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A TENTATIVE PROPOSAL FOR MEDIATION IN THE ZAMBIAN FAMILY COURT

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For my husband, Mark.

Thank you for a beautiful adventure. 969.

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CHAPTER 1

THE OUTLINE

1.0 INTRODUCTION

In the last three years, several changes have been made to Zambia's laws that have resulted in the following:

- The creation of a Family and Children's Court ('the Family Court').[1]
- The introduction of mandatory mediation for specific interlocutory family matters.[2]
- The recognition of alternative dispute resolution, which interestingly includes traditional dispute resolution mechanisms by the courts.[3]

These changes have set stage for the development of family law in Zambia as well as the growth of alternative dispute resolution, particularly, mediation. They also bring to the forefront the opportunity and challenge of re-envisioning what a court system should look like. This study seeks to assess how each of these changes can fit together into one comprehensive system for a Family Court model.

The Constitution of Zambia (Amendment) Act No. 2 of 2016 for the first time created the Family Court as a division of the High Court under Article 133 (2). The creation of the court appears to have been an unexpected occurrence as there is no public report indicative of any research, debate or inquiry conducted in order to arrive at the decision to create it.[4] In this regard, no particular model of how this court would run was developed. What has been established so far, is the jurisdiction of the court in all

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[1] Article 133(2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.

[2] Order XXXI Rule 4 of the High Court Rules as amended by the High Court (Amendment) Rules, 2018, Statutory Instrument No. 72 of 2018.

[3] Ghebtrekle in his analysis of Article 159 (2)(c) of the Kenyan Constitution which bears a striking resemblance to Article 118 of the Zambian Constitution states that this entails a recognition of customary law in the Constitution and could lead to the promotion of traditional justice systems by courts. T.B Ghebretkle *Traditional natural resource conflict resolution vis-à-vis formal legal systems African Journal on Conflict Resolution*, Volume 17. No. 1 2017(29-54) at 48.

[4] The Report of the Analysis of the Final Draft Constitution of the Technical Committee on drafting the Zambian Constitution and the Constitution of the Republic of Zambia Ministry of Justice (December 2014) shows that the purpose of the enactment of the bill was for the creation of the Constitutional Court and the Court of Appeal but no mention is made of the Family Court.

family matters such as: divorce petitions; petitions for judicial separation; custody disputes; applications for maintenance; applications relating to wilful neglect to maintain; applications relating to property adjustment; adoptions and intestate succession disputes, among others.[5]

Following its creation, the court is still far from fully operational and conducts family court proceedings under the adversarial approach. The adversarial approach has been widely criticised and this has prompted changes in many jurisdictions towards an abandonment of the adversarial approach to family disputes.[6] This makes the family court in its present state, no different from other courts and begs the question, what was the purpose of its creation as a specialised court if it maintains the same *modus operandi* as the general courts?

Since the court's inception, no legislative or policy framework has been passed to inform the underlying values, the purpose of the court or how it is intended to serve society. It is hoped however, that the Family and Children's Court once it is fully operational will have significant social impact and provide support to the institution of the family.

An additional important change to the legal landscape has been the introduction of mandatory family mediation, a development which appears to have occurred independently of the creation of the Family and Children's court. The High Court Act underwent significant amendments in September 2018 in order to make it mandatory for various family matters to be referred to mediation before they can proceed to trial. The High Court Rules now require that the following issues be referred to mediation: maintenance of spouse and or children; property settlement; and custody of children.[7] It is clear from the changes that the purpose of introducing mediation for these matters was to assist parties reach an agreement in good faith and achieve efficient resolution or partial resolution of their dispute.[8] This signifies an important development in incorporating alternative dispute resolution into the family law system. The

[5] The Judiciary of Zambia *Report on the Family and Children's Division at the 8th Policy Committee Review Meeting of the Judiciary* (2018).

[6] Stephen Parker, Patrick Parkinson and Juliet Behrens Australian *Family Law in Context: Cases and Materials* (2 ed) LCB Information Services, Sydney 1999 at p 91.

[7] The High Court (Amendment) Rules, 2018, Statutory Instrument No. 72 of 2018.

[8] Order XXXI Rule 4 of the High Court Rules as amended by the High Court (Amendment) Rules, 2018, Statutory Instrument No. 72 of 2018.

unfortunate thing to note is that the performance of mediation in general within the Zambian legal system paints a bleak picture of minimal success.[9] Will family mediation be subjected to a similar fate? This paper, seeks to highlight the central place that mediation should hold in the family court system. In discussing the place of mediation in a family court, this paper considers specific aspects of some family court systems in other countries in order to draw some insights on the considerations for a family court and family mediation. Of particular note is the background, motivations and philosophies that have influenced the development of the New Zealand family court system.[10] The uniqueness of this particular court system is discussed in relation to the central role that mediation plays in comparison to court proceedings.[11]

The third significant change relates to Article 118 (2) (d) of the Constitution which provides that the use of principles of alternative dispute resolution including, traditional dispute resolution shall guide the exercise of judicial authority.

In seeking to reposition mediation in a family court model, this study seeks to highlight the African perspective by addressing three pertinent issues: First, what could mediation look like from a Zambian viewpoint? This is largely because the Zambian legal system draws its inspiration for mediation from the United States of America and mediation is not necessarily perceived as originating from an African context. In this regard, the paper seeks to consider the possibility of the expression of African values, culture and heritage as a means for inclusion of the majority of citizens in a system that is reflective of and accepted by the society it seeks to serve.

Secondly, it seeks to draw attention to the fact that in the African context, elderly mediation played a very central role, a value that has been lost in a westernised dispute resolution system. Traditional dispute resolution has for many years utilised the wisdom and experience of the elderly for the resolution of family conflicts.[12] This study asks the question, could the elderly still have a role to play in family dispute resolution in a way that enhances the effectiveness of the court system whilst

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[9] The Judiciary of Zambia Mediation in Zambia and Statistics available at http://www.judiciaryzambia.com/mediation-in-zambia-and-statistics/ accessed on 4 April 2019.

[10] The New Zealand Royal Commission Report of 1980.

[11] T. Hipgrave. In T Fisher (ed) *Family Conciliation within the UK: Policy and Practice* (1992)53-58

[12] Kenneth C. Omeje (2008) Understanding Conflict Resolution in Africa. In David J. Francis (ed.), *Peace and Conflict in Africa*, Zed Books, UK: London at p 88.

recognising the unique nuances that customary practices have on the resolution of statutory processes?

Thirdly, the study seeks to draw attention to the fact that the legal landscape in Zambia exists in the realm of two separate legal systems ('dual systems'), namely, statutory law and customary law. The statutory law which generally takes precedence has never allowed for the blending of the different systems of law and yet society in practice blends the two without one disrupting the other. Should the law perhaps take a leaf from this?

This study is located in the context of urban Zambia which represents a proportion of citizens who are exposed to the interplay of the dual systems of law in family matters. This cross-section of society is particularly important because it represents a growing population.[13] What is noteworthy is that this part of the population practices a blend of customary and statutory law,[14] a phenomenon which the statutory law largely ignores.[15] Experience has shown that despite 'final' resolution by a court, many unresolved issues post-divorce spill into maintenance and property settlement disputes and lead to re-litigation. Some of these unresolved issues hinge on customary practices and the strong influence of the extended family.[16] Although the statutory law is expected to lead to the final resolution of family disputes, the underlying influence of customary practices and strong extended family influence[17] does affect the parties' perceptions and attitudes of the final resolution of a matter. It can be argued therefore, that the dissolution of a statutory marriage does not always entail finality in the customary context and further dispute resolution processes will be required to settle all the issues. Where one matter affects one family, is it prudent to continue to conduct separate dispute resolution procedures. This study as a result seeks to assess what kind of comprehensive family court model will best bridge the gap between the statutory and customary law dispute resolution practices of the population. As part of the answer to this question, the study proposes the possibility of the use of elderly

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[13] The urban population in Zambia currently stands at 43 per cent but it is projected that this figure will grow to 58 per cent by 2050. H. Plecher Zambian Urbanisation 2015 to 2017 (June 2019) available at https://www.statista.com/statistics/455963/urbanization-in-zambia/ accessed on 30 July 2019; M. Sladjoe Zambia urbanising part 1: Tackling bad contagion International Growth Centre https://www.theigc.org/blog/urbanising-zambia-tackling-bad-contagion/ accessed on 20 July 2019.

[14] Lillian Mushota *Family Law in Zambia: Cases and Materials* (2005) 4.

[15] Chuma Himonga *Family and Succession Laws in Zambia: Developments since Independence* (1995) 55.

[16] Ibid.

[17] Himonga (n 15) 55.

mediation as a bridge between two legal systems that resolves both customary and statutory law disputes in one comprehensive system. This paper also draws attention to the likely social impact of elderly mediation as providing an opportunity for the elderly to feel useful and provide their wealth of wisdom to the family dispute resolution process. It speaks to the social impact of availing to families in conflict, the most empathetic, experienced resource that society has to offer. The possibility of elderly mediation as a way of enhancing social harmony in society from an African perspective could be something worth considering.

In conclusion, the study intends to propose a way in which family disputes can be resolved in a more comprehensive and humane manner by a radical alteration of the court system. This study could create a better court experience by introducing a pacifying of the adversarial structure of the Family and Children's Court and promotion of a conciliatory approach to family conflict in appropriate cases. The study concludes by proposing a tentative model for a pilot study of a family court model which is uniquely based on mediation. The family court model proposed by this research would contribute to social harmony, the faster and more effective resolution of family conflict and better outcomes for children.

1.1 STATEMENT OF THE PROBLEM

Following the three significant changes to the law regarding the creation of the Family and Children's Court, the provisions for mandatory family mediation and the inclusion of traditional dispute resolution as recognised by the Constitution to the formal court process, very little progress has been made in making the Family Court fully operational. Perhaps the greatest need currently is how to bring all these legal changes to converge into one well-functioning system. This is the aim of this paper. Several questions require to be answered. These include how mandatory mediation will fit into the operation of the family court and to what extent the use of mediation, including traditional dispute resolution will influence the operation of the Family court. The Family court currently has no establishment but is presided over by a judge-in-charge of the division who single-handedly determines at least 40 per cent of the family law matters and is in effect

the only specialised judge in the division.[18] The remainder of family cases are heard by judges under the general list but there being no practice and procedure in place, family matters are generally handled under the adversarial approach as is the general system of hearing matters in the courts.[19] One of the highlighted needs of the family Division has been the need for social welfare officers, counsellors and trained family mediators.[20] This study focuses specifically on family mediators and the structure of form of the system in which they could operate.

Although the changes to the law will inevitably lead to the mandatory referral of matters relating to maintenance, custody of children and property settlement to mediation, this envisages mediation as an add-on service to the courts. Further, the mere referral of matters to mediation without a detailed analysis of the following issues: what purpose the mediation should serve; what specific issues it will address; and the social and legal context in which mediation will operate, could render the introduction of mandatory mediation ineffective. This study seeks to question the suitability of viewing mediation simply as supplementary facility and seeks to infer that mediation could instead be viewed as a first resort as opposed to a supplementary service.

Further, while the Family Court Report in its recommendations emphasised the need for counsellors or qualified family social workers with specialist knowledge and expertise,[21] the possibility of increased funding for additional operations of the Judiciary in general is extremely limited. This will be discussed briefly in chapter two. In the meantime, families are in desperate need of a Family Court that provides mediation at a cost that takes into account the financial limitations that some families face. Therefore, the need for a cost-effective family mediation which reduces the cost both to the courts and to the families in conflict is necessary.

In addition to this, Zambian families in conflict are often caught between the operation of separate legal systems, one a creature of colonialism and the other customary practices passed on from generation to generation.[22]The dual legal system exists with customary law operating side by side with received law.[23]The development of mediation in Zambia

[18] Report on the Family and Children's Division by Honourable Justice Nicola Sharpe-Phiri at the 8th Policy Review Committee Meeting of the Judiciary (April 2018)
[19] The Annual Judiciary Report of 2017.
[20] Report on the Family and Children's Division (n18).
[21] Ibid.
[22] Himonga (n 15) 55.
[23]Ibid at 43.

has developed under the received law. In this regards, mediation is seen through the lens of western court systems and is exemplified in the current formal court system. On the other hand, mediation derived from customary practices which is interwoven into the day-to-day reality of the citizenry goes unrecognised by the formal court process. It was not until, the recent recognition of traditional dispute resolution mechanisms to enhance formal court processes, that the room for the consideration of customary practices of mediation and their possible effect on formal court processes was formalised. This study seeks to show that mediation has existed in Africa long before the advent of colonialism and the philosophy and features of African mediation would be beneficial to family mediation as it is practised today. One of the challenges for the Family Court will be to create a court structure that is alive to the realities of the social and legal context of the citizens. This study will therefore, attempt to investigate the use and incorporation of specific traditional dispute resolution mechanisms as a possible solution to enhance both family mediation and the entire family court system.

1.2. PURPOSE OF THE STUDY

This study intends to discuss the prospects of the use and promotion of specific traditional dispute resolution mechanisms for family mediation in the Family Court. The study will also propose the formulation of a working model that incorporates particular traditional dispute resolution elements into a formal mediation system. This study will further look into formal mediation systems in various jurisdictions to with a view to formulate a model that combines the benefits of western mediation with traditional dispute resolution. Lastly, this study seeks to prompt discussion into the best structure of a Family Court that is authentically Zambian, incorporating features of statutory law and customary law.

1.3. OBJECTIVES OF THE STUDY

The General Objective of this study is:

- To formulate a Family Court model centred on the use of mediation, unique to the Zambian context.

The Specific Objectives of this study are:

- To assess the need for alternative dispute resolution with a particular focus on mediation in the determination of family disputes as opposed to the adversarial approach in use today.
- To assess best practices for family courts in other jurisdictions with a view to incorporating some aspects to the Zambian Family Court.
- To evaluate traditional dispute resolution mechanisms that could be applied alongside court annexed mediation to enhance its effectiveness.
- To ascertain a cost effective model of carrying out mediation by the use of traditional dispute resolution mechanisms.

1.4. RESEARCH QUESTIONS

The study will endeavour to address the following Research Questions:

1. Whether the introduction of family mediation reinforces the prevailing view that the adversarial system in family law matters is inappropriate?
2. With the introduction of mandatory family mediation, how will it fit into the structure and operation of the newly established Family Court?
3. Are there established family courts that can offer a guide of best practices in modelling family mediation in a family court?
4. Are there some traditional dispute resolution mechanisms that can be employed under the current system to enhance family mediation?
5. What would a family mediation system that incorporates traditional dispute resolution to court annexed mediation look like?

1.5. SIGNIFICANCE OF THE STUDY

Zambia does not have a family dispute resolution system in place yet and although the law now makes it a mandatory requirement for mediation for custody, property settlement and maintenance cases, it does not clarify the more detailed aspects of how such a system will be operated. Three years following the creation of the Family Court, there exists no legislative or policy framework to inform the running of the court. At present, the Family Court is not fully operational and does not have specialised judges.[24]This study is significant for the reason that it proposes a plausible family court model which incorporates not only mediation as a core element but also specific features of traditional dispute resolution mechanisms with the aim of

[24] The Annual Judiciary Report (n 19).

integrating these with western style mediation into a single system. Such a system would be consistent with both the international norms in dispute resolution and cultural practices of the Zambian society who, in any event, practice an overlap of both customary and statutory law in their personal lives. Further, this study is significant because the proposed system is intended to be sensitive to the reality of the financial constraints that limit the growth of mediation in Zambia while balancing the needs of the litigants' to reach agreements in good faith. A system that allows for the resolution of family conflicts in a manner that is reflective of African norms and practices would be significant progress for the Zambian legal system and acceptable to the society that it is meant to serve.

1.6. SCOPE OF THE STUDY

The study will involve desk research and document review. This could be a limitation in that it deals with an area of law that is fairly new in Zambia, making it difficult for the study to have access to researched information in Zambia. The study is also limited in time to the period 2016 (following the changes to the law) to 2019.

The study is limited to urban Zambia which currently makes up at least 43 per cent[25] of the entire population. However, the United Nations predicts that this figure will grow up to 58 per cent by 2050.[26]With the high possibility of a growing urban population which interacts with the formal court system, this study considers how the court system can adapt itself now to accommodate the increased strain of urbanisation on the court's capacity in the future.

1.7 CONCEPTUAL CONSIDERATIONS

1.7.1 Mediation

Mediation is one of the primary processes of alternative dispute resolution (ADR). It is an informal process in which a neutral third party mediates assists the parties with opposing views to reach an agreement.[27] The word mediation has been used interchangeably with conciliation in various jurisdictions. For instance the South

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[25] H. Plecher Zambian Urbanisation 2015 to 2017 (June 2019) available at https://www.statista.com/statistics/455963/urbanization-in-zambia/ accessed on 30 July 2019.

[26] M. Sladjoe Zambia urbanising part 1: Tackling bad contagion International Growth Centre https://www.theigc.org/blog/urbanising-zambia-tackling-bad-contagion/ accessed on 20 July 2019.

[27] Alberta Law Reform Institute *Court Connected Family Mediation Programs in Canada* Research Paper No. 20 (May 1994).

African International Arbitration Act defines conciliation to include mediation.[28] Although "mediation" seems to be the preferred North American term and "conciliation" was until recently the preferred British one, the former has now gained acceptance in Britain too.[29] Street submitted that is correct in asserting that there are no relevant, practicable or useful distinctions between the two terms, and that they are synonymous.[30]

1.7. 2. Traditional Dispute Resolution Mechanisms (TDRMs)

Predominantly, the dispute resolution process in African societies provided individuals with an opportunity to air their grievances, an element which connotes fairness.[31] Justice in these indigenous processes was for the most part simple, understandable and flexible; and for those reasons, popular, speedy, inexpensive and accessible.[32] Dispute resolution mechanisms also enabled the disputants to express themselves fully, without complexity or formality, and yet assured them of a knowledgeable and just resolution that would maintain communal relations. [33]

1.7.3. Western-style mediation in the context of western justice system in Africa

The reality that many African countries contend with is that with colonisation brought with it the Western style justice system which was often at odds with the traditional processes which were considered utterly inadequate by the coloniser.[34] Adenike and Ordor stated,

‘Traditional systems of dispute resolution were perceived as vastly different from notions of what constituted a fair trial in the justice systems of the colonising countries’.[35] Boniface also stated in relation to the nature of western mediation as follows:

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[28] Section 1 of the International Arbitration Act No. 15 of 2017.
[29] T Fisher(ed) (n 11) xiii.
[30] Van Zyl LJ *Alternative Dispute Resolution in The Best Interests Of The Child* (Unpublished Ph.D thesis, Rhodes University, 1994) 169.
[31] A. Adenike and A. Ordor ‘Integrating the Traditional with the Contemporary in Dispute Resolution in Africa’ Law and Democracy Development Volume 20 (2016) available at http://dx.doi.org/10.4314/ldd.v20i1.8 accessed on 25 July 2019.
[32] Ibid at 165.
[33] Adenike and Ordor (n 31) 165.
[34] Amanda Elizabeth Boniface ‘Family Mediation in South Africa: Developments and Recommendations’ 78 THRHR 397 (2015)(397-406) at 402.
[35] Adenike and Ordor (n 31) 165

'Western mediation is an ancient process that has been re-engineered to suit the needs of highly industrialised urban societies, and so has discarded the social context that originally underscored it.'[36]

Western mediation is described as individualistic and caters to the needs of indiviudualist societies whose court systems reflect this inclination, which is in stark contrast to African style mediation which prioritises social cohesion.[37]

1.7.4. Elder mediation in the African context

In Africa there is the tradition of family or neighbourhood mediation. This mediation is facilitated by elders and takes place in "an attitude of togetherness" and "in the spirit of *Ubuntu.*"[38] In many African communities, it is characterised by the intervention of respectable elders, and disputants are expected to honour the results and decisions of the process, which could be more or less mandatory, depending on the power relations at play and the customs of the community.[39]

1.7.5. Family Mediation

In England, the best definition of family mediation is that of the Finer Committee[40], that is to say,

'assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a divorce or a separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees, and every other matter arising from the breakdown which calls for a decision on future arrangements.'[41]

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[36] A.E Boniface n 34) 379.
[37] Amanda Boniface 'African-style Mediation and Western-style divorce and Family Mediation: Reflections for the South African Context' PER 2012 Vol 15 No. 5 available at http://dx.doi.org/10.4314/pelj.v15i5.10 accessed on 3 November 2019 (378 0 401) at 379.
[38] Ibid at 381

[39] T.B Ghebretkle and M, Rammala 'Traditional African Conflict Resolution: The case of South Africa and Ethiopia' (December 2018) MIZAN LAW REVIEW, Vol. 12, No.2.

[40]The Finer Report para. 4.288.
[41] Ibid at para 4.288.

This process is located in the context of dissolution of marriage and is fairly new to Zambia. It has inevitably been ushered in by the changes to the High Court that have made mediation mandatory for matters relating to custody, child support, financial arrangements and property settlement. It is a process that can empower the parties to make their own decisions about a dispute and can give them a voice on the needs and welfare of their families after separation.[42]

1.8. LITERATURE REVIEW

No previous comprehensive study has been done by other scholars on the form and structure of a family court as well as the use of use of traditional dispute resolution mechanisms and family mediation in a manner that is unique to the Zambian context. The existing studies regarding family law in Zambia are limited to the law as it is applied in the statutory context or in the customary law context and not necessarily a formal recognition of a convergence of the two. While Himonga speaks to the realities of dual systems and the practices of the citizenry in blending these systems,[43] this discussion takes place prior to the recognition of traditional dispute resolution mechanisms. Further, Mushota makes the argument that there is no need for a continuation of dual systems when the systems can blended into one,[44] her study focuses on the separate systems of law as distinct from each other. However both studies have focused on laws regulating marriage and succession, legislative and judicial actions and the operation of the law in practice. This study seeks to focus on family mediation in the Family Court Zambia.

The 2016 Constitution now recognises the use alternative dispute resolution and has established a family court and this poses a new area for research and discussion. This void in academic research in Zambia might be understandable considering that family law has not been considered as a discipline in its own right. It has for the most part been bundled together with other general areas of private law despite the unique subject matter and important social relationships that it covers. For this reason, very little research (if any) and no comprehensive study exists on what form a family court should take and the place of mediation in this court.

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[42] R.M Field and A. Lynch 'Hearing parties' voices in Coordinated Family Dispute Resolution (CFDR): An Australian pilot of a family mediation model designed for matters involving a history of domestic violence' Journal of Social Welfare & Family Law, 2014 Vol. 36, No. 4, 392–402.

[43] Himonga (n 15) 55.

[44] Mushota (n 14) 55.

However, earlier studies highlight the changes in the traditional social organisation of Zambian communities, the high levels of urbanisation and the application of the dual system of law[45]in Zambia which factors have shaped the country's family law system. Although traditional customs have changed over time, contemporary literature shows that certain values have survived, such as the payment of *lobola* for the marriage of a family member.[46] The practice of the contraction of marriages simultaneously under customary and statutory tenure is something that has also remained entrenched in the practices of people.

Previous studies indicate that the dual nature of the Zambian legal system extends to institutions of dispute settlement in the sense that the state recognises both the official forums (courts) and traditional customary forums for the resolution of disputes arising under customary law.[47]However, this recognition is limited and gives precedence to official forums.

The formal recognition of traditional dispute resolution mechanisms in 2016 now signals a new development which could raise the status of traditional dispute resolution. In Zambia, family and succession disputes of all kinds can be settled out of court by the families and this may sometimes include disputes arising out of civil marriages.[48] The strict application of dual systems does not exist in reality as most Zambians are using a blend of both systems law to regulate their family lives.[49] This reality reveals that one of the consequences of legal pluralism is a continuous interaction and conflict between the different systems of personal law.[50]Although the formal courts manage to resolve legal issues, conflicts continue to occur over the same issues in people's lives outside of the courts.[51]

For instance, the statutory law does not deal with the underlying effects of customary practices on the custody of children. In the case of *Sandra Mwanza v Brian Chanda*,[52] a child who had lived in the custody of his paternal grandmother and aunt was at the

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[45] C. Himonga, Family Law in Zambia: Kluwer Law International (2011) 49.
[46] Ibid.
[47] C. Himonga (n 45) 49.
[48] C. Himonga (n 15) 266.
[49] C Himonga (n 15) 266.
[50] Ibid.
[51] Himonga op cit (n15) 279.
[52] Sandra Mwanza v Brian Chanda 2017/HPF/D251.

centre of a custody dispute between his divorcing parents. According to his father's beliefs the child's living arrangements constituted custody by the father of the child. The court in drawing its conclusion decided that neither parent effectively had custody of the child and that the child lived with third parties. The court then made a finding on which parent was best suited to have custody of the child. In the case where a customary practice entails that a parent's perception of custody of the child differs from the legal point of view, how can a balance be struck? A study conducted as far back as 1997 in Zambia showed that customary law legitimises the extended family on the basis of kinship. People interviewed in the survey perceived the extended family as a contradiction to the Western family.[53] The difficulty with customary law is that it creates indefinite rights, obligations and access to family membership beyond the nuclear family.[54]Where the formal court processes undermine the customary perceptions, will parties willingly accept the decisions of a court or could the conflict of laws lead to re-litigation? This leads to the inference that the court system on its own is inadequate to address some of the social aspects that are caught between statutory and customary laws.

It has been established that the current practice is for parties contracting a civil marriage to still engage in customary marriage negotiations through families and a *shibukombe* or *nkhoswe* as a go-between. The consent of parents is an underlying requirement for a customary marriage, failing which the marriage will not be recognised.[55] What pertains in reality is that the two separate legal systems are blended without one disturbing the other.[56] Mushota argues that law reform should incorporate customary law which is not repugnant to justice equity and good conscience. She further argues that it is time to do away with the dual legal system and merge statutory law and customary law into one single law relating to family law and domestic relations.

In order to counter the weaknesses of the statutory law, some authors state that a return to traditional conflict resolution is necessary.[57]It has been argued that the basis

[53] Women and Law in Southern Africa Trust, The Changing Family in Zambia (1997) 60.
[54] Ibid at 60.
[55] Mushota op cit (n 14) 55.
[56] Ibid.
[57] R.B.G Choudree Conflict Resoultuon in South Africa; Lanshima, Cletus African *Traditional Systems Of Conflict Resolution;* T.B Ghebretkle and M, Rammala 'Traditional African Conflict Resolution : The case of South Africa and Ethiopia'; A.E. Boniface 'African-style Mediation and Western-style Divorce and Family mediation:

and rationale for traditional conflict resolution methods and customs should be given earnest consideration. They are part of social systems that have stood the test of time, and whose ultimate purpose surpasses the mere settlement of a case.[58] Traditional conflict resolution methods focus on reconciliation and the preservation or even enhancement of social relationships.[59]

Some authors also argue that central to African traditional systems of conflict resolution is the "entrenchment of a culture of peace", "the tradition of family, negotiation facilitated by elders", and the attitude of togetherness in the spirit of 'humanhood' referred to as '*Ubuntu*'[60]

In addition to embracing the values and culture of African traditional systems, scholars argue that the place of elder involvement must also be revived because 'throughout history, elder members of nearly every community have been seen as beacons of wisdom and sources of support. For many, respect for elders needs no explanation — it is a cultural expectation.'[61] The elderly are considered to be sources of important information. Mosten and Traum state that:

> *'The loss of elder input and guidance has harmed society. Many studies now urge a revitalization of elder involvement in childcare and multigenerational household decision-making. The absence of elder involvement has been detrimental to families. The value of elder involvement extends well beyond childcare and the nuclear family. Contemporary societies worldwide would invariably profit from the involvement of a generation of modern elder individuals, many of whom have the benefit of education, work experience, and rising longevity'*[62]

Reflections for the South African Context'; A. Adenike and A. Ordor 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' Law and Democracy Development Volume 20 (2016) 154 - 173 at 161.

[58] Ibid.

[59] Choudree, R.B.G. (1996) Conflict resolution in South Africa. LL.M. dissertation, University of Durban-Westville.

[60] Lanshima, Cletus 'African Traditional Systems Of Conflict Resolution' The African Anthropologist, 2016, Volume 20, No.1 & 2, Pages 262 – 291.

[61] Forrest Mosten and Lara Traum 'It Takes A Village: Using Seniors to help divorcing families' Cardozo J Conflict Resolution 748 (Vol 17:767) at 776.

[62] Ibid at 778.

Those who are of this view propose that with training, and well thought out processes and procedures, courts can create programs that involve the elderly, services unrepresented litigants and betters society as a whole.[63]

The reality is that traditional dispute resolution mechanisms in Africa, have been used for many years and are not the product of external importation. It is worth noting that traditional does not mean unaltered or archaic but includes practices from history that can be readjusted and refurbished to fit into a modern context.[64] It is in this modern context that this study seeks to adapt traditional dispute resolution mechanisms to enhance the current court-annexed family mediation for the benefit of the Family Court.

1.9 METHODOLOGY

The study will employ a qualitative doctrinal approach, which relies on prose, deep analysis and assessment of the issues at hand.

1.9.1. Review of Literature

As already indicated, a review of published literature and unpublished literature in Zambia and other countries was made. Both primary and secondary data have been collected. The primary data was obtained from statutes, decided cases and reports. Secondary data was collected from books, periodicals, journals and internet materials.

1.9.2 Observation

The author has served as research advocate to the Judge-in Charge of the Family Court and as a member of the Family Committee whose role was to operationalise the court as well as a District Registrar in the Family Court which role includes the determination of interlocutory applications, property settlement and maintenance matters. This background inspired the study and gave the author a deeper understanding of the issues, the current practice and the potential for improvement and change.

1.10 OVERVIEW OF THE CHAPTERS

Chapter one introduces changes to the law that have changed the landscape and facilitated the development of a family court system, particularly in the sphere of

[63] Ibid.

[64] Velthuzien A 'Applying Endogenous Knowledge in the African Context: Towards the Integrated Competence of Dispute Resolution Practitioners Africa' Insight Vol 42(1) June 2012.

family mediation. It points out the possibility of developing this system through the inclusion of traditional dispute resolution mechanisms as recognised in the Constitution. It highlights the statement of the problem and equips the reader with the objectives and research question sought to be answered. It highlights the research methodology and several scholars' views on a topic that is fairly un-researched in the Zambian context.

Chapter two will discuss the development of mediation in general, the rise of family mediation and its establishment as an alternative to the adversarial approach. It will then focus on mediation in Zambia, the legal framework and binding nature of court annexed-mediation. It ends with a consideration of the prospects for family mediation in Zambia.

Chapter three considers features of well-established family court models around the world with a focus on mediation. It reviews various jurisdictions but highlights New Zealand as a case study because it has been admired as a well-functioning system. The analysis seeks to adapt some findings from these jurisdictions to the Zambian context. It concludes by considering whether these models can be transplanted as they are to the Zambian context or whether they would require extensive alteration.

Chapter four discusses the possibility of blending aspects of traditional dispute resolution into the formal court system in order to improve family mediation. It briefly reviews the struggles of African countries to formulate authentic legal systems which are reflective of the interplay between received law and customary law. It draws attention to specific elements of traditional dispute resolution mechanisms that would be of value to the current mediation system, with a particular focus on the role of the elderly in dispute resolution.

The study will end with the proposed model that this paper seeks to formulate as well recommendations and conclusions.

1.11 CONCLUSION

The recent changes to the law present a unique opportunity for the Zambian Family Court to establish a model that incorporates the best practices of a mediation-based system. It also represents an opportunity to establish a model that is alive to the context of its received law and pre-colonial traditional law. In order to utilise and

incorporate traditional dispute resolution mechanisms alongside formal court processes there must be a clear understanding of their relevance and the place that they could occupy in a modern legal system. In envisioning a system that blends concepts of western mediation with traditional mediation, the opportunity to create a truly authentic Zambian model is imminent.

CHAPTER 2
THE DRIVE TOWARDS MEDIATION

2.0 INTRODUCTION

Following, the introduction of mediation for specific family matters[65], the stage has been set for the development of family mediation in Zambia. This chapter seeks to draw out the importance and place of family mediation in a Family Court. It traces the history and development of mediation in general and then focuses on its current state in Zambia. It concludes by reviewing the prospects for mediation in Zambia.

2.1 THE CASE FOR FAMILY MEDIATION: AN ALTERNATIVE TO THE ADVERSARIAL SYSTEM

Family law was one of earliest arenas of law in which mediation was practiced in various jurisdictions around the world[66] and it has continued to develop. For instance, in 1998, the Council of Europe's Committee of experts at a conference stated their findings on family mediation as follows:

> '*Research in Europe, North America, Australia and New Zealand suggests that family mediation is better suited than more formal legal mechanisms to the settlement of sensitive, emotional issues surrounding family matters. Reaching agreements in mediation has been shown to be a vital component in making and maintaining cooperative relationships between divorcing parents; it reduced conflicts and encourages continuing contact between children and both their parents*'.[67]

Irving and Benjamin contend that the adversarial approach to divorce is unsuitable for the following reasons: First, that it is inappropriate for the resolution of disputes because legal emphasis is placed on uncovering of facts without taking into account

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[65] Order XXXI Rule 4 of the High Court Rules as amended by the High Court (Amendment) Rules, 2018, Statutory Instrument No. 72 of 2018

[66] Yishai Boyarin, *Court-Connected ADR - A Time of Crisis, a Time of Change*, 95 MARQUETTE. LAW REVIEW 993 (2012) at 997.

[67] Council of Europe Recommendation No R (98) 1 21 January 1998, at para 7.

the emotional processes which underpin marital conflict.[68] It follows therefore that where the court passes a final decision on the legal issues, the emotional issues remain unresolved thus contradicting full resolution.[69] The adversarial approach should then be a last resort, when all else fails.[70]

One further aspect that makes this approach unsuitable is its effect on children because litigation over custody usually heightens hostility between parents[71] which has negative effects on the co-parental relationship.[72]The cost of the litigation, delays in the court process and formality of procedure are additional complications.[73]

The Judiciary of Zambia, particularly the Supreme Court, has become more emphatic in their support of the use of mediation in family disputes as evidenced in the case of *Matthews Nkhata v Esther Nkhata,*[74]where Malila, J in his opening statement remarked,

> '*The present appeal calls into question, yet again, the appropriateness of resorting to the judicial process to resolve seemingly bitter property adjustment and financial provision disputes between erstwhile lovers following an irretrievable breakdown of their matrimonial bond. Once their love life is over following a period of matrimonial harmony and bliss, the situation between former married couples typically descends into one of acrimony and discord. Not unexpectedly, emotions on either side are high. Therapeutic intervention, counselling or mediation may well be a possible panacea to the parties' predicament*'.

The UK Lord Chancellor dealt with the problem very aptly in October 1989 at the Family Division's Family Law conference when referring to [court] orders being treated as marks of victory and defeat by the parents. He stressed the fact that families were best left to resolve their own problems by agreement and that compulsion in the

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[68] Irving, H and Benjamin, M. *Family Mediation Theory & Practice of Dispute Resolution* (1987) at 40.
[69] Ibid.
[70] Ibid at 40.
[71] A Barratt & S Burman *Deciding the Best Interests of the Child: An International Perspective on Custody Decision-Making* 118 SALJ (556) (2001) at 557.
[72] Irving and Benjamin (n 68) 40.
[73] Ibid at 40.
[74] SCZ/8/017/2015.

form of a court order, could in fact be destructive and was only absolutely necessary if it added some obvious benefit to the child and family.[75]

Arguably, the adversarial approach is not suitable for the resolution of family disputes and this perspective must be expressed in the institution of the Family Court. In a legal system like Zambia's, where the development of mediation is still in its early stages, the opportunity exists to create a system that is not only suitable for the resolution of family disputes but is cost effective and reflective of values of society. In envisioning what such a system would look like, it is necessary to first consider the development and the state of mediation in Zambia.

2.2. MEDIATION IN ZAMBIA

2.2.1 History and Development

Mediation in Zambia has been in existence for a little over two decades.[76] In 1995, a team of Zambian judges led by the Honourable Justice Weston Muzyamba travelled to the District of Columbia Superior Court in Washington DC where they were introduced to the court's civil delay reduction programs.[77] This team was exposed to court-annexed mediation and its success because the relief on the court workload was apparent.[78]Subsequently, Chemonics International, a global multinational firm was contracted to spearhead the Zambian Court-Annexed mediation program. The first mediators training took place in 1996 and 11 Zambian lawyers and judges were trained. Thereafter, the then Chief Justice resolved to constitute a Judicial Development Mediation Committee which was headed by a High Court judge Hon. Justice I.C Mambilima [79](now the current Chief Justice of Zambia). Her duties included the facilitation of legislation to provide for mediation. The passing of statutory instrument No. 71 of 1997, the High Court (Amendment) Rules which provided for court-annexed mediation followed shortly thereafter.[80] However, it was not until the year 2000, when another Zambian delegation consisting of late Supreme Court Judge Peter Chitengi, Retired Supreme Court Judge Phillip Musonda (then Chief Administrator of the Judiciary) High Court judge Nigel Mutuna (then Secretary

[75] T. Fisher(ed) (n 11) preface iii
[76] Erasmus, Masuwa, E The Introduction of Court-annexed Mediation and its place in the Zambian Judicial System,(Unpublished LL.B Directed Research) (2004) at 6.
[77] Ibid.
[78] Masuwa (n 76) 7.
[79] Ibid.
[80] Ibid.

of the Law Association of Zambia- LAZ) were invited to Washington DC and Richmond, Virginia from February 12 to February 19, 2000 in order to establish the foundation for suitable Zambian court-annexed mediation and training programs, that mediation became a reality.[81]

The American courts had effective court-annexed mediation ADR progammes, which were achieved through a multi-door courthouse system where people could not only litigate but settle their disputes through mediation.[82] This begs the question, what is a Multi-Door Courthouse? This idea was first established in the United States of America, in the mid-70s when the then Chief Justice Warren Burger argued that there ought to be “a better way” to resolve disputes as litigation had proven costly and inconvenient.[83] At the 1976 Pound Conference, prominent jurists agreed with this perspective and added to this, the issue of delay for litigants in a congested justice system.[84] Soon after the Pound conference, a task force was created to consider Professor Frank Sander’s vision of a court that was not simply a courthouse but a dispute resolution centre.[85]Sander researched the varieties of dispute processing and rough-sketched the design of a Dispute Resolution Centre.[86]The multi-door courthouse proposal led to the process of institutionalising ADR in the United States of America.[87]

The invitation to Zambian jurists was intended to achieve various objectives including: First, to expose key Zambians to comparative mediation models and administrative systems for court mediation programs; secondly, to develop a work plan to be executed by the Zambians for the implementation of mediator training and settlement week events scheduled for April and August 2000; and finally to begin the development of policies and procedures for the use of mediation in the Zambian Civil

[81] The Judiciary of Zambia *Mediation in Zambia and Statistics* available at http://www.judiciaryzambia.com/mediation-in-zambia-and-statistics/ accessed on 5 August 2019.
[82] Ibid.
[83] Warren E. Burger, ‘Isn't There A Better Way?’ American Bar Association Journal, March (1982), at 274, 274-76.
[84] Goldberg, Sander, Roger *Dispute Resolution,* (1992) 6.
[85] Ibid.
[86] Ibid at 6.
[87] Boyarin (n 66) 997.

Justice System.[88] That year, a mediator training across various professional spheres was conducted involving 36 participants.[89] This was soon followed by a mediation settlement week which provided an opportunity to mentor 33 of the newly trained Zambian mediators.[90] A settlement week was then set aside as a week in the court calendar where high court judges would select cases for settlement with priority being given to cases that had been pending for a long period of time and cases involving pro se parties, amongst others.[91] By the year 2002, a total of 91 mediators had been trained across different professional spheres in three cities. The following year, a national strategic planning event involving fifty stakeholders, including, judges, mediators, court staff and advocates was held[92]. This sparked the beginning of mediation in Zambia.

It is against this background that the Judiciary of Zambia set out to grow the practice of mediation by recognising the key role that it plays in the quick disposal of justice. The overriding duty of the court is to ensure that justice is done and alongside this duty is the speedy resolution of disputes in a dignified manner with minimised costs and stress.[93]The High Court Rules particularly provide for mediation as an ADR mechanism.[94]Over the recent years, there has been a renewed drive towards the promotion of mediation because it is viewed as an effective way of dismantling the backlog of cases and pending judgments which have plagued the court system. This understanding led to the setting up of an Advisory Committee on Court-annexed Mediation and Delay Reduction in the year 2017 as well as the facilitation of four mediation settlement weeks with a view to promoting this plan.[95] This vision is what has sparked some recent changes to the law, namely, amendments to the High Court Rules[96] and the Subordinate Court Rules[97] to further promote the use of mediation.

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[88] The Judiciary of Zambia *Mediation in Zambia and Statistics* available at http://www.judiciaryzambia.com/mediation-in-zambia-and-statistics/ accessed on 5 August 2019.
[89] Masuwa (n 76)36.
[90] Ibid at 37.
[91] The Judiciary of Zambia Mediation in Zambia and Statistics available at http://www.judiciaryzambia.com/mediation-in-zambia-and-statistics/ accessed on 4 April 2019.
[92] Ibid.
[93] The Judiciary of Zambia Report on the mediation seminar for Copperbelt-based magistrates on 5th December 2018.
[94] Order XXXI of the High Court Rules, Chapter 27 of the Laws of Zambia.
[95] The Judiciary of Zambia Report (n 93).
[96] The High Court (Amendment) Rules, 2018. Statutory Instrument No. 72 of 2018.

2.2.2 The Legislative Framework for mediation

Court-annexed mediation[98] was formally introduced in 1997 through The High Court (Amendment) Rules 1997 known as Statutory Instrument No. 71 of 1997. [99] In 2012, the High Court Rules were again amended by Statutory Instrument No. 12 of 2012 making it a requirement for parties to be referred to court-annexed mediation during the scheduling conference. This statutory instrument[100] amended the High Court Rules to make it mandatory for a judge to refer any action amenable to mediation at the scheduling conference.[101] In addition, the statutory instrument provided that where a party that had received notice of mediation failed to attend without reasonable cause, the court could make an order for costs despite the defaulting party being successful in the action.[102]Four years later, the Constitution was amended to make provision for the promotion of alternative forms of dispute resolution in the exercise of judicial authority.[103]This was the first time that ADR was given constitutional recognition, inevitably this includes mediation. In 2018, the most recent amendments regarding mandatory mediation were made to the High Court Rules.[104] Statutory Instrument No. 72 is of particular import because it creates the foundation for family mediation in the High Court particularly, the Family Court. By virtue of these rules, mediation has been extended to certain aspect of family disputes particularly, interlocutory matters such as child and spouse maintenance and property settlements.[105]

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[97] The Subordinate Court (Amendment) Rules, 2018. Statutory Instrument No. 73 of 2018.

[98] The rules and procedure for court- annexed mediation in the Zambian High Court is regulated by the High Court Rules, a piece of subordinate legislation, which is amended by statutory instruments. It is not contained in Acts of parliament.

[99] Mary Mutupa 'ADR Practice in Zambia: Exploring legislative reforms and future prospects to further enhance the practice ' 1 March 2019 available at https://www.ciarb.org/resources/features/adr-practice-in-zambia-exploring-legislative-reforms-and-future-prospects-to-further-enhance-the-practice/

[100] Statutory Instrument No. 12 of 2002

[101] Order XXXI Rule 4 of the High Court Rules as amended by The High Court Rules (Amendment) Rules, 2012.

[102] Order 31 Rule 8(3) of the High Court Rules (Amendment) Rules, 2012.

[103] Article 118 (2) (d) of the Constitution (Amendment) (No. 2)of 2016

[104] Rule 16 of Statutory Instrument Number 72 of 2018

[105] Order 31(4) of the High Court Rules, 2018.

2.2.3 The Binding Nature of Court-Annexed Mediation

Under the High Court Rules, a mediation settlement order is final and binding on the parties. Rule 31 sub-rules (8), (12) and (14) provide as follows:

> *'(8) The parties shall appear in person at the mediation, If they are represented, their advocates shall accompany them ...*
>
> *(12) A mediation settlement in form 28D in the First schedule to these Rules shall be signed by the parties and the mediator and registered under Order XXXVII, rule 1, and shall have the same force and effect for all purposes as a judgment, order or decision and be enforced in the like manner" ...*
>
> *(14) No appeal shall lie against a registered mediated settlement'.*[106]

Zambian courts have had occasion to interpret this provision and emphasise the binding nature of court-annexed mediation. In the case of *Charles Mambwe v Mulungushi Investment Limited (in liquidation) and Mpelembe Properties Limited*,[107] the Supreme Court held that there can be no appeal, no stay of execution and no review against such order [the mediation settlement order]. In the aforementioned case, the Supreme Court differentiated court-annexed mediation from ad hoc or private mediations as follows:

> *'Court-annexed mediation is not unique to Zambia. It is applied in most courts in this region and indeed in the United States of America and the United Kingdom. It is by definition, a process by which a trial court refers the parties to a 'neutral' third party called, a mediator, to help them resolve their dispute. The said neutral third party plays a facilitative role by merely providing a forum for the parties to explore options for settling their disputes. The process is party driven and as such, the parties structure the agreement that they finally come up with. Court-annexed mediation is distinct from ad hoc or private mediation, because whilst the latter is non-binding, court-annexed mediation is binding.'*

It is clear that the form of mediation favoured by the courts in Zambia is differentiated from the non-binding effect of ad hoc or private mediation defined by Black's Law Dictionary as "*a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.*"[108]

[106] Rule 31 sub-rules (8), (12) and (14) of the High Court Rules, Chapter 27 of the Laws of Zambia
[107] SCZ Judgment No. 36 of 2016
[108] B. Garner, Black's Law Dictionary 8th Edition (2004)

From this, it is clear that the process of mediation in the ordinary sense is viewed as non-binding in that it does not compel a party to participate in the process and neither is any agreement reached by the parties binding[109] and enforceable upon them. On the other hand, the rules on court-annexed mediation in Zambia, under Order 31 of the High Court Rules) of the High Court Rules as amended by The High Court (Amendment) Rules, 2012 and 2018 (The High Court (Amendment) Rules) depart from this notion in that a party who does not wish to participate in mediation can actually be compelled to do so by law[110] and where a party refuses to participate in court-annexed mediation, they may incur legal costs.[111]

The mediation process in Zambia is triggered at the time of a scheduling conference before a matter is set down for trial.[112] The law makes it mandatory for a judge at the scheduling conference to refer any action that is amenable to mediation to the mediation process. [113]The only actions that are excluded from this process are actions relating to constitutional issues, the liberty of an individual or where the matter in the judge's opinion is not suitable for mediation.[114]In addition to this, a judge may at any stage during proceedings refer the matter to mediation.[115]Prior to the changes made to the law in 2018 the mediation office chose mediators for the parties, however, parties may now choose their own mediators from a list of mediators.[116]Mediation is conducted on the court premises in a room designated by the mediation office. Where mediation fails the judge can then set down a date for trial.[117]According to the law, the mediation process should be concluded within 45 days.[118]

What perhaps is unusual about the position of the law in Zambia is that a registered mediated settlement order, signed by a mediator and the parties is a binding and final

[109] Ibid.
[110] Order 31 of the High Court Rules,, Chapter 27 of the Laws of Zambia.
[111] Order 31 Rule 8(3) of the High Court Rules (Amendment) Rules, 2012.
[112] Order 31 Rule 4.
[113] Ibid.
[114] Ibid.
[115] Order 43 Rule 17 of the High Court Rules (Amendment) Act Statutory Instrument No. 72 of 2018
[116] Order 31 Rule 5(4).
[117] Order 31 Rule 3 of the High Court Rules, 2018.
[118] Order 31 Rule 7(1).

order and it marks the end of the proceedings.[119] In the *Charles Mambwe* case mentioned above, their lordships stated that a mediated settlement order cannot be subject to appeal, interpretation or review nor can the proceedings from which it arises be reopened. The court observed that the rationale for court-annexed mediation, is that it helps decongest the courts, thereby reducing the work load on judges in the High Court.[120] A further justification for this position has been that the parties play a major role in the process in structuring their settlement in accordance with terms and conditions they can abide by.[121]

In the case of *Charles Mambwe* their Lordships stated that by referring the parties to mediation, the court ceases to have jurisdiction over the matter if it is settled. The court can only assume jurisdiction where mediation fails, pursuant to Order 31 rule 11 of the High Court Rules. Order 31 rule 11 (1) and (2) and provide: The Supreme Court in the Charles Mambwe case stated in closing that: 'This is the only situation under which a record can be referred back to a trial judge from mediation. A record cannot, under any circumstances, be referred back to the trial judge where the dispute is settled in mediation and a settlement order filed with the court in the prescribed form.' The aforementioned case was an employment matter concluded by way of mediation settlement order.'

With the advent of mandatory family mediation, it remains to be seen whether the Supreme Court will maintain the same strict interpretation of the binding nature of mediation settlement order, particularly where family situations are susceptible to change and needs of children vary as they grow. An inference to be drawn from the law is that this interpretation may be upheld because the amendments to the rules introducing mandatory family mediation are required to be read as one with the High Court Rules which expressly provide for the binding nature of a mediation settlement order. Whether this is appropriate for family mediation orders is a topic for further research and will not be covered in this paper.

[119] Rule 31(12) of the High Court Rules, 2018.
[120] SCZ Judgment No. 36 of 2016 at para 1333.
[121] Ibid.

2.3 THE CURRENT STATE OF MEDIATION IN ZAMBIA

Since the year 2000, 1,219 cases have been referred to mediation. Of this number 320 have been fully mediated and settled, 256 have not yet been mediated, 199 have not been settled and 44 are on-going.[122] These figures are expressed as follows:

Cases Referred	1,219	
Less on going	- 44	Outcome not determined yet
Subtotal	1,175	
Less not mediated	- 256	Possibly abandoned/ not taken back to court
Less not settled	- 199	Taken back to court
Balance	720	Not reported on Judiciary website
Less recorded as settled	- 320	
Unknown outcome	400	Not reported

These figures represent slow growth in mediation as it is clear that 1,219 cases over a period of 19 years is quite small. Admittedly the statistics are not impressive at a success rate of 26 per cent based on the figures represented above.[123]This percentage represents the general and commercial divisions of the High Court, but it is higher in the Industrial and Labour Relations division.[124]

[122] The Judiciary of Zambia Mediation in Zambia and Statistics available at http://www.judiciaryzambia.com/mediation-in-zambia-and-statistics/ accessed on 4 April 2019.

[123] Bwalya Lumbwe, Alternative Dispute Resolution, Based on a Paper Presented as a Key Note Speech for the CIArb (Zambia Branch) 22nd March 2019 at the ADR Open Day Radisson Blu Hotel, Lusaka, Zambia.

[124] M.S. Mulenga, *Mediating a Better Future* Weinstein International Foundation available at https://weinsteininternational.org/zambia/zambia-bio/ accessed on 5 August 2019.

The question to be asked is what can be expected for the newly established Family Division of the High Court. This question cannot be answered as yet because this court is still in the very early stages of its development. Following its creation, the Constitution gives no further detail about it but states that matters of process and procedure; jurisdiction, powers and sittings are to be prescribed.[125] The term prescribed under article 266 of the Constitution means provided for in an Act of Parliament. Four years following the creation of the family court, legislation has not been enacted. It would be safe to assume however that the success of family mediation will be dependent on the successful establishment of the Family Court. This paper therefore looks at how family mediation would fit into a family court model.

2.4. THE PROSPECTS FOR FAMILY MEDIATION

The success of mediation in Zambia in general is minimal to average. With the current Judiciary figures showing that a total of 320 cases have been successfully resolved out of 1,219 cases over a period of nearly two decades,[126]this begs the question, will family mediation suffer the same fate? Under the High Court (Amendment) Rules 2018, only matters relating to matrimonial causes will require mandatory mediation, however, judges will still maintain the discretion to refer any matter to mediation. However, on account of the Family Court's wide jurisdiction covering adoption, intestate and wills matters, among others, it is reasonable to conclude that family mediation will extend beyond separation and divorce matters. This paper however restricts the scope of its discussion to matrimonial causes.

The most recent statistics on family litigation show that in the year 2018[127], a total of 888 cases were filed into the Family Court registry, 661 of these were filed in the main Family Court registry located in Lusaka. The remaining 227 were filed into Family Court registries in other cities. Of the 661 cases filed into the main Family

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[125] Article 120 (3)(b) of the Constitution (Amendment) Act No. 2 of 2016.
[126] The Judiciary of Zambia Mediation in Zambia and Statistics (n 47).
[127]Statistics for the year 2019 have not yet been complied.

Court registry, only 129 of these cases were disposed with 532 carried over.[128] With the figures above, there remains much progress to be made. Arguably, because is still in its early stages of development, the court-annexed model is the only means of ensuring the continued use and development of mediation in the Zambian legal system. Parker, Parkinson and Behrens as if to echo the current situation in Zambia when speaking of Australia, stated

> '*It seems unlikely that more than a small percentage of separating couples will try mediation until more members of the public and helping professionals are educated about the mediation process and have positive experiences in the use of mediation. Alternatively, mediation may become more prevalent where it is or may become a mandatory pre-requisite to the availability of other services such as legal aid or a court hearing date*.'[129]

Having established that the recent changes to the law have set the stage for court-annexed family mediation, what other challenges must be considered in order for the mediation to be successful in a Family Court model?

2.4.1. Present Challenges to the development of Mediation in Zambia

In seeking to project a future for mediation in Zambia, this study seeks to discuss briefly some challenges to mediation and the chapters that follow will seek to highlight some ways in which these challenges can be transcended. The first and perhaps most daunting challenge is that of a lack of institutional support for [mediation] programs, that is to say, financially and in terms of policy. In terms of financial support, the Judiciary as an arm of government for the year 2018 received an allocation of only 0.6 per cent of the country's national budget. Of this percentage, the total allocation for mediation and settlement represented a meagre 0.06 percent of the Judiciary budget.[130]It is clear that mediation, let alone, family mediation comes

[128] Ibid.
[129] Parker, Parkinson and Behrens (n 6) 233
[130] Ministry of Finance, Yellow Book for the 2019 Budget available at http://www.mof.gov.zm/yellow-for-the-2019-budget/ accessed on 10 October 2019.

nowhere close to a priority where government expenditure is concerned. The possibility of a change to this situation is highly unlikely because Zambia is a country in the throes of a heavy debt burden. The World Bank estimated that Public and Publicly Guaranteed (PPG) debt rose from 20.5 per cent to in 2011 to 78.1 per cent of GDP in 2018.[131] Further, there is looming pressure for debt repayments such as a Eurobond debt of US$1.75 billion due in 2022, and another in 2024.[132] Therefore over the next decade, the challenge of financial support to mediation will be exacerbated by the effects of the country's struggling economy and debt. One question to be determined is whether a cost-effective model for mediation in the Family Court can still be developed in the midst of inadequate financial support. Is there a possibility that an innovative Family Court mediation model could thrive under the right legal and policy framework?

Secondly, there is a great need to define the goals of the use of mandatory family mediation in the Family Court. This challenge is not unique to Zambia. There is a general ambiguity [in ADR programs] with regard to striking a balance between fairness, justice, effectiveness, benefits to the parties, and efficiency.[133]Boyarin states that "a possible explanation for this has been the failure to embrace all that [mediation] offers as an efficient and effective conflict resolution process that does not compromise and perhaps even enhances perceptions and experiences of fairness and justice."[134]This paper will review whether a shift in the perception of mediation as a dispute resolution process that embraces African values, will enhance its acceptability to society and the legal system.

2.5. CONCLUSION

In view of the challenges outlined above, the prospects for the development of family mediation appear bleak. In the meantime, the fact remains that the development of family mediation would most likely have a positive impact not only on the rate of

[131] The World Bank Group Zambia available at http://pubdocs.worldbank.org/en/248071492188177315/mpo-zmb.pdf accessed on 2 December 2019.

[132] Zambia Institute of Policy Analysis and Research 'Eurobonds Repayment: Limiting the risk of default' Policy Brief No. 17 (March 2015) available at http://www.zipar.org.zm/research/our-publications/policy-briefs/47-eurobonds-repayment-limiting-the-risk-of-default/file accessed on 15th January 2019.

[133] Boyarin (n 66) 993.

[134] Ibid at 993.

disposal of cases but on the well-being of families and society as a whole. Further, the binding effect of mediation settlement orders in Zambia would guarantee finality to the litigation process. In concluding, where it is clear that financial support for mediation is improbable, could a mere rethinking of the system, legal and policy changes make the difference? For instance,

- policy that entails a radical departure from the traditional adversarial approach to a more conciliatory model for the operation of the Family Court.
- the enactment of a Family Court Act that entrenches the use of mediation in the resolution of family disputes
- the introduction of traditional dispute resolution mechanism to encourage the growth and acceptability of mediation.

These options would require a rethinking of the entire family court system at present. In re-envisioning an entire system for Zambia, a starting point would be an analysis of successful family mediation models around the world and their possible application to the Zambian context.

CHAPTER 3

MEDIATION IN A FAMILY COURT SYSTEM

3.0 Introduction

The main aim of this study is to propose a family court model that incorporates mediation as a core element of its procedure. This follows the apparent lack of public research, debate or inquiry, into the creation of a Zambian Family Court[135]let alone its function and structure. This is in comparison to the general practice in many countries around the world such as South Africa or England, which have engaged in decades of reports, commissions of inquiry and national debate regarding what a family court should encompass.[136]This is appears to have not been the case for Zambia. Although a study tour was conducted in the year 2017, to investigate other family court models in two jurisdictions,[137]the Family Court continues to conduct its proceedings based on the adversarial approach, an approach that has been highly criticised as unsuitable.[138]Since its inception, there has been no legislation enacted to inform the underlying principles or purpose of the court. The subsequent introduction of mandatory family mediation[139] appears to have occurred independently of the creation of a family court despite the court being in existence at the time of its inauguration.

While the overall aim of this study is to consider, how the changes to the law can be integrated to enhance the structure and operation of the Family Court, this chapter looks specifically at aspects of family court models in several jurisdictions with a view to draw on the accomplishments of established systems. The chapter focuses on the place of mediation in these systems in order to consolidate best practices that could inform the place that mediation could hold in the newly established Family Court. Of particular note is the background, motivations and philosophies that have influenced the development of the New Zealand family court system.[140] It is important to note that each of the systems discussed have developed as a result of

[135] Article 133(2) of the Constitution of Zambia.
[136] T Fisher (n 11); Madelene De Jong 'An Acceptable, Applicable and Accessible Family-Law System for South Africa – Some Suggestions concerning a Family Court and Family Mediation' 2005 J. S. AFR. L. 33 (2005).
[137] Report on the Study Tour undertaken to the United Kingdom and United States of America on the Establishment of the Family Division (December 2017).
[138] Matthews Nkhata v Esther Nkhata SCZ/8/017/2015
[139] Statutory Instrument No. 72 of 2018.
[140] The Royal Commission Report of 1980

unique historical contexts. In this regard, this chapter concludes by assessing the legal and social context of Zambia and seeks to ascertain whether elements of these successful systems can be incorporated into the Zambian context.

As a starting point, the first question to be asked is, what place should mediation hold in a family court system? In England, the Family Justice Review in the year 2010 proposed as follows: "*We strongly recommend that ADR should be properly regarded as the primary dispute resolution. Final court hearings should be the last resort resolution*".[141] Some participants in the review were of the opinion that the role of the judiciary was not just case management but also conflict management.[142] They proposed that this broader mission would include out-of-court, pre-court interventions to resolve conflict[143] as well as in-court prevention programs such as specialised courts, unified family courts, and ADR programs, among others.[144] In the United States, the concept of the multi-door courthouse was developed by Professor Frank Sander who researched the "varieties of dispute processing" and rough-sketched the design of a Dispute Resolution Centre.[145] The multi-door courthouse also places ADR programs at the core of court models.[146]

In Australia, the Family Court is premised on the belief that disputes should be resolved by conciliation and counseling with court hearings only as a last resort. This was based on the need to provide resolution to such a high emotive area of law in a less confrontational environment [147] or at least a less formal setting as opposed to what was prevailing in state courts at the time.[148] It is estimated that since the inception of that Family Court, only about five per cent of disputed matters require a

[141] The Centre for Social Justice, Family Justice Review: Response of the Centre for Social Justice 2010 available at www.centreforsocialjustice.org.uk accessed on 26 August 2019.
[142] Ibid.
[143] Ibid.
[144] Ibid at 1040
[145] Timothy Hedeen '*Remodeling the Multi-Door Courthouse To "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR*' 95 Marq. L. Rev. 941 (2012) at 942
[146] Ibid at 942.
[147] A Dickey *Family Law* 3rd ed, LBC Information Services, Sydney 1997 at 500
[148] Dickey Family Law as cited in Van Zyl, L.J 1994 Alternative Dispute Resolution In The Best Interests Of The Child (unpublished Ph.D thesis, Rhodes University, 1994) 179

contested hearing.[149] Australia has gone a step further than most jurisdictions, in that its policy papers relating to family law refer to mediation as a form of Primary Dispute Resolution (PDR), rather than ADR.[150] This is because the vast majority of disputes are dealt with and resolved using mediation in Australia.[151] In New Zealand, a conciliatory approach to family disputes is encouraged and litigation viewed as a last resort.[152] It is clear from these examples that mediation is seen as having a central role in the family court systems of established jurisdictions. Whether mediation should be court connected or practiced independently from the courts is another area of interest. However, because Zambia favours a court-annexed mediation model, this paper will lean more towards such approaches in other jurisdictions. However, a cursory glance at the different ways that mediation can be conducted is considered in the next part of this chapter.

3.2 THE EARLY NEW ZEALAND FAMILY COURT SYSTEM

One country that made an attempt to revolutionise family mediation is New Zealand. One scholar argued that in countries like England the majority of people in favour of family courts were fixated on a particular image of what a court must be like such that they could only conceive of a court with a mediation service and nothing else.[153] His conclusion was that the New Zealand model was unique because it did away with the debate of the traditional model of what a court must be like.[154] The South African Hoexter report of 1983 which was later followed up by a report of 1997[155] in its recommendations for a family court had also proposed a court with a social component to offer support and mediation much like the New Zealand model.[156]This

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[149] Parker, Parkinson and Behrens (n 6) 227

[150] Nadja Alexander *What's Law Got to Do With it? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, Bond Law Review Issue 13 2001 available at http://epublications.bond.edu.au/blr accessed on 20 October 2019.

[151] Response of the Family Court of Australia to the Attorney-General's Department Paper on 'Primary Dispute Resolution Services in Family Law' (1997) *Family Court of Australia* 8.

[152] Peter Boshier, Nicola Taylor & Fred Seymour, "EARLY INTERVENTION IN NEW ZEALAND FAMILY COURT CASES" (2011) 49:4 Family Court Rev 818 at 819.

[153] T Fisher (ed) (n11) 54.

[154] Ibid at 54.

[155] *Commission of lnquiry into the Structure and Functioning of the Courts* (RP78!1983) vol III part 7 and *Commission **of** Inquiry into the Rationalisation of the Provincial and Local Divisions* (4 *the Supreme Court* (RP200/1997) vol **I** part 2 in Vol II part 2 par 1.5.

[156] Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court (RP200/1997) Vol II part 2 para 1.5.

begs the question, what was so unique about the New Zealand family court that it served as a model for other jurisdictions in the early 90s and can it be useful to the Zambian context today?

3.2.1 The Underpinning philosophy

The New Zealand Family Court, was established on 1 October 1981[157]under the belief that this court was to serve as a place where people could seek assistance to resolve their family problems in a just and humane manner.[158]Paragraph 484 of the 1978 Royal Commission stated in essence that a family court should be a conciliation service and that a court appearance should be held only as a last resort.[159]This was in stark contrast to the prevailing idea that a court must simply have a conciliation service.[160] A summary of the overall philosophy of this court is this: First, that the finest and most permanent solutions to family disputes are those which comprise of the parties' active participation in the final decisions that are made.[161] Secondly, that such an approach would in the long run be in the best interests of any children that are affected by the process.[162] This philosophy also puts forward the notion that children should be permitted to be contribute to final decisions regarding matters that affect them.[163] Thirdly, a lack of formality in the manner in which these decisions are made tends to enhance participation and the quality of decisions made.[164]

3.2.2. How the Family Court Process Unfolded

The brief process outlined in this part is what applied under the Family Proceedings Act 1980. Although, various amendments have been made to the process by later

[157] Section 1 of the Family Court Act 1980.

[158] Beattie et al., 1978, p. 181). Beattie, D. S., Kawharu, I. H., King, R. M., Murray, I D., & Wallace, J. H. *Report of the Royal Commission on the Courts (* 1978) 181.

[159] T Fisher (ed) (n1) 54.

[160] Ibid at 54.

[161] Ibid.

[162] T Fisher (ed) (n 11) 54.

[163] Ibid.

[164] Ibid.

Acts, it is the procedure under the 1980 Act that was hailed as innovative and gained recognition for its uniqueness.

(a) *Counseling and Conciliation*: This process was for all intents and purposes mediation and it being termed counselling was mere semantics,[165] used to distinguish the stages and not necessarily the actual dispute resolution process or skill used.[166]

(b) *The Mediation Conference*: Under the 1980 Act where the counselling and conciliation process failed, the matter proceeded to a mediation conference which was chaired by a judge.[167] A judge held a one to two hour conference with the parties before the matter could proceed to litigation but the judge did not preside over it in a judicial capacity.[168] However, the judge still maintained the power to make any order that could be made by a court.[169] Within a decade of the court's establishment, at least a quarter of disputed custody cases were resolved by way of a mediation conference.[170]

(c) *Litigation*: This is the traditional approach to the resolution of disputes that has been held to be incompatible with family disputes. In the New Zealand Family court, an inquisitorial approach to family proceedings is encouraged over an adversarial approach.[171] It does appear that the New Zealand approach was a revolutionary in comparison to the traditional model of a court system at the time of its inception. Records show that the introduction of the counseling service and of the mediation conference succeeded in reducing the number of contested custody cases which proceed to trial to approximately 10 per cent, with 67 per cent being resolved in counseling or conciliation, that is, in the first stage.[172]

What this paper seeks to propose is a unique approach to a family court model and it borrows some aspects of the New Zealand model, however, one cannot consider mediation or formulate a system for that matter in isolation from the context that a

[165] T Fisher (ed) (n 11) 55.
[166] Ibid.
[167] Section 13 of the Family Proceedings Act 1980.
[168] Report of the New Zealand Royal Commission para 307.
[169] Section 14 of the Family Proceedings Act 1980.
[170] T Fisher (n 11) 56.
[171] Ibid at 821.
[172] L Van Zyl (n 30)

particular country exists in.[173] The New Zealand model though innovative and revolutionary is not perfect, it too has some flaws. One particular flaw that relates to the issue of context, is its exclusion of the native Maori tribes of New Zealand.[174]This is unfortunate because the native Maori hold family relationships to be a central value of theirs[175] and ideally ought to have had their tradition and cultural values reflected in the dispute resolution process. Maori culture and values in many ways are similar to African customs particularly where the role of the extended family is concerned. Although, some New Zealand judges do allow for extended family to participate in proceedings this is not the standard.[176]New Zealand is still finding ways of to rectify this exclusion by creating an effective dispute resolution systems that embraces the Maori as well. The only problem is that the proposals appear to still be separate from the mainstream dispute resolution systems.

The failure to blend western systems of dispute resolution with native systems is mirrored in Zambia's dual legal system, a remnant of its colonial history. The question to be asked is, if the basis on which legal systems were enforced was to reflect the differences of those they sought to serve, what differences are we seeking to re-establish by continuing to differentiate in our disputes resolution systems? To borrow from the South African Law Commission in their issue paper on family dispute resolution, "Best practice intervention tools will not take root in local contexts unless they are either created from within those social contexts, or are modified or even partially dismantled by those who use them."[177] This chapter closes by looking at Zambia in the context of its dual court structures and what this means for the formulation of a family court model.

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[173] Ibid.

[174] Report of the New Zealand Royal Commission at para 780

[175] Ibid.

[176] Ibid at para 790.

[177] Clause 3.10.22 of the South African Law Reform Commission Issue Paper 31 (December 2015) Project 100D Family Dispute Resolution : Care of and Contact with Children at p 219

3.3 THE MISSING LINK: THE REFLECTION OF ZAMBIA'S SOCIAL AND LEGAL CONTEXT IN A FAMILY DISPUTE RESOLUTION SYSTEM

A country's context determines how mediation is absorbed and applied, and has a direct impact on how it will be practiced in that context.[178] Zambia's history reveals social and legal contexts[179] that have entrenched systemic differences in how family conflict is resolved. While Zambia has taken a progressive step by creating a Family Court, it continues to operate a dual and fragmented court system which does not meet the needs of all the people. Colonialism brought with it a separation of the western justice system from the traditional practices which were perceived by the coloniser as inadequate.[180] The application of received or imposed laws of foreign origin and diverse customary laws concurrently has created a legal landscape that reflects the interaction of different systems of law".[181] Zambia existed before 1964 as a British protectorate by virtue of which British law (the received law) was extended to it.[182]The received law which covers legislation, common, law and equity[183]co-existed with African customary law, the former governed the coloniser and the latter governed the colonised.[184] It was not until 1963 that Africans were allowed to marry under the received law and people were granted a choice of which law would apply.[185] At independence in 1964, Zambia inherited the colonial legal system.[186] In 1966 Zambia established a unified court system[187] but maintained the dual legal system with the separation of the received law and customary law. [188]

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[178] Ibid.
[179] Himonga (n 15) 43
[180] Adenike and Ordor (n 31) 158
[181] Ibid.
[182] Mushota (n 14) 4
[183] Chuma Himonga Family and Succession Laws in Zambia: Developments since Independence (1995) 55
[184] Ibid at 4
[185] Mushota op cit (n 14) 55
[186] Himonga (n 15) 43
[187] Ibid.
[188] Mushota (n 14) 6

The concept of customary law is said to refer to unwritten rules developed from the practices and social life of the indigenous people.[189] In Zambia, today the existence of two systems means that Zambians can choose to marry under customary law or under the received law. This entails that issues of property settlement, maintenance and custody of children are to be governed by the law under which a marriage was contracted.[190] In reality, however, this is not necessarily the case, the courts and people do not follow this distinct separation. For instance, in the case of the courts, a common practice which has been perpetuated by the Supreme Court is that where ancillary matters of property settlement, custody or maintenance proceed on appeal to higher courts, they are decided not on the basis of customary law but statutory law.[191] Arguably, where a court goes ahead to apply principles of statutory law to a customary marriage on appeal, it underplays the distinction between customary and received systems of family law.

In relation to the practices of society as whole, the adoption of received law does not entail the abandonment of customary law. Within a decade of independence courts grappling with the application of laws conceded that [192] it was impossible for Africans to ever divest themselves of customary law because it was unthinkable that one could abandon their cultural heritage. These views have been replicated in other African countries, Kenya,[193]for instance. The reality is that Zambians who opt for statutory marriage also marry their partners under customary arrangements. This results in a mixing of the two forms of marriage into one and it is subsequently recognised under both systems of law.[194] The vast majority of persons who contract statutory marriages will still contract a valid customary marriage such as engaging in marriage negotiation through families and *shibukombe* or *nkhoswe*, a middleman as is customary.[195] A further practice of the payment of *lobola*[196] to validate the marriage by the groom's

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[189] Himonga op cit (n 15) 51
[190] Ibid at 65.
[191] Chibwe v Chibwe 2001 ZR 1; Lizzy Musauka v Mpasi Solomon Dube Supreme Court Judgment No. 64 of 2017
[192] Munalo v Vengesai (1974) ZR 91
[193] Wambui Otieno v Joash Ochieng Ougo and Omolo Siranga CA, Civil Appeal no. 31 of 1987
[194] C Himonga (n 15) 266
[195] Mushota op cit (n 14) 55
[196] A study conducted by Women in Law in Southern Africa Trust revealed that the term lobola did not mean the same thing for all ethnic groups. For some people lobola appears to be only one payment made in the process of marriage and not necessarily a payment for the children as it is understood in other customs.

family[197] is almost mandatory. One of the main reasons for this practice is the strong influence of extended family in the sphere of marriage.[198] In the Zambian context, particularly those of the older generation and the less educated,[199] a marriage is only recognised if it fulfils the requirements of a customary marriage and the risk of marrying only under statutory law entails that one's marriage may not be recognised by one or both families.[200] In this regard, a marriage in the customary context is dependent on social sanction and it signifies the union of two families not two individuals.[201]This phenomenon also affects the dissolution of a marriage. In many a case, marriages are dissolved according to customary law even where a statutory marriage has been contracted.[202] Further, the payment of *lobola* and its return after dissolution of marriage has implications for custody,[203] maintenance and even property settlement. Himonga states that

> '*…within the larger polity of the state, there exist semi-autonomous social fields which, through the extended families, define the people's response to the state regulation in a manner which is contrary to the state's policy of keeping the various forms of marriage separate and distinct. In achieving this result, the extended family relies upon social values and beliefs which the state ignores in its statutory regulation of marriage…*'[204]

What can be gleaned from this is that the social and legal context must also influence the processes of dispute resolution. If the common practice of society is to blend two systems of law then dispute resolution systems must be reflective of and responsive to this blend. A disregard for this fact, entails that disputes relating to the marriage and the family have not been fully resolved. Is there a way to create systems that bear not

However, the term lobola in this paper is used to refer to the payment of bride price as understood in the earlier context.

[197] Ibid.

[198] Himonga op cit (n 15) 268

[199] Ibid.

[200] Ibid at 269.

[201] Women in Law in Southern Africa Trust (n 53) 61

[202] I v I 1986/HP/D46 (HC Lsk) ; M v M 1986/HP/D41 (HC Lsk)

[203] C. Himonga (n 15) 277

[204] Ibid at 274

only the colonial heritage of the received laws but the African culture, values and identity to ensure that one system of law does not take precedence over the other?

3.4 CONCLUSION

In conclusion, in formulating a Family Court system, several issues must be considered. If a family court system cannot guarantee the full resolution of disputes, it might be asked whether this would be sustainable or even acceptable to the majority of society. In a society where received family law and customary law has been blended by the people to adapt to their needs, one would ask if it is necessary to continue with distinctions in a court system. According to Mushota, there exists in reality a blend of the two laws without one disrupting the other.[205] It follows therefore, that certain aspects of customary law can and should be reflected in a court system in order to better reflect the society that it seeks to serve. In essence what this paper seeks to do is formulate a system that reflects this blend of practices from received law and customary law. The received law is the dominant system of law at present. Therefore, the missing link is a reflection of aspects of the customary law as practised by society in a contemporary dispute resolution system. At a time when the inadequacy of the adversarial approach under the received law has become evident, one would ask whether there are aspects of traditional dispute resolution that could enhance the family dispute resolution. It would then be necessary to consider how traditional dispute resolution could be incorporated into the court systems so that society can better see a validation of its practices and cultural values. The year 2016 brought some unexpected but welcome changes to the Zambian laws. One of these was the recognition of traditional dispute resolution principles by the courts in the exercise of judicial authority, conceivably the stage is finally being set for a merging of dual systems.

[205] Mushota op cit (n 14)55

CHAPTER 4

A BLAST FROM THE PAST: THE RECENT RECOGNITION OF TRADITIONAL DISPUTE RESOLUTION AND ITS SIGNIFICANCE FOR FAMILY MEDIATION

4.0 INTRODUCTION

The Constitution of Zambia expressly stipulates that the exercise of judicial authority shall be guided by principles of alternative dispute resolution, including Traditional Dispute Resolution Mechanisms ("TDRMs").[206]There is a growing voice for a return to the use of TDRMs[207]as they were practiced in Africa even before the advent of colonialism whose coming led to the growth of western systems which entrenched the adversarial approach into the resolution of family disputes. At the heart of TDRMs, is the preservation of social harmony, especially the family unit. Although family mediation is generally located in the context of family breakdown, there is still a commitment to the family in that its purpose is to pacify the destabilisng effect of divorce on family life.[208]It has been argued that the effect of the adversarial approach in family conflict destroys rather than builds social harmony at the expense of the children of the family.[209]In this regard TDRMs reflect the same values that modern-day family mediation seeks to espouse. Rather than adopt international models of contemporary family mediation practices in their entirety, this study seeks to advocate for the basis of family mediation to be rooted in its African context in line with the practices and customs of the people it seeks to serve. One key feature of the practice of TDRMs is the central role given to the elderly in resolving family disputes. It must be acknowledged that if the use of TDRMs is to be revived, the elderly in society who are custodians of these practices, present a unique resource as their wisdom, life

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[206] Article 118 (2)(d) of the Constitution of Zambia (Amendment) Act No. 2 of 2016

[207] R.B.G Choudree Conflict Resolution in South Africa; Lanshima, Cletus African *Traditional Systems Of Conflict Resolution at 263;* T.B Ghebretkle and M, Rammala Traditional African Conflict Resolution : The case of South Africa and Ethiopia at 325; A.E. Boniface African-style Mediation and Western-style Divorce and Family mediation: Reflections for the South African Context; A. Adenike and A. Ordor Integrating the Traditional with the Contemporary in Dispute Resolution in Africa, Law and Democracy Development Volume 20 (2016) 154 - 173 at 161;

[208] Berger, B and Berger, P The War Over the Family: Capturing the middle ground as cited in T. Fisher *Family Conciliation within the UK Policy and Practice* 2 Ed(1992) p 23.

[209] Laura Greyvenstein 78 - Augustus 2016 – Servamus; L Gold. Mediation in dissolution of marriage. Arbitration Journal 1981, 36 (3); Irving, H and Benjamin,M. Family Mediation Theory & Practice of Dispute Resolution (1987)

experience, empathy and time is largely at the disposal of society but goes unrecognised.

4.1 The inadvertent loss of TDRMs in Family dispute resolution

Silungwe, CJ as he then was, in a paper presented at the First Judicial and Law Association of Zambia seminar in 1990 stated the following on [TDRMs]:

> *'The indigenous judicial system was characterised by simple and informal procedures…peaceable reconciliation and mediation and in some cases arbitration. This was due to the importance attached to the notion of settling disputes without the rupture of the harmonious relationships or the creation of lifelong enmity. Significance was thus placed on the promotion and maintenance of harmonious relationship as a pragmatic means of engendering order, tranquillity and social equilibrium in society.'*[210]

He then spoke of the changes that occurred with the advent of colonialism. He quoted Ronald L Olson, Chairman of the American Bar Association Special Committee on Dispute Resolution who spoke of "increased urbanisation, broadening government involvement in everyday life and a waning of non-judicial institutions traditionally engaged in dispute resolution" as the reason for an unprecedented explosion of formal litigation. He stated that following this judicial institutions have not been able to meet the growing demand for litigation. As a result, courts have been clogged and the effectiveness of the judicial systems, has been compromised and justice as well as mercy have become inaccessible. [211]

In addition to this, as a result of urbanisation, as well as enhanced literacy, Zambian society has become more fragmented and complex.[212] The traditional institutions of the extended family which had once been the heart of family dispute resolution began to disintegrate and lost the place of importance they once held in society.[213] This chapter focuses on TDRMs in the context of their underpinning values and the special place they accorded to the elderly as well as the unique benefits that flow from 'elder mediation' that would be helpful to the family mediation process today. The study is restricted in scope to urban Zambia where the interplay of the dual systems of

[210] Chief Justice Hon. A Silungwe in a paper presented at the First Judicial and Law Association of Zambia seminar held at Lusaka in 1990
[211] Masuwa (n 76)30
[212] Ibid.
[213] Ibid at 30

law occurs. This is in contrast to rural areas where customary is largely prevalent and family disputes are still resolved by elders, headmen and chiefs. The urban population represents 43 per cent of the total Zambian population[214]and is said to be growing. The United Nations predicts that this population will increase to 58 per cent by 2050.[215]This means that more and more people will come into contact with the reality of the interplay of dual legal systems in urban areas. This raises the question of whether an already burdened family court system that conducts adversarial proceedings would be equipped to handle the disputes of a growing urban population. This study proposes the concurrent use of alternative dispute resolution as envisaged by the Constitution to include TDRMs for the resolution of family disputes in a Family Court model.

4.2 AN EMERGING SCHOOL OF THOUGHT: THE BLENDING OF DUAL SYSTEMS

In light of what appears to be a worldwide shift, away from the desirability of the adversarial approach derived from the Western legal system, African countries now find themselves caught up in considering a reversal of some aspects of the inherited systems and a redefinition of their own legal systems. Africa is currently experiencing an important change of perspectives regarding its legal systems, which it is hoped will be readjusted to an African context.[216] Arguably, this necessitates a return to applicable African customary law or practices.

One would ask though, what is the current state of African customary law in African countries? Since the beginning of colonialist rule in Africa, indigenous customary laws were treated as inferior, undeserving recognition as proper laws.[217] At best, they were tolerated and provided for in repugnancy clause.

[214] H. Plecher Zambian Urbanisation 2015 to 2017 (June 2019) available at https://www.statista.com/statistics/455963/urbanization-in-zambia/ accessed on 30 July 2019.

[215] M. Sladjoe Zambia urbanising part 1: Tackling bad contagion International Growth Centre https://www.theigc.org/blog/urbanising-zambia-tackling-bad-contagion/ accessed on 20 July 2019.

[216] A, Velthuzien (n 64)

[217] T.W Bennet 'Ubuntu: An African Equity' Potchestfroom Electronic Law Journal 2011 (Vo14. No. 4) at 351 available at https://www.ajol.info//index.php/pelj/article/view/68745 accessed on 6 December 2019.

With the growing unpopularity of the adversarial approach, rather than discard all western influence, some theorists call for an integration of traditional and contemporary dispute resolution methods on the continent, to promote better access to justice for litigants.[218]This would safeguard against the isolation of the law from people who perceive the formal court systems as foreign and not reflective of their practices. This is the reality in most African countries which function under dual legal systems or even multiple legal systems.[219]

The lack of recognition and incorporation of TDRMs in African legal systems entails that formal courts in Africa today are only partially effective in urban and rural areas.[220]Arguably, if these systems are partially effective then they do not need to be discarded but their effectiveness simply needs to be enhanced. Faris recommends that Western knowledge systems should be taken apart and reviewed critically in order to preserve the relevant elements while at the same time introducing indigenous knowledge.[221]In this way, the two can be brought into a complementary relationship.[222]With regard to ADR, it is proposed that a combination of transformative and family-inclusive mediation, be combined with the inclusion of *Ubuntu*-style values.[223]This emerging school of thought argues that the emphasis of mediation should be on a restorative outcome that benefits the whole community in line with African values.[224]

In the past years, African States have been moving towards incorporating TDRMs into their policies, laws and constitutions. Even in countries where there is no formal state recognition, TDRMs have survived over the years and have continued to exist without state encouragement.[225]In Ethiopia, Article 34(5) of the 1995 Constitution

[218] Adenike and Ordor (n 31)155.
[219] Ibid.
[220] Adenike and Ordor (n 31) 160.
[221] Faris. J "From alternative dispute resolution to African dispute resolution: Towards a new vision" unpublished paper delivered at the 5th Caribbean conference on disputes 28-30 April 2011, Jamaica.
[222] Ibid.
[223] AE Boniface (n 37) 638
[224] Ibid.
[225] Fayemi Ademola Kazeem (2009) 'Agba (Elder) as Arbitrator: A Yoruba Socio Political Model for Conflict resolution-A Review of Lawrence O. Bamikole' Journal of Law and Conflict Resolution, Vol. 1(3) pp. 60-67, August 2009.

recognised a limited application of traditional law but encouraged people to use customary and religious laws for marital, personal and family rights.[226]Ghebretekle states that in Kenya, in the Judicature Act, customary law is used only as a guide; while in the Constitution, the courts are to be guided by TDRM principles.[227] It must be noted, however, that TDRMs are used only as a guide. The implication is that the courts may refuse to apply them even in appropriate cases, since they are only a guide.[228] However, the Constitution of Kenya seems to clarify the juridical place of customary law at least by recognising it.[229]This may contribute to greater recognition and the promotion of traditional justice systems by courts as a means of enhancing access to justice.[230] Thus, traditional conflict resolution mechanisms are coming to the fore as suitable mechanisms for conflict resolution in Africa. From the above, it is clear that although not necessarily binding, the recognition of TDRMs provide an opportunity to rethink what a truly authentic African legal system will look like.

As earlier stated, Zambia also has for the first time in its Constitutional amendments in 2016 recognised the use of traditional dispute resolution mechanism by the courts. Article 118 (2) stipulates:

> ‘*In exercising judicial authority the court shall be guided by the following principles:*
>
> *(d) alternative forms of dispute resolution including traditional dispute resolution mechanism shall be promoted, subject to clause (3).*’

This is against a background of Zambia’s dual systems of law, a legacy of colonialism, which entailed that TDRMs held no place in the formal court systems which were of a superior standing. The fact that TDRMs have only been recognised in the Zambian Constitution[231]five decades after independence is indicative of the subordinate place assigned to their practise.

The reality, however, has been that citizens in their day-to-day lives have practiced an overlap of the two separate systems of law, as well their dispute resolution

[226] Constitution of the Federal Democratic Republic of Ethiopia. 1994. Federal Negarit Gazeta, Proclamation No. 1/1994.
[227] T B Ghebretekle (n 3) at 47
[228] Ibid.
[229] Article 159(2)(d) of the Constitution of Kenya
[230] Ghebretkle (n 3) 47
[231] Article 118(2)(d) of the Constitution of Zambia (Amendment) No. 2 of 2016

mechanisms, particularly in the area of family disputes.[232]The recent approval of the application of traditional dispute resolution principles by the Constitution may very well be a first step towards unifying customary law and statutory law. It also recognises the untapped value of traditional dispute mechanisms in the resolution of disputes by formal courts. What then is the underpinning philosophy of these traditional dispute resolution mechanisms?

4.3 THE ESSENCE OF TRADITIONAL DISPUTE RESOLUTION

In Africa, traditional conflict resolution is based on values, norms, cultures and beliefs as they are practiced by the members of a community.[233] The ultimate goal of African traditional dispute resolution is to restore balance, settle conflict and reduce differences.[234]

One of the prominent TDRMs is mediation. Family or neighbourhood mediation is facilitated by the elderly members and has always taken place in "an attitude of togetherness" and "in the spirit of *ubuntu*."[235] Himonga, Taylor and Pope state that "while it is obvious that *ubuntu* and customary law are not synonymous, it ought to be equally obvious that, as a fundamental value that informs the regulation of African interpersonal relations and dispute resolution, *ubuntu* is inherent to customary law". Because Zambia is only just beginning to embrace the use of TDRMs, there is no jurisprudence on the African concept of *ubuntu*. South African jurisprudence however, has developed to the extent that the concept of *ubuntu* has found its place in interpretations of the Constitutional Court.[236]Malan states that *ubuntu* signifies "being as human and humane as can be, being as human oriented as can be, living in genuine humanness, together with fellow human beings" as a way of being.[237]Bennet states that *ubuntu* defies definition but is closer to a value or, better still, a representation of the right way of living.[238] *Ubuntu* has also been described "as an age-old and traditional African world-view", a set of principles or thinking which plays a dominant and

[232] Mushota (n 14) 55
[233] Ghebretkle and Rammala (n 39) at 325
[234] R.B.G Choudree 1999 AJCR 10
[235] Malan Conflict Resolution 88.
[236] S v Makwanyane 1995 3 SA 391
[237] Ibid.
[238] Bennet (n 217) 351

essential role in influencing social conduct.[239]Former Constitutional Court of South Africa, Justice Yvonne Mokgoro wrote:

> *'The concept ubuntu, like many African concepts, is not easily definable. To define an African notion in a foreign language and from an abstract as opposed to a concrete approach is to defy the very essence of the African world-view and can also be particularly elusive...Because the African world-view cannot be neatly categorised and defined, any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea'.*[240]

Mokgoro J in the case of *S v Makwenyane* stated,

> '*While [ubuntu] envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation'*. [241]

This principle or value then finds its expression in the dispute resolution process in African societies by providing individuals an opportunity to air their grievances, to express themselves fully, without complexity or formality, and yet assured them of a knowledgeable and just resolution that would maintain communal relations.[242] Ubuntu also appears to find its expression in the African Charter on Human and People's rights which speaks to the duty of an African to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society.[243]

This was the general way of being for Africans for centuries until the advent of colonialism which negatively impacted on African values, norms, cultures and beliefs as it disregarded, undermined and weakened them.[244]The cultural supremacy of the western systems and legal transplantation which excluded traditional systems has

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[239] C Himonga, M, Taylor, A Pope Reflections on Judicial Views of Ubuntu Potchestfroom Electronic Law Journal Volume 16 No. 5(2013) at 616 available at https://www.ajol.info//index.php/pelj/article/view/101890 accessed on 20th January 2020.

[240] Mokgoro 1998 PELJ 2-3.

[241] S v Makwanyane 1995 3 SA 391 (CC) para 236.

[242] A Adenike and A. Ordor (n17) p 158

[243] Article 29 (7) of the African Charter on Human and People's Rights.

[244] C.A Lanshima African Traditional Systems of Conflict Resolution, The African Anthropologist, 2016, Volume 20, No.1 & 2, Pages 262 – 291. ISSN: 1024-0969 % January 2019 available at https://www.researchgate.net/publication/330170887 accessed on 20 June 2019.

affected traditional conflict resolution in Africa. Nonetheless, the continuous use of traditional dispute resolution mechanisms across African communities clearly demonstrates that they still have a role to play.[245]

4.3.1 Mediation in the African context

Mediation is compulsory in African culture, especially when a family dispute occurs and this has been an essential part of African families and society.[246]De Jong states that in relation to African mediation it is not actually a matter of moving towards mandatory mediation but it is simply a formal recognition of TDRMs that have existed for centuries.[247]In African mediation, conflicts are seen in their social contexts. They are not seen as isolated events and all relevant background information is covered during mediation. During mediation not only are the consequences for the parties looked at but also the consequences for others in their families.[248] The traditional objectives of African mediation are to soothe hurt feelings and to reach a compromise that can improve future relationships.[249] The values that are upheld in African mediation are African humanistic values.[250]

4.3.2 The Role of the Elderly in TDRMs

In many African communities, TDRMs usually involved the intervention of trustworthy elders, either on their own initiative or by the invitation of a concerned third party or the parties in conflict.[251] In most African traditions, elders are respected as the communities' source of practical wisdom and experience and are therefore assigned a prominent place in dispute settlement.[252]For many Africans, respect for elders needs no explanation-it is a cultural expectation as the elderly are viewed as

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[245] Ghebretekle and Rammala (n 39) 326

[246] Madelene De Jong *A pragmatic approach to mediation* Tydskrif vir die Suid-Afrikaanse Reg (TSAR), Volume 2010, Issue 3, Jan 2010, 515 - 531 at 526.

[247] Ibit at 526.

[248] Family ties and community networks are "respected, maintained and strengthened" and "Africa's emphasis on relationships may be regarded as unique.

[249] Relationships of the past, present and future are looked at. There is an "interest-based orientation towards the future". Malan Conflict Resolution 27.

[250] Ibid.

[251] D Francis (ed. (n 12) 88.

[252] Ibid.

living sources of vital communal information.[253] It has been argued that the elderly in society are an essential source of traditional family dispute resolution.[254]

4.3.3 A place for the elderly in contemporary Zambia

Mosten and Traum state that contemporary societies worldwide could invariably profit from the involvement of a generation of modern elder individuals, many of whom have the benefit of education, work experience, and rising longevity. [255] One could also argue that the elderly in society can pass on forgotten values and styles of dispute resolution that have not been practiced in formal dispute resolution processes and perhaps they could help provide a foundation for a truly African approach to family mediation. Having been important members of society at some point in their lifetime, many elderly individuals may still want to continue to engage with their communities beyond the sphere of assisting their immediate families.[256] Today's elderly may very well be a link between the past and the future as well as a conduit to establishing an authentic African legal system. The formal development of [elderly mediation] could possibly be an extension of a useful exchange between the old and the young that would benefit different cross sections of society that come into contact with the family court including divorcing couples, children and the entire court system, and the elderly citizens who assist the process.[257]

4.4 MAKING THE LINK: THE BENEFIT OF ELDER MEDIATION TO CONTEMPORARY FAMILY MEDIATION?

The elderly in the context of traditional family dispute resolution embody various characteristics that would enhance the effectiveness of family mediation. Mosten and Traum in arguing for the involvement of the elderly in assisting court processes state that:

> '*Many senior citizens have experienced what it means to be a member of a family and community. They remember being young children, yearning for maternal attention and paternal validation. They often remember being husbands and wives, mothers and fathers, grand-parents and sometimes even great grandparents. As the elderly population grows, our collective access to this resource of vast experience and*

[253] Traum and Mosten (n 61) 776
[254] Ibid.
[255] Ibid.
[256] Ibid.
[257] Ibid.

> *perspective grows as well. Collaborative multi-generational family decision-making has been a cornerstone of multi-generational family dynamics for centuries*.'[258]

The same logic can be applied to the context of the elderly in the context of practising TDRMs. The wealth of life experience, perspective, wisdom and empathy simply does not exist in any other cross-section of society. The wisdom of an 'underappreciated elderly population can offer invaluable assistance' to people facing family conflict,[259]among others. These elders' personal experiences could offer invaluable insight and sensitivity to families caught in a system that cannot holistically serve them.[260]

4.4.1 The qualifications of elder mediators

One would then ask what value apart from being a repository of traditional dispute resolution would the elderly bring to a modern family mediation system. In the case of *Charles Mambwe v Mulungushi Investment Limited (in liquidation) and Mpelembe Properties Limited***,** the Supreme Court stated in passing that the mediation office must ensure that it selects an appropriately qualified mediator from its multidisciplinary panel of mediators. In that case, the Supreme Court took the view that the mediation office should have appointed a mediator who was suitable for the dispute. The qualification of a mediator must therefore bear heavily on the nature of the dispute. Family law is one such area which would require appropriately qualified mediators. But what is the most important qualification for a family mediator? In Western style mediation, private family mediators are mainly attorneys, psychologists or social workers who have at least forty hours of training in family mediation.[261]One is therefore a mediator based on one's professional qualification.

As has been earlier stated, the issues in dispute between the parties may involve issues of customary practices and perceived rights that the formal legal system may not resolve entirely. Although the courts are liberty to decide upon customary issues, the tendency is to defer to statutory applications of the law which undermines customary law. Further, some marital disputes hinge more on resentments and communication

[258] Mosten and Traum (n 61) 776
[259] Ibid.
[260] Ibid.
[261] De Jong (n 246) at 528.

breakdown and not necessarily a legal issue.[262]That such disputes are referred to the formal court process seems quite unnecessary. In cases that may be appropriate for elderly mediation, would a professional qualification be as essential as it would be in any other case? A case can be made that legal expertise need not be a prerequisite for basic family mediation particularly that which inclined towards customary issues. This is especially so since in traditional African mediation, the elders did not have formal mediation qualifications. Mediatory authority was conferred on elders because they had a reputation in the community as persons with wisdom and integrity and because they understood the cultures and traditions of their people.[263]This rare benefit came with one outstanding benefit namely, that it was given free of charge.

4.4.2 The cost of elder mediation

In Zambia, under the court annexed mediation system, mediators do charge a reasonably minimal fee in comparison to lawyers' fees but it is a cost to the parties, nevertheless. In his paper on court annexed mediation in Zambia, Mwase proposed the securing of volunteers to provide free mediation services.[264] Mosten and Traum in proposing an elder corps service to assist the United States family court stated that as the elder population expands, these willing volunteers can offer invaluable, in-court manpower and expertise at little cost.[265] They propose that centers, redesigned and staffed by elderly volunteers, could be the way of the future.[266] Mediation in the African context has been voluntary in nature because it did not depend on professional legal services but relied on the services of lay people and common sense thinking.[267] One could argue that a reflection of the ideologies of *ubuntu* and the African philosophy of dispute resolution would entail that it be offered at very little to no cost to members of society.

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[262] Bevan, G. and Davis, G. (2002) 'The Future Public Funding of Family Dispute Resolution Services' Journal of Social Welfare and Family Law 24(2).

[263] Obarrrio Traditional Justice as the Rule of Law in Africa: An Anthropological Perspective" in Sriram C , Martin-Ortega O and Herman J (eds) *Peace Building and the Rule of Law in Africa: Just Peace*? (2011) 23-43 at 32

[264] Masuwa (n 76) 57

[265] Mosten and Traum (n 61) 776

[266] Ibid.

[267] Adenike and Ordor (n 17) 161

4.4.3 TDRMs and elder mediation

Adenike and Ordor cite Roberts and Palmer who state that some elements which make traditional justice systems (including the use TDRMs) the preferred option include: their informality; the lack of reliance on professional legal services; the use non-professional people and an emphasis on practical issues rather than procedural details.[268] These are contrasted with the ideals of formal court processes, which include "independent and technically correct decisions, expert professional skill, impartial judges, fair procedures and the observance of due process."[269]In the African context, procedures are flexible, and both combined and separate sessions with the parties in conflict are used.[270] Further, African-style mediation emphasises collaboration and problem-solving as well as "the essential unity of humanity".[271] Because of its focus on social cohesion it provides a value system that facilitates forgiveness. African-style mediation therefore, places great importance on the maintenance of social harmony and emphasises the mending of relationships and reconciliation of groups.[272]It can be argued that the practice of family law could benefit from such an approach and the underlying philosophy of *ubuntu*.

4.4.4 Elder mediation: A human touch for the emotional needs of families in conflict

Where no other similar source exists, divorcing parents and their children can utilise the support of elderly people who can offer their capacity, life experience, and compassion.[273] After a divorce, maintaining contact through the children may prolong and intensify pain and[274] although, mediation cannot resolve the profound loss and grief of separation, a mediator needs to be aware of people's pain.[275] It can be argued

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[268] Ibid at 161
[269] Ibid.
[270] Mugeni Siwale Mulenga, Senior Fellow-Zambia, Weinstein International Foundation available at *https://weinsteininternational.org/zambia/zambia-bio/*
[271] Murithi 'Practical peacemaking wisdom from Africa: Reflections on Ubuntu' 2006 JPAS 25-52.
[272] Amanda Elizabeth Boniface, Family Mediation in South Africa: Developments and Recommendations, 78 THRHR 397 (2015).
[273] Mosten (n 47) 776
[274] L. Parkinson, Family Mediation. (London: 1997)
[275] Ibid.

that it is the humanity that the concept of *ubuntu* espouses that families in conflict are in desperate need of. Because couples undergoing divorce are at very different stages of emotional and psychological adjustment, mediators need to be able to adapt their approach and pace, responding to different reactions to conflict and the different stages each partner may be at in their emotional and psychological divorce.[276]One could argue that more than just professional training a personal understanding through experience or observation of these stages could be beneficial to the process. The ability to adapt and assess parties in conflict is often gleaned over time and the elderly have most likely endured similar crises of their own or provided support to persons going through such struggles during their lifetime. The elderly in our communities may be best placed to understand and meet these needs. Mosten and Traum make the argument about the elderly in general as, wanting to continue to engage with their communities beyond assisting their immediate families.[277]They postulate that the (elderly) community should be just as responsible for helping the parents and children of divorce as they were for helping members of intact traditional families.[278] The argument can be made that they are needed even more by families in conflict.

4.4.5 The Limitations of TDRMs: The need for balance and a human rights perspective

Ghebretekle argues that the emerging recognition of traditional institutions[279]should not deter us from the analysis and consideration of their limitations. One of the glaring limitations is violation of human rights. He cites Fiseha who notes that they (TDRMs] are "male dominated and women are largely excluded from the process…"[280] The discrimination against women[281] is a glaring weakness of TDRMs that cannot be ignored. The following chapter proposes one possible solution to this challenge in the form of co-mediation of men and women. However, once the limitations of TDRMs have been rectified, traditional legal institutions can continue to play a role in dispute resolution. A further safeguard within the Constitution of Zambia is that TDRMs must only be practiced in the context of the rights upheld by

[276] Parkinson, L. Family Mediation in Practice 'A Happy Concatenation'. In J.M. Wescott, (ed). Family Mediation: Past, Present and Future (2004) 33
[277] Mosten and Traum (n 61) 780
[278] Ibid.
[279] Ghebretekle (n 240) 38
[280] Ibid at 38
[281] Adenike and Ordor (n 27) 163

the Constitution of Zambia and they must not be repugnant to natural justice.[282] It follows therefore that where the practice of TDRMs results in the discrimination of women, any result of such a process would inevitably be unconstitutional.

4.5 CONCLUSION

The recognition of the use of traditional dispute resolution mechanisms as a form of alternative dispute resolution and as a guide for the exercise of judicial authority is a first step in recognising the significant role that TDRMs can play in our legal system. It also represents the opportunity to develop a hybrid legal system which reflects the traditional values and practices that have for many years maintained social harmony in African societies. Of greatest importance is the re-envisioning of the role of "elderly mediation" as a link between the past and the present and an opportunity to retain aspects of traditions that are beneficial for families in conflict. Formulating systems that include aspects of traditional dispute resolution would create a legal system that is reflective not only of Zambia's colonial history through its inherited laws but also the rich cultural practices that maintain social harmony. A focus on synergy, particularly on what each system could contribute to the positive advancement of the other should be aim of integrating the two. Further, the fact that increases in urban population are likely to place further pressure on an already strained legal system, it is necessary, now more than ever, to rethink the concept of what an authentic Zambian judicial system should look like. The interplay of the dual legal systems that could with careful strategy and policy be amalgamated into one efficient legal system must come to the forefront of legal reform in Zambia. The elderly as respected members of society in the African context can be envisioned as having great potential to play a key role in a court-annexed family mediation model through the use of TDRMs. However, there will be need for safeguards to ensure that the inherent weaknesses of the practice of TDRMs do not introduce unintended injustices for certain members of the family. With regard to the overall resolution of family disputes, a family law system that focuses on mediation first rather than adjudication would be a revolutionary step forward. Mediation practiced in accordance with African systems and values would also represent a leap towards a recapturing of the essence of a truly African approach to family conflict.

[282] Article 118 of the Constitution of Zambia

CHAPTER 5

5.0. CONSIDERATIONS, PROPOSALS AND CONCLUSIONS: MEDIATION IN A FAMILY COURT MODEL

This study considers what type of family dispute resolution model would be suitable for Zambia in light of the changes to the law regarding the creation of a Family Court. It further took into account the introduction of mandatory family mediation and the constitutional recognition of TDRMs. The study sought to assess a model that could fit each of these changes into one comprehensive system. The model in this chapter proposes mediation as having the ability to create a link between two separate legal systems. It is hoped that a mediation model which provides for the use of TDRMs will allow for the resolution of family disputes that border on customary law issues while at the same time dealing with the emotive aspects of family conflict that are governed by statutory law as is inherent in the divorce procedure.

The study has outlined the development of mediation in Zambia, its current state and the prospects for family mediation including challenges of institutional support which include financial support and policy framework. In seeking to consider best practices of family court models it highlighted the New Zealand family court model which imbeds mediation into the structure of the family court model in a way that no other court has done. It then considered the unique social and legal context of Zambia as a country with a dual legal system which is reflected in a blend of customary and statutory law in the day-to-day practices of society. It draws the conclusion that it is the elements of customary law that the statutory law largely ignores that makes it inadequate for the full resolution of dispute. The paper then considers whether the recognition of TDRMs now sets the stage for a fusion of customary practices into the court system. It seeks to draw attention to the elevation of elder mediation in African traditional dispute resolution and explores its relevance to modern-day family mediation.

This chapter now seeks to draw all these perspectives into one tentative proposal of what mediation in the Zambian Family Court could encompass. The model borrows some of its underlying structure from the 1980 New Zealand Family Court of which it has been stated "*provided a reminder that it may not be enough to be developing a clearer a philosophy for intervening in the lives of families in distress, without an imaginative re-appraisal of the institutional context in which mediation was intended to operate*."[283]In the same vein this model seeks to envisage a complete re-appraisal of the institutional context of mediation. Rather than view mediation as part of the dispute resolution process, it seeks to anchor a Family Court model on the use of mediation in two stages of the court process.

Erasmus stated that in common law jurisdictions, it is today generally recognised that policy decisions for the improvement of civil justice should be underpinned by careful research and analysis, based on sound empirical data. He refers to Black, who has said the following in this regard, "*procedural reforms achieve nothing if they are simply conjured out of thin air (or out of the — perhaps atypical — experiences and prejudices of particular judges and practitioners"*.[284]

5.1 PROPOSED PILOT PROJECT IN A RECOMMENDED PROCESS OF FAMILY DISPUTE RESOLUTION FOR THE ZAMBIAN FAMILY COURT MODEL

Robert Mnookin and Lewis Kornhauser refer to "a different way of perceiving the role of the law at the dissolution of a marriage.[285]They state that: "*We see the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their post-dissolution rights and responsibilities.*"[286]

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[283] Ibid. 58
[284] Erasmus HJ 'Forum: Rules Board' 1999 12 *Consultus* 29 accessed at http://www.sabar.co.za/law-journals/1999/march/1999-march-vol012-no1-pp29-30.pdf on 19 October 2019.
[285] BC Justice Review Task Force *Family Justice Reform Working Group* 2002-2007 with reference to Mnookin R & Kornhauser L "Bargaining in the Shadow of the Law: A Case of Divorce" 1979 88 *Yale Law Journal* 950 available at http://www.bcjusticereview.org/working_groups_family_justice/ accessed on 3 September 2019.
[286] Ibid.

The current state of the law in Zambia does not envisage a referral to mediation prior to a hearing by a judge. This model however proposes that mediation be the first point of contact in any case and a court appearance be the last resort. What this means is that that mediation should be the first resort in any case of marital breakdown unless it is found to be inappropriate.[287]This study proposes a court-annexed pilot project which follows the stages outlined below:

5.1.1 Sieving Procedure by Family Registrar

This entails the requirement for a sieving procedure to ensure that all cases referred to mediation are assessed to ensure that it is the appropriate process for the matter before it. The author proposes that that role of the Registrar of the Family Court be expanded to include the following: First, a sieving procedure to assess the appropriate dispute resolution process for family applications filed into the registry. Secondly, a mediation role for matters involving issues encompassed by S.I No. 72 of 2018. It is proposed that within 14 days of the filing of any process into the family registry the Registrar should assign a matter either to mediation or litigation. It is proposed that all matters affecting children be referred for mediation, unless an exception is applicable.

Specific factors to be considered by a Family Registrar during this stage would include:

- Whether the parties are represented or not: This would entail a choice of the type of mediation, discussed under Part 5.2 below.
- The specific grounds for dissolution and mode by which the parties commence proceedings. For instance divorce occasioned by the mutual consent of the parties may not pose a risk for acrimonious proceedings and may not require mediation,
- Whether there are children of the family: In order to give effect to the Matrimonial Causes Act[288] requirements for proper arrangements for children and the requirements for mandatory family mediation, all issues of custody, maintenance and property settlement should ordinarily be referred to mediation.
- Whether there is unequal bargaining power between the parties or a history of violence between the parties which makes mediation inappropriate. [289] In Australia,[290] for instance, a list of factors to assess whether a matter is suitable for mediation include: 'the degree of equality (or otherwise) bargaining power of the parties, the risk

[287] De Jong (n 246) 526
[288] Section 71(1)(b) of the Matrimonial Causes Act No. 20 of 2007.
[289] Australian Law Reform Commission *Equality Before the Law: Women's Access to the Legal System Report no 67* AGPS Canberra (1994).
[290] Order 25A of the Australian Family Court Rules

of child abuse if any, the risk of family violence, the emotional and psychological state of the parties, such as whether one of the parties may use the process to gain delay'[291].

- The financial status of the parties would determine what mode of mediation would be best suited under Clause 5.2 below.
- The ethnicity of the parties involved. It is unlikely that non-African litigants would be interested in mediation that includes aspects of traditional dispute resolution for instance and these could therefore go straight to the normal court process or a different mode of mediation.
- Where there are very complicated legal issues and the parties are in very strong disagreement about issues such as property settlement, maintenance, among others.[292]

5.1.2 Pre-Mediation Conference

Whereas in countries such as England, a process of reflection and reconciliation takes at least nine months to serve as a cooling off period before the divorce process can begin,[293]it is proposed that the objectives of the period of reflection and consideration be applied to a pre-mediation conference instead. At such a conference the mediator would then assess the parties' readiness for mediation and any possibility of reconciliation. If the mediator considers that a cooling off period would assist the parties or give one party the opportunity to come to terms with the situation, then a cooling off period of three to six months could be introduced before the actual mediation process begins.

In the Zambian context the pre-mediation conference can also be used in assessing to what extent the involvement of the extended family would affect the proceedings. At this stage the mediator may ask questions regarding whether there has been a repayment of *lobola* or any steps taken to dissolve the marriage under customary law. It would also give the mediator opportunity to assess whether other members of the family ought to be included in the mediation process.

5.1.3 Mediation Hearing

It is proposed that three types of mediation be employed on a sliding scale to cater for the different economic situations of parties. The first category of mediation it is

[291] Order 25A of the Australian Family Court Rules
[292] De Jong (n 246) at 522
[293] Section 7(3) of the Family Law Act 1996

proposed should be conducted by family dispute resolution practitioners who have the competence to utilise TDRMs. In order to cover the aspects of customary practices, it is proposed that an elderly member of the community who is a trained mediator but also well versed in the nuances of customary law aspects fulfil this role under the supervision of the court in that the final agreement must be reviewed by the court. This form of mediation would include the use of both conventional mediation mechanisms and traditional dispute resolution mechanisms. It would be best suited to address aspects of customary law that have been merged into a statutory marriage and which are likely to have a bearing on issues ancillary to divorce. This type of mediation could be handled by one mediator or two where the parties have concerns regarding the gender of the mediator and would prefer a female and male mediator.[294] At this stage of mediation, a more facilitative, conciliatory role could be played by the mediator with a view to re-establish communication lines and social harmony. It is proposed that this type of mediation would be offered at little to no cost. (Clause 5.2 of this Chapter discusses this in further detail). This mediation would be best suited for family disputes that do not contain complex legal issues.

The second category of mediation would be a maintenance of the current type of mediation offered by the courts at a reasonable fee. However, a variation to this model could include the option to use the services of two mediators[295] one who charges the normal rate and one who offers their service at no cost, where a co-mediation model would be appropriate.

The third category of mediation it is proposed is one that would entail a multi-disciplinary and more comprehensive approach and would be modeled in a manner as those in more developed countries involving the services of social workers, psychiatrists[296] and counselors alongside mediators and where necessary mediators from the first category with competence to handle issues of a customary nature. Integrating therapeutic and interdisciplinary approaches within the family law system can have a major impact on the wellbeing of families in conflict and society in general.[297]

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[294] Austria uses a mandatory co-mediation model. One mediator has a psycho-social background with the other having a basic legal training. If co-mediation is departed from in any instance, authorisation from the ministry is required. Usually the co-mediation team must also comprise a man and a woman.

[295] co-mediation model allows for the perception of objectivity and impartiality as well as diverse backgrounds and experiences

[296] The South African Law Reform Commission Issue Paper 31 (December 2015) Project 100D Family Dispute Resolution: Care of and Contact with Children at p. 232.

[297] Ibid.

5.1.4 Judge-Led Mediation Conference

The idea of a judge-led mediation conference is not the preserve of the New Zealand family court. In England, in financial remedy proceedings following divorce, the court will hold a Financial Dispute Resolution Appointment (FDR) at which a judge will assist the parties to reach a compromise by providing an indication of the likely outcome if the matter proceeded to a hearing.[298] Further, in private law children cases, the court holds a First Hearing and Dispute Resolution Appointment, at which the court explores the issues between the parties and the possibility of an agreed resolution of those issues.[299] Therefore in England as well as in New Zealand, even though a matter is scheduled to proceed to trial, the court still seeks at any stage to encourage resolution by agreement.[300] Closer to home, Malalwi has been practicing judicial mediation for at least a decade in commercial matters.[301] If judicial mediation has been found to be beneficial for commercial matters, it can be argued that its application to family disputes would be useful.

It is proposed that all Family Court judges prior to their appointment receive training in mediation in order to equip them play the role of a judicial mediation in family disputes. In this stage of the process, it is desirable that non-legal issues would have been resolved at the previous and only highly contentious and complex would be proceed to this stage. Although judge-led mediation has come under criticisms by cross sections of society it has proven to be useful in New Zealand in 2003 the Law Commission had recommended its removal, it has continued to prove useful.[302]

5.1.5 Litigation

As earlier stated the Family Court, as a division of the High Court in its current form conducts an adversarial approach to family matters which approach is disadvantageous to families. New Zealand's Family Court system favours a more

[298] Ibid at 16.
[299] Ibid.
[300] The Judiciary of Zambia Report of the Family Division Study Tour 2017
[301] Frank Kapanda A Critical Evaluation if Judicial Mediation in Malawi (Unpublished LL.M thesis, University of Cape Town, 2013) 14
[302] Boshier et al (n 152) 822.

inquisitorial style of justice and this is supported by the view that for as long as family law processes continue to be conducted under the adversarial system, lawyers and litigants will exert more control over case-flow management than judges,[303]this is unfortunate because some litigants are simply stuck in the cycle of conflict and are genuinely unable to find an easy pathway out.[304] The general view that carries substantial support of jurists in that country is that of judges must endowed with the liberty to deviate from a strict adherence to the adversarial model and be more proactive.[305]It is proposed that Zambia also adopts a more inquisitorial approach to family disputes and a more active role for family judges in managing the process.

5.1.6 Supervisory role of Family Court

It is proposed that all agreements reached in the mediation process must be submitted to the courts for final revision and approval. As stated earlier in this study, Zambia has adopted a court-annexed model of mediation whose final outcome is binding. This would place mediators in an extremely powerful position. As a safeguard, the overall supervision of mediation agreements by the Family Courts would ensure that the mediator's influence is used in a prudent manner. The courts should, however, not use this supervisory power in an unwarranted manner. There must be valid reasons for interference with agreements reached in the mediation process, particularly where the issues in dispute are not entirely of a legal nature. This power of the courts must ultimately be used when an agreement is not in the best interests of any children involved or where the interests of one of the parties are seriously disadvantaged by such an agreement. In other instances the court may simply use its supervisory should the courts have the authority to rectify this agreement or recommend particular amendments to it.

5.2 A SLIDING SCALE MEDIATION MODEL

In order for mediation to meet the needs of various cross sections of society, this paper proposes that three categories of mediation be offered on a sliding scale. The rationale in this proposal is that mediation services should be available to parties at different costs. The idea of a sliding scale for payment of mediator fees based on the litigant's ability to pay and secondly the securing of volunteers to provide free

[303] Ibid.
[304] Ibid at 822.
[305] Ibid.

mediation services[306]are not new ideas.[307] While some suggest pro bono dispute resolution services, it is acknowledged that a rethinking of fee structures must be addressed in order to allow dispute resolution services to be provided to all parties across the board in a sliding-scale model.[308] The types of mediation to be offered therefore include:

Category 1 envisions a little to no cost form of mediation which utilizes the services of an elderly mediator who gives their services on a voluntary basis. This type of mediation would also be suited to unemployed parties or a situation where one party is unemployed and paying a portion of the mediation fee would be an added burden where the issues in question concern scarce resources of failure to maintain. In the same way that these parties are able to secure an appearance before a judge unrepresented, the same should apply to their access to mediation.

Category 2 is already in existence and represents the current model. Under this model the parties pay a nominal fee of K500 which is shared between the parties and the matter is heard by a court-annexed mediator. This category would cater for middle income parties.

Category 3 This model would obviously cost more. However, it could also cater to represented parties and those with the means to access the services of additional professionals that will assist the parties undergo the difficult period of family conflict. The current economic challenges faced by the country entail that the state may not be in a position to extend funding for this category to those who cannot afford it over the next five years or more, as is currently in existence under the legal aid services. However, it is proposed that in the future the state does consider providing funding for unrepresented litigants to access category 3 services as well.

5.3 CONCLUDING PROPOSALS:

In concluding, a few other issues require mention. First, that there can be no direction for the development of a Family Court system without legislation to inform the purpose of the court and as its guiding principles. It is therefore in the best interests of all stakeholders that a Family Court Act be enacted to guide the operation of this court at the earliest convenience.

[306] Masuwa (n 76) 57
[307] Boniface(n 34) 405.
[308] Boyarin (n 66) 993

5.3.1 The purpose of the Family Court and Guiding Principles

The first step in formulating a Zambian family court system would be to create underlying principles or philosophies upon which the entire system can rest. The South African Law Commission in its report on family dispute resolution stated that, 'in sum, the failure to manage divorce effectively is due to the fact there is 'no coherent vision of State and family -nor is such a vision being sought'.[309] The same challenge exists in Zambia. However, various jurisdictions around the world have promulgated family legislation which espouses guiding principles for how the courts are to administer family matters. The Malawian Divorce and Family Relations Act of 2015 provides in its general principles to include: the protection of the institution of marriage;[310] the requirement for parties to a marriage to take all practical steps, whether by counselling or otherwise, to save the marriage.[311]The guiding principles further provide for a marriage which has broken down and is being dissolved as follows: first that the marriage be brought to an end with minimal distress to the parties and to any affected children[312]; secondly, that questions be dealt with in a manner designed to promote as good a continuing relationship between the parties and any children affected as far as is possible in the circumstances;[313] thirdly, that no unreasonable costs be incurred in bringing the marriage to an end[314]; and that any risk of violence be removed and diminished.[315]These guiding principles mirror the English Family Law Act of 1996.[316]

Proposals for Matters to be included in Guiding Principles

The elements to be incorporated into Zambia's Family Court guiding principles could be borrowed from the Malawian and English Family Act and address the following aspects:

- The status of the family in the Zambian context

[309] Clause 1.5.19 of the South African Law Reform Commission Issue Paper 31 (December 2015) Project 100D Family Dispute Resolution: Care of and Contact with Children at 20
[310] Section 59(1)(a) of the Divorce and Family Relations Act No. 4 of 2015.
[311] Section 59(1)(b) of the Divorce and Family Relations Act No. 4 of 2015.
[312] Section 59(1)(c)(i) of the Divorce and Family Relations Act No. 4 of 2015.
[313] Section 59(1)(c)(ii) of Divorce and Family Relations Act No. 4 of 2015.
[314] Section 59(1)(c)(iii) of the Divorce and Family Relations Act No. 4 of 2015.
[315] Section 59(1)(d0 of the Divorce and Family Relations Act No. 4 of 2015.
[316] Section 1 of the Family Law Act, 1996.

- The attitude of the courts towards the family, its support, and where dissolution is imminent, the manner and environment in which it must be carried out.
- The court's attitude towards the maintenance of relationships, encouragement of parental involvement, co-parenting, and joint responsibility in the best interests of the child
- The role of dispute resolution in achieving these aims including the use of traditional dispute resolution.
- The recognition of customary practices and traditions that have an impact on the statutory dissolution of a marriage, including the recognition of the strong influence of the extended family.
- The encouragement of amicable settlements of future disputes by way of mediation or other appropriate ADR mechanisms
- The acknowledgement of the variations of family contexts and the use of mediation for blended family arrangements and unmarried parents.

5.3.2 A mediation centred system in a jurisdiction that does not favour no-fault divorce. Is it plausible?

One important factor to note is that, the ease of mediation in the process of marital breakdown in countries like New Zealand[317]or South Africa[318] among others, is enhanced by their no-fault divorce systems. Zambia however, requires the irretrievable breakdown of a marriage to be proved by any of five grounds,[319] four of which are adversarial in nature. Of these five grounds, only two grounds do not rely on fault but a period of separation with consent[320] or five year separation. This is the closest to a no-fault procedure. The Zambian legal system also allows for the use of the special procedure list under the conditions set out in the English 1973 Matrimonial Causes Rules. This procedure facilitates a divorce without the requirement for a contested hearing. England, whose legal system Zambia's is largely modelled after, recently produced the Divorce, Dissolution and Separation Bill[321] whose purpose is to usher in a no-fault divorce

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[317] Megan Cook, 'Divorce and separation - No-fault divorce: 1980–21st century', Te Ara - the Encyclopedia of New Zealand, http://www.TeAra.govt.nz/en/divorce-and-separation/page-3 (accessed 9 December 2019)
[318] Section 4 of the Divorce Act 70 of 1979
[319] Section 9(1)(a) to (e) of the Matrimonial Causes Act No. 20 of 2007
[320] Section 9(1)(d) of the Matrimonial Causes Act No. 20 of 2007
[321] The Divorce, Dissolution and Separation Bill (HL) 2019 available https://services.parliament.uk/bills/2019-19/divorcedissolutionandseparation.html accessed on 9 December 2019.

procedure. This bill underwent its first reading on 15th October 2019 in England.[322]This is strongly indicative of changing behaviour towards the conduct of divorce proceedings in an adversarial manner in that country. Zambia on the other hand, has not made any strides in this area and the very conservative nature of the general populace entails that prospects of any change of the law in this area are unlikely for the near future. In the meantime however, this paper proposes two changes that could aid the divorce process as follows: where the irretrievable breakdown of a marriage can be proved by way of customary law, then

- *The recognition and elevation of proof of irretrievable breakdown under customary law as ground for divorce*. In Zambia, for instance, the return of *lobola* (dowry) by one family and its acceptance by the other side is largely considered to result in the dissolution of a marriage. Because the majority of parties contracting a statutory would have undergone a customary marriage, the recognition and elevation as ground for divorce would serve two purposes: First, it would eliminate the need for a contested divorce and secondly, it would elevate a customary practice's recognition. One would argue that where families have accepted the irretrievable breakdown of the marriage, is there really need for the law to dispute this reality?
- *The requirement for the mediation process regarding children's arrangements to fall within a two year separation period and not after*. This proposal would then give effect to Section 71 of the Matrimonial Causes Act which provides that a court shall not grant an absolute decree of divorce unless it is satisfied that arrangements for the children have been made. It is proposed that since a period of two years is rather long, part of this waiting period pending the dissolution of the marriage should be utilised to secure the welfare of the children of the family. In this regard, the mediation process should then be made open to couples with children who are on separation.

5.3.3 Elderly mediation 'in the shadow of the Law'

Since the main role of a mediator is to help facilitate settlement discussions, some have argued, that there is no need for substantive knowledge of the areas in which they mediate, including the law.[323] However, that generally held belief has been questioned in the family law field. Some have observed that family disputes are perhaps unique because

[322] Ibid.
[323] Nancy J. Foster & Joan B. Kelly 'Divorce Mediation: Who Should Be Certified?' 30 U.S.F. L. REV. 665, 666 (1996).

divorce mediations require mediators to address legal issues.[324] As one commentator noted, the issues that must be resolved in a divorce mediation inevitably involve legal questions. The discussions over these issues and agreements reached in divorce mediations are guided by the law and end with a final decree in the court to finalize the divorce. Accordingly, legal institutions remain at the center of the family law system.[325] As Mnookin and Kornhauser observed, parties in a divorce case do not bargain over finances and custody "in a vacuum"; rather, "they bargain in the shadow of the law.[326]With the proposal for elderly mediation and the inclusion of TDRMs outside of the statutory legal framework, how is the balance to ensure the law is upheld not compromised?

The answer is not clear cut. Different countries have different policies and legislation on who should be allowed to mediate in family law matters. In some countries an inclusive approach is taken, where any person with family law experience can mediate. In other countries, which support the co-mediation model, at least one mediator must be a lawyer and the other a mental health professional.[327] The South African Law Commission, for instance, espoused the view having such a diverse population, with different cultural, religious, racial and customary backgrounds, it was necessary that the net of who should be allowed to mediate be cast wide enough to ensure that the interests of all people and children are protected.[328] It is a matter for concern for a non-lawyer mediator to be involved in the application of the law to a specific set of facts and drafting documents that can have a legally binding effect,[329] this is especially true of Zambia where mediation settlements are recognized as legally binding. This chapter has outlined several processes of how the family court system can be run, which may act as safeguards these include: First, an initial sieving procedure by the Registrar of the Family Court to verify which matters are suitable for category 1 mediation with a non-lawyer mediator having with

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[324] Ibid.

[325] Salem, P 'Improving Our Family Courts and Services: A Call for Interdisciplinary Collaboration' UNIFIED FAM. CT. CONNECTION, Winter 2011, at 7.

[326] Robert H. Mnookin & Lewis Kornhauser 'Bargaining in the Shadow of the Law: The Case of Divorce' 88 YALE L.J. 950 (1979).

[327] Clause 3.8.69 of the South African Law Reform Commission Issue Paper 31 (December 2015) Project 100D Family Dispute Resolution: Care of and Contact with Children at 178.

[328] Ibid at 228.

[329] Debra Berman and James Alfini 'Lawyer Colonization of Family Mediation: Consequences and Implications' 95 MARQ. L. REV. 887 (2012) at 893

experience in TDRMs. Secondly, the possibility of co-mediation which entails the ability to share expertise between mediators by combining different specialties for the benefit of the parties. Thirdly, the overall supervision of the outcomes of mediation by the Family Court will ensure that mediation agreements involving legal issues are checked to ensure that they conform with the law. Perhaps, a fourth proposal to this would be the opportunity at either pre-mediation stage or during the time of hearing to refer a matter to the Registrar of the Family Court who should also be a trained mediator to handle any legal matters that may arise.

6.0 CONCLUSION

In conclusion, the changes to the law since the year 2016 have created great opportunities for the development of family law and mediation in Zambia. The process and model proposed in this study has attempted to envision what mediation in general and particularly mediation in an African context could look like in the Family Court. It is imperative that all the significant changes to the law that affect family matters must be incorporated into one comprehensive family law system. This comprehensive system must be both cost-effective and acceptable to the majority of the citizenry whose customs and practices are not fully resolved by the formal court system. A family mediation practice that reflects the heritage, values ad culture of all Zambians ushers in the possibility for mediation being a means to unify two separate systems of law.

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