the aggrieved consumer. The aggrieved consumer alleged to have bought the said Castle Lager and no receipt was issued. Given that there was a third party involved and based on the Cook Vs Pasminco case, which emphasizes that goods and services, occurs as part of a bilateral transaction between parties, therefore the Tribunal found that it had not been proved how the ZB supplied contaminated beer. It was further found that the CCPC also failed to prove and adduce evidence on whether the named

beer was indeed purchased at the Tall Trees, as the commission did not attempt to conduct a physical search at Tall Trees.

Failure to address these administrative-related arguments CCPC lost on all ten grounds of appeal by ZB.

6.1.4 Authorisation of Mergers

A merger occurs where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses. [796]

The IHS Zambia vs CCPC[797] is among the cases that have addressed issues hinging on meager authorisation. This is a case were HIS Zambia appealed against the decision of CCPC that rejected its application to purchase 100 percent shares of Zambia Tower Limited – a subsidiary of Airtel Zambia Limited. HIS was incorporated in 2013 and commenced operations in 2014 following acquisition of MTN Zambia. One of the Commissions' arguments in this case was that the merger, if granted, would lead to substantial lessening of competition as it involved removing of a vigorous and only competitor in a market that has high barriers to entry. IHS argued this reasoning. The Tribunal in making its ruling on this point observed that there were four (4) players in the market comprising of Zambia Tower Limited (39 percent shares), HIS Zambia Limited (32 percent shares), Zamtel (21 percent shares) and ZICTA (8 percent shares). If the merger was to be allowed, the Tribunal observed that this would lessen the number of players in the market to three – hence creating an oligopoly market and not a monopoly market as perceived by CCPC. The Tribunal concluded, therefore, that the proposed merger would not result in the removal of effective competition in the market. The Tribunal argued that the Commission failed to prove and showcase, in its arguments, how the said merger would lead to eliminating irritating sources of competition.

[796] Section 24 of the CCPA
[797] CCPT/011/CON/2015

The Tribunal further argued that, given that the two merging firms (Zambia Tower Limited and HIS) were already dominant players in the market and that the merger would result in IHS having a market share of about 92 percent, it did not subtract the fact that being dominant as per section 16 (2) of the Competition and Consumer Protection Act was not a violation in itself. Further, the Tribunal also opposed the Commissions' decision to reject the proposed merger on alleged abuse of conduct which had not been determined and proved by the Commission itself.

Another ground of appeal hinged on public benefits and detriment tests. CCPC argued that the public would not benefit as the horizontal merger would involve the removal of a vigorous competitor and thereby will induce upward pricing pressures and stifle the market due to already existing high barriers to entry in the market. The Tribunal in its determination opposed this argument. The Tribunal was of a view that the fact that a firm is dominant and or acquires dominance is not sufficient to conclude that such a firm will have high propensity to unilaterally increase prices.

The Tribunal having considered all the arguments by both parties and having made the above and other arguments judged in favor of IHS. The Tribunal ordered that the merger be authorised.

6.1.5 Determining a consumer under the CCPA

Racheal Mhone Chama vs CCPC is among the cases that have addressed issues on determination of a consumer. In this case, Chama sought the interpretation of the Tribunal on whether the CCPC was in order not to hear her case as a consumer. This is in a matter where Chama, sometime in 2013 imported adult diapers from China for purposes of reselling them in Lusaka. Chama transported the consignment from Dar es Salaam in Tanzania to Kapiri Mponshi in Zambia through TAZARA Railways Limited. The consignment was then transported by road from Kapiri Mponshi to Lusaka. Before the consignment was transported from Dar es Salaam to Kapiri Mponshi, it was stored in

TAZARA warehouse for about four (4) months and it turned out that the goods got soaked in the sheds they were kept.

In seeking redress, Chama approached the Commission that declined to address the case on the basis that the circumstances of the case with TAZARA did not warrant Chama being called a consumer – as per CCPA. The CCPC argued that the purpose of Chama acquiring the services from TAZAMA was for purposes of advancing her business of selling diapers and not for personal consumption. The Tribunal on the other hand, whilst citing section 2 (I) and 56 (I, II), differed with the decision of the Commission and held that Chama was indeed a consumer. The following were the grounds of the judgment. It was observed that Chama did not acquire the adult diapers from TAZARA but instead acquired services which were to be used for purposes of transporting her goods from Dar Les Salaam to Kapiri Mposhi. Chama, in the eyes of the services providers *(in this case TAZARA),* was a consumer. Based on this argument, the Tribunal ruled that Chama was a consumer and should have given been given an opportunity to be heard by the Commission.

These cases give an abridged aggregate tally of the qualitative nature of the decisions made by the Tribunal. Although the subsequent chapter discusses the issue of ***"cost"*** and ***"time"*** from a quantitative point of view, understanding the broad status of the latter is based on a qualitative perspective is necessary.

6.2 The appeal process and Case timeframe

The introduction of the adjudicative model under the CCPA is founded on the need to speedily and inexpensively dispose of cases. This development is in affirmation with Article 118 Subsection (2) (b) of the Constitution (Amendment) Act No. 2 of 2016 which mandates the Judiciary to consider alternative forms of dispute resolution so as to expedite disposal of cases[798]. In addition to the functions of the Tribunal of hearing

[798] Article 118 Subsection (2) of the Constitution of Zambia No. 2 of 2016 states; In exercising judicial authority, the courts shall be guided by the following principles: a) Justice shall be done to all, without discrimination; (b) Justice shall not be delayed; (c) Adequate compensation shall be awarded, where

appeals, the adjudicative body has power under Section 71 of the CCPA to take any other course which may lead to just, speedy and inexpensive settlement of any matter before it.

6.2.1 The appeal process

The appeal process, as in figure 1, begins with an aggrieved party of the decision of the CCPC filling a notice with the Tribunal secretariat within 30 days from the date on which the order or direction was made[799]. The secretariat may, at any time after receiving the notice of appeal or an application, require the appellant to furnish a statement detailing the grounds of appeal and any relevant facts and contentions.[800] The appellant is expected to send copies of the requested information not more than 14 days from the date the request was made. The chairperson, under Statutory Instrument No. 37 is permitted to dictate a lesser timeframe. Having received the requested information, the secretariat is expected to furnish the respondent with a copy of the statement and both the applicant and respondent are also expected to be notified of the date and place of hearing. The notification should not be more than 14 days from the date of the hearing[801]. And the law permits parties served with a notice to apply to the secretariat for the alteration of the date of the hearing.

Table 8: Summary of the appeal stages and the indicated statutory timeframes

APPEAL STAGES	STATUTORY TIMEFRAME
1) Appeal to the Tribunal (*Appellant challenges the decision of the CCPC by invoking Section 68 (A) of CCPA)*	**Within 30 Days** (*Section 2 of SI No 37 of 2012)*

payable; (ternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be d.

[799] See Section 2 of Statutory Instrument No 37 of 2012
[800] Ibid. Section 7
[801] Supra, Section 2

2)	**Detailed Statement Requested from Appellant** *(Statement detailing the grounds of appeal Section)*	Within 14 days from date of request *(Section 7 (1) & (2) of SI No 37 of 2012*)
3)	**Copy of Statement Submitted to Respondent**	No timeframe specified for transmitting and receipt *(Section 7 (3) of SI No 37 of 2012)*
4)	**Notice of the Date, Time and Place of Hearing of the Tribunal**	Notice to be issued at least 14 days from the date of hearing (*Section 8 (1) of SI No 37 of 2012)*
5)	**Alteration of the Date of Hearing** *(parties served with a notice for hearing can apply for the alteration of the date of the hearing).*	No timeframe specified (*Section 8 (2) of SI No 37 of 2012)*
6)	**Hearing of Appeal by the Tribunal**	Within 60 days of receiving a notice of appeal or an application (*Section 9 of SI No 37 of 2012)*
7)	**Proceedings or Trial**	No timeframe indicated
8)	**Decision of the Tribunal**	Within 60 days after hearing the appeal and application (*Section 31 (2) of SI No 37 of 2012)*

Source: Authors compilation

Setting clear time limits for review of fillings and the determination of appeals is necessary[802] if fluidity to the process is to be attained. Specific timeframes should take into account the need to for adjudication of the claim to take place within the specified time limit[803]. The limits of lodging and deciding appeals must be short[804]. An attempt has been made in the CCPA and the Statutory Instrument No. 37 of 2012 to define the parameters for cases to be disposed of. Whereas timeframes have been expressly indicated under stages 1, 2, 4, 6, stage 3, 5 and 7 do not have specific timeframes. Under stage 3, the secretariat is expected to share copies of the statement or grounds of appeal to the respondent. Therefore, absence of a clearly indicated timeframe on when the secretariat should transmit the statement to the respondent weakens the intended

[802] International Foundation for Elections, (2011), Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections: Edited, Chad Vickery. IFES, Washington D.C. 2006
[803] Ibid
[804] Ibid

procedural law process. Secondly, stage 7 involves trail or hearing the main matter. The law is silent on the time it should take and therefore this could be the reasons why cases take longer periods.

The aforementioned scenario is further affected by the absence of a specified timeframe for the respondent to acknowledge receipt of the statement. Although this specific issue is addressed at stage 4 when the Tribunal issues a notice of the date, time and place of hearing, it still remains imperative to have a timeframe defined at stage 3 as this will strengthen procedural requirements. This also applies to stage 5. Granting, either an appellant or respondent, permission not to appear at the specified hearing time due to justified reasons is founded within the periphery of natural justice and the right to be heard. However, the narrative to the respective provision i.e. Section 8 (2) of SI No 37 of 2012 will also require strengthening. The Article in its current form as it reads "a *part served with the notice referred to in sub rule (1) may apply, in writing, to the secretariat for the alteration of the date of the hearing",* creates another layer of extended procedure which could have an effect on the length of the case. Every notice of a hearing is issued at least 14 days before the hearing of the case as indicated in stage 4. And if an application for alteration by either of the parties to the dispute is granted by secretariat, there is no provision which explains when and how the new date for sitting will be decided on. This, therefore, calls for the need to strengthen the provision on alteration by having an express timeframe indicated on when the case should be heard.

The other debatable issue is on the timeframe for hearing an appeal and the timeframe for disposing or determining an appeal. Section 9 of SI No 37 deals with hearing of appeals and expressly states that;

> *"The Tribunal shall sit at such place, and times as the chairperson may determine, within sixty days of receiving notice of appeal or an application referred to in Part II.*

Part II deals with application procedures and timelines indicated in Table 1. Section 31 (2) deals with decision or determination of the Tribunal and states:

> *32 (b) the decision shall be made by the tribunal within sixty days after the hearing the appeal or application.*

In other provisions, the maximum timeframe given is 60 days, bringing the total number of days to 120. Therefore, with this in mind, it will be important to understand the average length each case takes.

6.2.2 Case timeframe

This analysis, attempts to document the average length of cases from filling to disposal date. Understanding the broader picture based on filling and disposal date is key in developing a frame for qualitative analysis to be based on legal requirements and nomenclature of Section 9 and 31 of SI No 37.

Therefore, properly documented reports were reviewed to arrive at a frame for analysis. From the Annual reports reviewed, it was concluded that only 2016 and 2017 had detailed information on the number of active, pending and disposed cases. Secondly, it was observed that before the enactment of the CCPA of 2010, there was only one appeal case that was recorded between 2019 and 2010 i.e . Lipimile and Another v Mpulungu Harbour Management Ltd. (SCZ/8/270/2005) [2008] ZMSC 15 (22 July 2008); This case initially came up on 1st September, 2005, through the High court all the way to the Supreme Court. At the Supreme Court, judgment was only passed on 23rd July, 2008. Therefore, while taking into account this timeframe which represents about 34 months and about 996 days, it will be important to test whether the average duration of cases under the new legal regime from date of filling to date of disposal is significantly greater than the indicated 34 months. Secondly, it is clear based on the indicated KPIs of the tribunal that they endeavored to dispose of cases within six (6) months. The cited reasons for this target is to have cost, intensity and contingency risks such as life and missing documents.

> ***The hypothetical question therefore is that, if the average duration was significantly greater than 6 months, then the tribunal had not achieved its estimated 6 months target indicated in its KPIs for disposal of cases.***

The information was, therefore, transposed through excel based on the case *number, filling and average disposal dates* as provided below.

Data on duration (from date of initial hearing to date of disposal) was collected from 2014 to 2017. And results from this data are presented below;

Summary Statistics:

Table 9: Summary Statistics

	Duration in Months
Mean	11.08333
Standard Error	1.498691
Median	11
Mode	15
Standard Deviation	7.342057
Sample Variance	53.9058
Kurtosis	-0.23064
Skewness	0.710904
Range	24
Minimum	3
Maximum	27
Count	24

Source: Authors Compilation (2020)

Table 6 presents the summary statistics on the initial analysis on the duration of cases based on the 24 cases sampled. It revealed that the maximum number of months it took the tribunal to disposed-off a case was 27 months while the minimum was 3 months with an average duration for disposal of cases of 11 months and a standard deviation 7 months. This, when compared to the average duration of 34 months recorded under the *Lipimile and Another v Mpulungu Harbour Management Ltd*, a case which happened before the introduction of the Tribunal, shows that there has been significant improvement in the time it takes to dispose of cases.

Further, in order to understand whether the average duration *(i.e. from date of hearing to date of disposal of cases)* was significantly greater than 6 months, the following Hypothesis Test was conducted;

Hypothesis:

$H_0: \mu \leq 6$

$H_a: \mu > 6$

Table 10: Summary of results: Hypothesis testing

t-Test: One Sample

	Duration
Mean	11.08333
Variance	53.9058
Observations	24
Hypothesized Mean	6
df	23
t Stat	3.391849
P(T<=t) one-tail	0.001254
t Critical one-tail	1.713872

Source: Authors Compilation (2020)

The table above presents the results from the Hypothesis that was done using Microsoft excel version 2013.

Test Statistic:

The test statistic under H_0 was given as $t_{n-1} \sim \frac{\bar{x}-\mu}{s/\sqrt{n}}$.

(Assuming the population duration measurement are independent and normally distributed)

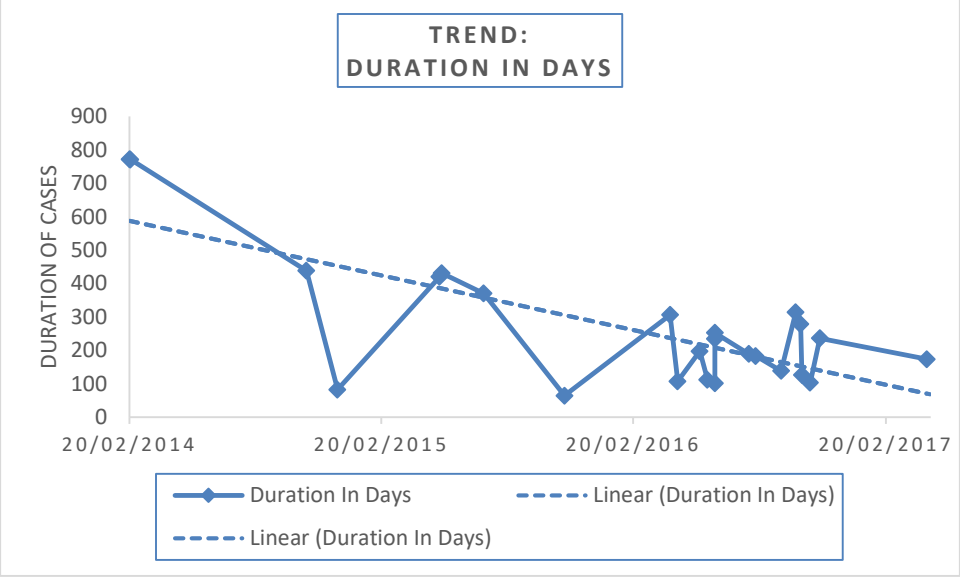
Therefore, from Table above the results showed that the T-Statistic $t = 3.392$

Since the calculated t-value is greater than the critical t-value and the p-value 0.001254 is less than the 5% significance level, Ho is rejected.

In conclusion, since the t $(3.392) > 1.7138$ or P-value is less than 0.05, we reject the null hypothesis and conclude that at $\alpha = 5\%$, the average duration of cases is significantly greater than 6 months.

However, despite this development, it is important to note that there has been a downward trend in the disposal of cases which entails that sign of things improving over time. See figure below.

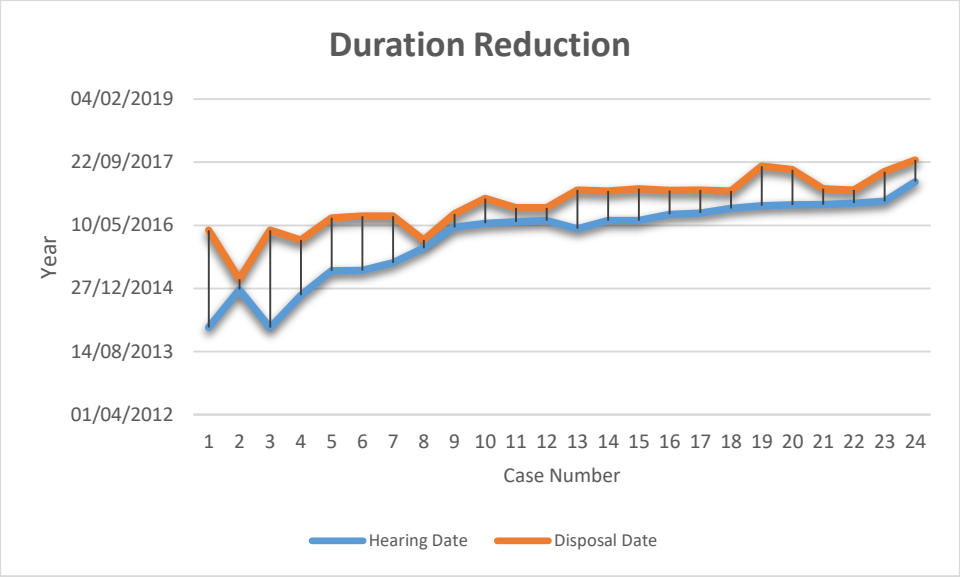
Figure 14: Trend Analysis of disposal of cases over-time



Source: Authors Compilation (2020)

This trend analysis is further underwritten by the figure below which shows that the gap between the date of initial hearing and that of disposal is reducing over time.

Figure 15: Trend Analysis of duration of cases over-time



Source: Authors Compilation (2020)

However, from the hypothesis test that was conducted, the average duration of cases is still statistically greater than I80 days (6 Months). The factors leading to this development could hinge on a number of reasons. Among these could include, unnecessary adjournment induced by disputing parties, absence of specified timeframes at certain stages of the appeal process as highlighted above. Absence of a full-time secretariat of the Tribunal is also another challenge. According to the head of the Tribunal secretariat, both the Tribunal and secretariat operate on a part-time basis and this has an effect on the operational efficiency of the Tribunal. Further, the Tribunal secretariat indicated that delays are also caused by some parties appearing before the Tribunal who have the tendency to file documents late and this unnecessarily causes applications for adjournments from opposing parties resulting in delays.

6.3 Conclusion

It is clear from this chapter that there is great body of case law that is being developed. And in this adversary tradition, no better instrument has been devised for arriving at truth than a contest between parties, presided over by a neutral arbiter – the Tribunal. Some decisions of the CCPC have been upheld whilst others have been nullified signifying some level of independence between the two institutions. With the extension of the appellate jurisdiction of the High Court to preside over cases where tribunal has decided in favour of and not against a claim of appellant, the legal turf has changed[805]. Tribunal decisions have been quashed whilst others have been upheld, a situation that is relative to the normative legal doctrine. As indicated above, it is clear from the above ensuing case law that the creed of separation of powers within the periphery of the judiciary remains an indispensable ingredient in the dispensation of justice. Without the interpretation of the High Court on criminal jurisdiction, wrong precedence would have been advanced within the jurisdiction of competition and consumer protection. This, therefore, questions the existence of the Section 70 (4) which promulgates the need for the Tribunal to ensure that its decisions are based on reasoned judgements[806]. However, the crystallisation of the decision of the High Court on criminal matters in the *CCPC vs Jam Investment Limited*, *CCPC vs Africa Supermarket* and *CCPC vs Zambia Breweries*, signifies that the Tribunal upholds decisions of higher courts.

This chapter also makes an observation on the length of cases. The average statutory length for hearing a case by the Tribunal is 6 months. And the indicated statutory length for the tribunal to dispose of a case is another 60 days of which, in cumulative terms amounts, to 120 days – about 4 months. A snap assessment of the average length of time shows that most cases analyzed between 2014 and 2017 have taken lengthy time. Therefore, this conjures the notion that most cases could have been delayed – a situation which is at variance with the statutory intention of its introduction. Further, cases which delay are also at variance with the Constitutional requirement under Article 118

[805] See section 75 of the CCPA - A person aggrieved with a decision of the Tribunal may appeal to the High Court within thirty days of the determination.
[806] Section 70 (4) of the CCPA - A decision of the Tribunal shall be in the form of a reasoned judgment…….

Subsection (2) (b)[807] which emphasizes that *"Justice shall not be delayed".* Perhaps reforms are required to tighten the Act to ensure that cases are disposed of within the specified timeframe. Drawing lessons from other jurisdictions like Canada might present good insights for this reform process. And two cases can be cited for this purpose i.e. *R. v. Askov and R. v. Jordan*. In the case of R. v. Askov[808], the appellants were charged with conspiracy to commit extortion. The trial took place almost three years after the original charges were laid. The Supreme Court found the delay excessive and unreasonable and ordered a stay of proceedings.

[807] Constitution of Zambia No. 2 of 2016 states;
[808] *R. v. Askov* (1990) *Charge of Extortion*

Chapter Seven

7 Discussions of the conclusions and recommendations

7.1 Introduction

This study responded to the contemporary debate in Zambia and other jurisdictions, regarding the modification of existing litigious practices and the revision of the values underlying the public adjudicative process. Abundant reasons for dissatisfaction with the judicial process could be put, but only the most salient were discussed. A brief diagnosis of the ailments of civil procedure was explored and it evidently became an incongruous starting point for a work that looks at performance of Alternative Dispute Resolution (ADR) mechanisms. This study is anchored on seven core chapters. Therefore, this chapter presents a summary of the key finding and recommendations.

7.2 Conclusions

As highlighted in the preceding section, this study is anchored on seven core chapters. The introductory chapter notes that litigious disputes can be time consuming. They also can be protracted and acrimonious and they have potential to destroy commercial relationships of contracting parties, and adversely impacting the supply chain. Literature shows that they can add substantially to business costs, negating much of its benefits or advantages. Merits, therefore, of ADR in addressing the issue of inundation in courts has been emphasized. Therefore, to measure the performance of ADR, the chapter disaggregated the elements of ADR and mooted the idea of focussing on adjudicative tribunals. Notably, these adjudicative tribunals are premised on the need to provide simple, cheap and speedy justice. Their introduction is part of legal reforms to address the challenge of inundation by the traditional court systems. In this chapter, literature showed that, in the Commonwealth administrations, there had been rapid multiplication of adjudicative tribunals. And Zambia had copious adjudicative Tribunals covering various jurisdictions i.e. social, political, and economic matters. The literature, however, showed that there was a dearth in knowledge on the performance of adjudicative tribunals in contributing towards addressing the challenge of backlog of cases. And in bridging

this void, this chapter, therefore, outlines the methodological approach used which involved a mixture of a descriptive and inferential statistical method of analysis and other key instruments as outlined.

Chapter two looks the extent to which global historical and contemporary jurisprudential developments of ADR have contributed towards addressing the challenge of inundation in ordinary court systems. Most literature affirm that ADR has bridged the gap. More prominently, it has been observed that ADR is touted as more efficient and effective system than the traditional courts in providing justice, especially in countries in which the judiciary has lost the trust and respect of the citizens. The chapter, further, notes that several of the hybrid examples suggest that a dispute resolution system often involves the possibility of linking several different procedures. Notably, various forms of ADR are now sometimes embedded into the formal system of adjudication. Whether by agreement of the parties or by the imposition of law, procedures are often sequenced. In such cases, parties may first negotiate on their own. They then may be obligated to mediate before having a case adjudicated or arbitrated. In other words, various procedures in ADR can be used in conjunction with the formal dispute resolution process.

Lastly and given the nature and variety of ADR processes that exist, the chapter emphasises that it was important to note that the amount at stake, complexity and novelty of the issues, are among the key considerations used when deciding on the kind of ADR procedure to use. Granted that resolution of all disputes should be cheaper and speedy, but some disputes, due to the amounts involved or the magnitude of the case, will require a dispute resolution process based on traditional legal procedures.

Chapter three looked at the sufficiency of the present traditional justice delivery system and the institutionalized ADR process in addressing the challenge of inundation and delay experienced by ordinary courts in Zambia. The chapter notes that, significant levels of legal reforms have been noted overtime which present an opportunity for a strengthened legal regime for dispute settlement. Notably, the enshrining of ADR principles in the present Constitution was one great attempt to signify the importance of ADR in complementing traditional court processes in dispute settlement. Other reforms which have ensued over time illustrate the recognition and crystallization of ADR in

Zambia. Most prominently, Conciliation, Arbitration and Mediation have dominated with considerable legal backing.

The chapter also notes that the formal court system has recorded some improvement in the case handling processes. All Courts, except the Local Courts, continued to record a reduction in backlog. The Local Courts closed with 31, 557 pending cases in 2019, compared with 30, 057 pending civil cases at the close of 2018, representing a difference of 1,500 pending cases. This was attributable to closure of some of the courts due to lack of infrastructure and low staffing levels. Reportedly, the Supreme Court had a total of 257 criminal cases. Out of these cases, 196 were brought forward from 2018 and 61 were filed in 2019. A total of 170 cases were disposed of and 87 cases were carried forward the subsequent year. As for civil cases, 190 were brought forward from 2018, while 16 were filed during the year bringing the total number to 206. Out of these, 148 were disposed of, leaving 58 cases at the close of 2019.

Despite the observed positive developments covering 2018 and 2019, there has been dissatisfaction with the performance of the Zambian judiciary. Despite the marginal improvement recorded the cited major challenges facing the Zambian judiciary has been that of inefficiency and inordinate delays in the processing of cases.

Chapter four discussed the existing legal, administrative and institutional factors which underpin performance of administrative bodies, with adjudicative functions. This discussion roots its foundation in administrative law. Administrative law, being law which, governs the powers and procedures of agencies was a tool used to determine whether the exercise of power was exercised in any particular form. The CCPA of 2010, for instance, confers on CCPT, the powers to hear appeals from the decision of the CCPC. The role of the CCPT, as an independent institution, in providing checks on the exercise of powers of the CCPC, just like the Court would perform such on the CCPT, is the concern of administrative law. Therefore, performance of any adjudicative tribunal is dependent on the extent to which its statutory powers and the general legal environment was supportive to its existence. Therefore, at the core of this chapter was the classification of the institutional design and the adjudicative model which define the functions of the tribunal system. The chapter concludes that the institutional design adopted is that of a

bifurcated integrated agency model, where the first level of adjudication is done by the competition authority, with the Tribunal coming in on appeals. In jurisdictions that have adopted bifurcated integrated agency models, experiences reveal the importance of ensuring that the members of the adjudicative tribunal have substantial legal and sectoral expertise of a consistent and continuous nature. The chapter acknowledges the attempt made in the CCPA to ensure high level participation of legal and sectoral minds. However, this chapter argues that the appointment process of Tribunal members needs to be strengthened through putting up appropriate recruitment rules and ensuring that all appointments made by the Ministers are vetted by the Judicial Service Commission or Chief Justice as in the Sampath V. Kumar's case.

This study also analyses the regional dynamics and made comparative study with the South African Competition Tribunal. This was explored in chapter five. The rationale that stimulates this exploration hinges on the understanding that the South African Competition Adjudicative regime was a fairly old system in the Southern African Region. Therefore, it harbours jurisprudential developments which are essential for the Zambian, and other countries in the region whose competition and consumer protection policy and legal regime are at a nascen stage, to draw from. The first point worth noting is on the legislative coverage and institutional design. The Zambia law is a hybrid law covering competition and consumer-related issues. Therefore, besides hearing mergers and prohibited practices-related disputes just like in the South African jurisdiction, the Zambia Tribunal also adjudicates on consumer-related disputes. In terms of the institutional design architecture, it is clear that the South African model is a bifurcated agency/Tribunal model, where the Competition Authority has to rely on a specialized Tribunal for enforcement. The Zambian model, on the other hand is an integrated agency model, where the first level of adjudication is done by the Competition Authority with the Tribunal adjudicating on appeals. In terms of performance, this paper has attempted to look at elements which might influence ***Exante and Expost*** developments on case handling. It is clear that the South African budget is over 500% more than the Zambian budget. This, therefore, explains the variance in Tribunal members and secretariat staff composition. The South African Tribunal has a staff compliment of twenty-six (26),

excluding part-time members, compared to twelve (12) part-time Tribunal members and secretariat staff.

Therefore, the need for Zambia to consider relooking at its structure and making some key positions permanent has been recommended. Effecting this proposal will, therefore, conjure reforming some of the provisions of the Act which include Section 67 (1)[809] which expressly emphasises on part-time members. The chapter also proposes that the review exercise should be extended to Section 69[810] mainly with the view to enhance the provision by clearly emphasising the independence of the Secretariat. In the present situation, both the Tribunal and the Competition authority report to the Minister of Commerce through the department of Domestic Trade and Commerce. In view of that, the Act gives the Tribunal authority to uphold or dismiss the decisions of the Commission with Costs, this could potentially raise institutional political economy challenges hence the proposal. Further, going by the economic and social importance of competition and consumer protection issues in the economy, it is imperative that Zambia should consider some of the major elements of the South African institutional architecture. The South African experience shows that huge budgetary allocation is not a precursor to achieving procedural justice. The chapter shows that between 2013 and 2018, about twenty-nine (29) appeals were filled before the Competition Appeals Court (CAC). On average, there were more cases that were dismissed compared to those upheld and this development questions the accuracy principle. Out of the 29 cases handled by the CAC between, fifteen (15) cases were dismissed representing fifty-one (51%) percent compared to forty-one (41%) percent of cases upheld.

Therefore, given that on average the number of dismissed cases outweighs the number of cases upheld, it may imply that limited efforts are being applied to ensure that a system of procedure that aims at attaining accuracy, as a principle of procedural justice is attained.

[809] Competition and Consumer Protection Act of 2010 of Zambia
[810] Competition and Consumer Protection Act of 2010

Chapter six looks at whether the average duration of cases under the new legal regime from date of hearing the case to date of disposal was significantly greater than 6 months as per KPI of the CCPT. A One Sample T Test was used to establish this assumption which is based on the following hypothesis and T test. The study found that (at $\alpha = 5\%$), the average duration of cases was significantly greater than 6 months. However, further analysis indicates that there has been a downward trend in the disposal of cases which entails that things are improving over time.

7.3 Contribution of the Study

With the foregoing, therefore, it can be observed that this thesis has made contribution to the field of ADR, specifically those with adjudicative functions. The main contributions of this study are:

1. The discipline of ADR, as a theory is still at a nascent stage. Consequently, scholars, administrators and researchers in the Judiciary and academia have little methodological guidance on how to deal with the interplay of factors that determine the performance of ADR in addressing the challenge of inundation and delay experienced in traditional court system. Empirical research in the field of performance of ADR continues to reflect a rather narrow paradigm. There is need for more quantitative studies that contribute to our search for increased understanding of the phenomena. In order to strengthen its theoretical base, this thesis offers a contribution in that direction by undertaking to assess the performance of adjudicative tribunals, in addressing the challenge of inundation and delay in the formal court system using a mixed methodological approach of descriptive and inferential statistical methods.
2. Indisputably, having comprehensive and deeper understanding of the structural, functional and resource requirements and the other factors which affect performance of adjudicative tribunals is key in unpacking and understanding the causes of underperformance of the courts and ADR functionaries. Therefore, the contribution of this thesis is to improve understanding on the key internal and external factors which affect performance for the attention of key policy makers and administrators.

7.4 Recommendations

In view of the above observations, the following are the recommendations.

1. Appeals from the Tribunal should lie straight to the Court of Appeal. This is because for one to be appointed Chairperson of the Tribunal, they need to have 10 years or more at the bar which is the same qualification as that of High Court Judges. It will in turn also enhance the status of the Tribunal and it will also help with decongesting the High Court and save on the time that cases are held up in the High Court.

2. The power to which the Tribunal can extend the filing of documents should be clear and specify the grounds to which the Tribunal can grant that extension and not only leaving it to the parties to provide the grounds for which the extension is being sort.

3. Setting up a permanent secretariat in order to have efficient and speedy resolutions of appeals brought to the Tribunal, thereby avoiding situations where new staff have to start anew reviewing the cases at hand.

4. The Tribunal should have a permanent legal department and a research library in order to help the Tribunal in coming up with well researched rulings and to keep record of the cases heard by the Tribunal. Including support staff to ensure adequate running and fulltime support of the Tribunal.

5. The secretariat should also have personnel with a legal background. This will assist the members of the tribunal in conducting adequate and thorough research of the cases at hand. This can accord the Tribunal members time to focus more on the process of hearing the appeals on time. It will further create confidence in the public as matters will be heard and determined within time and not inconvenience business owners.

6. Having a provision in the rules that state the timeframe for which cases should be heard and determined. Since the nature of appeals brought before the Tribunal are business in nature and are an important drive towards the economic growth of the country. The failure to have a provision in the Act or in the Tribunal rules that sets the timeframe for which matter should be heard, and judgment passed leaves room to the members to adjudicate on matters at their own pace. This inconveniences the business entities and detrimental to the economy's growth.

7. Establish a permanent location for the Secretariat away from the Ministry to ensure its independence. This will require more funding.

7.5 Areas for future research

The researcher suggests the following areas for further research based on the outcome of the research work:

- An analysis on the actual legal costs which are paid by clients to legal firms with a view to establish whether introduction of ADR has had an impact on cost. There is paucity of information on this matter and more research is, therefore, required. This study should also explore the applicability of implementing insurance policy incentives or covers for litigants, just like in the health sector, to address the cost burden and options.

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9 Annexes

Questionnaire

Open Ended Research Questions

COMPETITION AND CONSUMER PROTECTION COMMISSION (CCPC)

Student Name: Simon Ng'ona

Alternative Dispute Resolution - The Role of Adjudicative Tribunals in Providing Speedy Adjudication: The Case of the Competition and Consumer Protection Tribunal (CCPT) of Zambia

ETHICAL CONSIDERATIONS FOR THE RESPONDENT: Kindly note that information provided by you in this questionnaire shall be used solely for academic purposes.

Research questions and Responses from CCPC

1. Could you explain the difference in case handling (investigations and appeals) handled between the two legal regimes i.e. of the Competition and Fair Trading Act of 1994 and the Competition and Consumer Protection Act of 2010; What are the differences and common features?

   Response:

   Common Feature

   In both the Competition and Fair Trading Act of 1994 (CFTA) and the Competition and Consumer Protection Act of 2010 (CCPA), the Commission may, at its own initiative or on a complaint made by any person, undertake an investigation if it has reasonable grounds to believe that there is, or is likely to be, a contravention of any provision of the Acts. The Commission's basic functions of investigating restrictive business practices, examining mergers, and of carrying out competition advocacy work, remain in the CCPA.

   Differences

   The investigative powers of the Commission have been strengthened under the CCPA by the appointment of inspectors, who have statutory powers to conduct

dawn raids. The need for due process and transparency in the undertaking of the Commission's investigations is also strongly enshrined in the Act.

Remedies - The remedies in merger control that are provided for in the CCPA are also of both a structural and behavioural nature and are provided for in the case of both prospective mergers and completed mergers that have been found to result in a substantial lessening of competition. The enforcement of competition law by the Commission at the request of foreign competition authorities, particularly those in the COMESA and SADC regions, and for positive comity, is also provided for under the Act. The Commission may operate a leniency programme where an enterprise that voluntarily discloses the existence of an agreement that is prohibited under this Act, and co-operates with the Commission in the investigation of the practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act.

Consumer Protection - The CCPA harmonises the various pieces of consumer protection legislation in Zambia, with the Commission being the focal-point enforcement agency. The consumer protection provisions in the Act have been enhanced to protect consumers effectively from unfair trading practices and unscrupulous businesses.

Sanctions - One of the major shortcomings of the CFTA was the inadequacy of sanctions under that Act which did not deter would-be offenders. The CCPA has rectified that problem and provides for the imposition of various sanctions, of both an administrative and criminal nature. The most deterrent administrative sanction is the imposition of fines of up to 10 per cent of the offending enterprise's annual turnover. Imprisonment can also be imposed on anyone who delays or obstructs the Commission's investigations or gives the Commission false or misleading information in the course of its investigations. Managers of offending enterprises can also be made personally liable for offences committed by the enterprise.

Appeal Process – In the CCPA, orders or directions made by the Commission from its investigations can be appealed against to the Competition and Consumer Protection Tribunal by any aggrieved person or enterprise within thirty days of receiving the order or direction. Appeals against decisions of the Tribunal can be made to the High Court, also within thirty days of the determination.

2. Could you estimate how many cases (investigations and appeals) were handled under the Fair Trading Act of 1994 between 2007 and 2010?

Response:

	2007	**2008**	**2009**	**2010**
Investigations (#)	210	183	109	231
Appeals (#)	-	1[811]	-	-

3. Could you estimate how long cases (investigations and appeals) under the Competition and Fair Trading Act of 1994 would take to be disposed-off between 2007 and 2010?

Response:

In the exercise of its functions under the CCPA, the Commission may make operational manuals as are necessary for the better carrying out of the provisions of this Act. The manuals determine the duration of time under which cases are investigated and concluded. Full mergers & Acquisition, Abuse of Dominance, Restrictive Business Practices and Consumer cases have a period of up to 90 days within which to be investigated and concluded. However, the Commission cannot determine the duration of an appeal.

4. What can be described as the main cost heads that a firm faces when having their cases presided under the Competition and Fair Trading Act of 1994 and the

[811] Lipimile and Another v Mpulungu Harbour Management Ltd. - https://zambialii.org/node/2582

Competition and Consumer Protection Act of 2010?

5. **Response:**

CFTA

The main cost heads that a firm may face include legal fees associated with legal representation at the High Court and the fines/penalties placed on the firm if found liable of contravening the provisions of the Act.

CCPA

The main cost heads that a firm may face include legal fees associated with legal representation at the Tribunal or the courts of law and the fines/penalties placed on the firm if found liable of contravening the provisions of the Act

6. Without a Competition Tribunal, appeals against the decision of the Competition Authority (ZCC) would only be heard at the High Court and Small Claims Court. How would the costs incurred at the High Court and Small Claims Court differ with those incurred at the Tribunal?

Response:

The Commission does not have information relating to the question. However, lawyers/firms would be best suited to give a response to the above question.

7. Can you give an estimation of the cost of adjudication to be faced without a Tribunal in place?

Response:

The Commission cannot estimate the cost of adjudication to be faced without a Tribunal in place as it does not have access to information relating to the estimated costs.

8. Is the Tribunal composition and membership adequate in handling legal matters that come before it?

Response:

The composition and membership of the Tribunal is adequate in handling legal matters that come before it. The Tribunal consists of five part-time members appointed by the Minister under the terms of section 67(1) of the Act. These include: a legal practitioner of not less than ten years legal experience (Chairperson); a representative of the Attorney-General (Vice Chairperson); and three other members who are experts, with not less than five years' experience and knowledge in matters relevant to the CCPA.

9. What are some of the concerns and challenges that have been characterising the Zambia Competition Tribunal to date?

Response:

The Tribunal is in a better position to give a response to the above question.

10. Are there any legal reforms required to further strengthen the Tribunal's role in handling matters?

Response:

The following are the recommendations that should be considered in the enhancement of service delivery of the Tribunal:

i. Setting up a permanent secretariat in order to have efficient and speedy resolutions of appeals brought to the tribunal thereby avoiding situations where new staff have to start anew reviewing the cases at hand.

ii. The secretariat should have personnel with a legal background. This will assist the members of the tribunal in conducting adequate and thorough research of

the cases at hand. This can accord the tribunal members' time to focus more on the process of hearing the appeals on time. It will further create confidence in the public as matters will be heard and determined within time and not inconvenience business owners.

iii. Having a provision in the rules that state the timeframe for which cases should be heard and determined. Since the nature of appeals brought before the tribunal are business in nature and are an important drive towards the economic growth of the country. The failure to have a provision in the Act or in the Tribunal rules that sets the timeframe for which a matter should be heard, and judgement passed leaves room to the members to adjudicate on matters at their own pace. This inconveniences the business entities and detrimental to the economy's growth.

iv. The power to which the Tribunal can extend the filing of documents should be clear and specify the grounds to which the Tribunal can grant that extension and not only leaving it to the parties to provide the grounds for which the extension its being sort.

11. Any other information relevant to the assignment?

Response:

For more information you can access our Act and guidelines on our website[812] and you can also refer to the voluntary peer review of competition law and policies performed by UNCTAD[813]

[812] www.ccpc.org.zm
[813] https://unctad.org/en/PublicationsLibrary/ditcclp2012_Zambia_en.pdf

Questionnaire

Open Ended Research Questions for

COMPETITION AND CONSUMER PROTECTION TRIBUNAL (CCPT)

Student Name: Simon Ng'ona

Alternative Dispute Resolution - The Role of Adjudicative Tribunals in Providing Speedy Adjudication: The Case of the Competition and Consumer Protection Tribunal (CCPT) of Zambia

ETHICAL CONSIDERATIONS FOR THE RESPONDENT: Kindly note that information provided by you in this questionnaire shall be used solely for academic purposes.

Research questions

- Kindly give us an overview of the rationale behind establishing of the Tribunal
- What is the staff compliment and how many employees are needed for optimal efficiency of operations?
- What is the monthly and annual budget appropriated for the tribunal. How sufficient is it?
- What are the major costs heads for the tribunal?
- What factors influence independence and impartiality?
- How long is the average hearing and disposal process of cases?
- Under what circumstances do they positively influence the economy?
- How can the tribunal increase its impact on the community it serves?

- What legal reforms are required in the CCPA to improve the operations of the tribunal?

- What institutional reforms might be require addressing to improve the operations of the tribunal?

Table 11: Detailed List of Cases Contained in the 2016 and 17 Annual Report

Cause No.	Name of Case	Filling Date	Disposal Date	Duration
2014/CCPT/004/CON	*ZB vs CCPC*	21.02.14	02.04.16	27
2014/CCPT/013/CON	*African Life vs CCPC*	18.12.14	10.03.15	4
2014/CCPT/003/COM	*CAZ vs CCPC*	20.02.14	02.04.16	27
2015/CCPT/004/CON	*Wael vs CCPC, Hazida*	03.11.14	15.01.16	15
2015/CCPT/009/CON	*Taja vs CCPC*	15.05.15	08.07.16	15
2015/CCPT/011/CON	*Africa Supermarket vs CCPC*	18.05.15	22.07.16	15
2016/CCPT/007/CON	*Peter K.vs CCPC*	18.07.15	22.07.16	12
2015/CCPT/018/CON	*CCPC vs Ukrainian Higher Edu*	12.11.15	15.01.16	3
2016/CCPT/002/CON	*Vehicle Centre vs CCPC*	24.04.16	09.08.16	16
2016/CCPT/003/CON	*Hopeful Technology vs CCPC*	26.05.16	09.12.16	20
2016/CCPT/004/CON	*ZANACO vs CCPC*	06.06.16	26.09.16	15
2016/CCPT/005/CON	*CCPC vs Limpompo*	17.06.16	26.09.16	15
2016/CCPT/001/COM	*Zamtel vs CCPC*	13.04.16	13.02.17	11
2016/CCPT/006/CON	*CCPC vs Mary Carlos Events Hire*	17.06.16	06.02.17	7

2016/CCPT/015/CON	*CCPC vs Abercon Roofing*	17.06.16	24.02.17	7
2016/CCPT/008/CON	*Southern Cross Motors vs CCPC*	05.08.16	10.02.17	5
2016/CCPT/009/CON	*Spar Zambia vs CCPC*	15.08.16	14.02.17	4
2016/CCPT/011/CON	*CCPC vs Kaya Gold Investments*	21.09.16	06.02.17	3
2016/CCPT/012/COM	*Dykes RT Mwenifumbo vs CCPC*	12.10.16	22.08.17	5
2016/CCPT/013/C0N	*PEP Stores (Zambia) vs CCPC*	19.10.16	24.07.17	4
2016/CCPT/014/C0N	*CCPC vs R. M. Motors Spares*	21.10.16	24.02.17	4
2016/CCPT/016/C0N	*CCPC vs Jorama Enterprise*	02.11.16	13.02.17	3
2016/CCPT/018/COM	*MTN (Zambia) vs CCPC*	16.11.16	10.07.17	11
2017/CCPT/007/COM	Star Bakery and others vs CCPC	20.04.17	10.10.17	18
2017/CCPT/009/COM				
2017/CCPT/011/COM				
2017/CCPT/012/COM				

Permission Granted for use of materials

DR. MUMBA MALILA SC

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26th August, 2021

Mr. Simon Ng'ona
Trade Related Facility (TRF) Project
Ministry of Commerce
9th Floor
New Government Complex Building
LUSAKA

Dear Mr. Ng'ona,

Re: REQUEST TO CITE YOUR BOOK "THE CONTOURS OF DEVELOPING JURISPRUDENCE OF THE ZAMBIAN SUPREME COURT"

I make reference to your letter of 17th August, 2021

I am pleased to grant you permission to refer and make fair use of any materials in my book entitled **"The Contours of Developing Jurisprudence of the Zambian Supreme Court – Reflection of my first five years as judge (2014-2010)"** in your research work towards your doctoral research work.

Yours sincerely,

Hon Justice Dr. Mumba Malila SC

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28th September, 2021

The Registrar
University of Lusaka
P.O Box 36711
Lusaka

Dear Dr. Yasmin Muchindu

RE: THESIS RESEARCH CORRECTIONS BY SIMON NG'ONA PHDITL 1611073

I hereby confirm that the above named PhD candidate undertook all the corrections on his thesis research as recommended by the examiners during the last defense session.

Having examined the final edited copy against the list of issues that had been raised and submitted to me on the 20th of this by the candidate, it is my pleasure to affirm his revised research thesis for the next steps and processes by the university.

Yours Sincerely,

Prof. Eusebio Wanyama
Principal Supervisor