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ORIGINAL ARTICLE

# Labour alternative dispute resolution modes in Zimbabwe

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## Abstract

The study looks at the defining features of various labour dispute resolution modes and their appropriateness in Zimbabwe. Researchers used a qualitative approach to collect and analyse data, drawing on a purposive sampling method to select and distribute open-ended questionnaires to 38 participants. The study established that the alternative dispute resolution (ADR) modes used in Zimbabwe are collective bargaining, conciliation, and arbitration, all formalised and regulated by the *Labour Act (2015)*. Nevertheless, these ADR mechanisms have numerous flaws including, that they are not 'culturally' close to citizens, and as a result, access to justice is still a challenge, they are also expensive and cannot be easily understood by ordinary employees. Accordingly, the study recommends that the government amend the *Labour Act (2015)* to return to the old conciliation and arbitration system which was decentralised to the districts. When making the amendments to the *Labour Act*, the government should also consult with general employees and employers, because they are the victims of the current system. Furthermore, workers' committees and trade unions should also be empowered to support and educate employees.

**Keywords:** alternative dispute resolution; arbitration; conciliation; collective bargaining; negotiation; Zimbabwe

**JEL Codes:** J50; J52; K31

## Introduction

Alternative dispute resolution (ADR) can be defined as a range of procedures that serve as an alternative to litigation, in business and labour matters (Matsikidze 2013). Shonk (2022) remarks that ADR is a process in which a neutral third party helps parties in a dispute to come to an agreement. ADR involves both the assistance of this neutral third party and the informality of proceedings in dispute resolution. Thus, key aspects of ADR include that it is a process, that it is informal, and that it may involve a neutral third party.

In pre-colonial Zimbabwe, disputes were resolved through four main methods, namely wars, chief's courts, family, and religious platforms (Matsikidze, 2013). In the 1930s, the *Industrial Conciliation Act* (1934) was promulgated and brought exclusive resolution to labour disputes. After independence, dispute resolution relied upon the *Labour Relations Act* (1985) and its various amendments and regulations. The *Labour Relations Act (LRA)* was amended in 1992 to fit the government's Economic Structural Adjustment Program (ESAP)

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which had been implemented in 1990. It is notable that the ESAP was effectively an anti-labour initiative. For example, in one industry, splinter unions were permitted which effectively weakened the unions overall. Moreover, workers' committees were introduced, weakening the trade unions' involvement at the enterprise level, and sectoral bargaining in National Employment Councils (NECs) was introduced, streamlining the disciplinary procedure by introducing an employer-controlled code of conduct (Mucheche, 2019). When the LRA was amended in 2002 to become the *Labour Act (2002)* (Chapter 28:01), the dispute resolution system was amended as well. Noteworthy is the fact that Labour Officers' territorial dominion was reduced to conciliation of disputes, whereas before the amendment, Labour Officers were empowered to issue determinations. Eventually, the amendment established a new system of ADR involving the use of arbitrators in cases where labour officers or designated agents were unable to reach an agreement at the conciliation level (Matireyi & Duve 2011). Furthermore, the 2002 Act abolished the Labour Relations Tribunal and established the Labour Court, with no other court having the power to hear any application before the Labour Court in the first instance (Matireyi & Dube 2011).

The *Labour Act* (2015) has various dispute resolution mechanisms that include negotiation, conciliation, mediation, collective bargaining, and arbitration (Matireyi & Dube, 2011). Negotiation involves direct or indirect communication between parties with opposing interests. For example, Company A is a mining business, currently doing open-cast mining before sinking underground shafts. It claims not to be in a financial position to pay employees gazetted rates. The union, representing concerned workers, can negotiate with the responsible employer to pay half of the stipulated rate for a particular period. Similarly, conciliation is where parties to a dispute are assisted in discussing the issue with one another in the presence of a neutral third party usually referred to as a Labour Officer or Designated Agent in Zimbabwe. The parties can reach either a certificate of settlement, in which terms are specifically and unambiguously detailed, or the outcome may be no settlement. Likewise, in mediation, the parties are assisted by a neutral facilitator (can be a subject matter expert), who then gives his or her legal opinion at the end of the proceedings. This opinion is non-binding, and parties are free to disregard it.

In contrast, collective bargaining involves collective relations where employer and employee representatives negotiate for changes in wages or other working conditions. This can be done at the industry level, where the outcome is usually called a collective bargaining agreement which is registered with the Ministry of Labour to become a statutory instrument with a binding effect on both parties. Under arbitration, the arbitrator considers the parties' claims and makes a final and binding decision. The striking feature of an arbitral award, of all ADR outcomes, is that it is registrable with any court that has jurisdiction over the monetary value attached to it. Put simply, an arbitral award is enforceable in a court of law.

The Zimbabwean Legislature has enacted other laws to strengthen and encourage ADR processes. These include the *Civil Matters (Mutual Assistance) Act*) of 1995 (Chapter 8:02), allowing for the registration of foreign judgements in Zimbabwe provided that the judgement was handed down in a designated country, and the *Arbitration Act* (Chapter 7:15), enacted to give effect to domestic and international agreements while providing a more efficient means of dispute resolution through submissions and enforcement of arbitration awards. From the preceding account, it is evident that some ADR strategies feed into litigation, such as Section 93 of the *Labour Act* (2015) which says that a matter may be dealt with through conciliation, arbitration, and the Labour Court. Thus, litigation is part and parcel of ADR in Zimbabwe. In this respect, some notable benefits of ADR are flexibility, maintenance of privacy, and possible speed of resolution of disputes.

The models for resolving disputes between employers and employees have undergone significant development during the past few decades (Dukes & Streeck, 2020). This

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phenomenon has been triggered by the rapid advancement of globalisation, the expansion of the informal sector, and the resulting increase in competition for goods and services in the international market (Sigafoos & Organ, 2021). ADR is being promoted as the preferable alternative to more traditional, litigious mechanisms, which can include expensive lawyers and lengthy, complex court processes (Booysen, 2018). Many countries have realised that fostering better labour relations and raising the likelihood of industrial peace is crucial for any successful economic endeavour (Araujo et al 2020).

Southern African nations are perceived as having unequal societies that have an impact on the balance of power between disputants, with capitalists continuing to exert immense power (Bushe 2019). In this case, the relationship between employees and employers is highly unbalanced, leaving employees particularly vulnerable. Additionally, any civilisation will experience contradictions, conflicts, and disputes (Ali 2016). In terms of injustice, ADR has been criticised for creating informational inequities between employees and employers (Ali 2016). The main issue expressed about labour ADRs, in particular, is the potential for reinforcing the power disparity between the employer and the employee (Sigafoos & Organ 2021). In the same vein, Mucheche (2019) bemoans that ADR systems contain absurd mechanisms that were created more for injustice than the rule of law. Only the most obvious flaws in the law are usually noticed, and when these flaws directly affect the privileged or result in needless human deaths, the cry for reform only gets louder (Nkoane 2018). Despite widespread agreement regarding the risks of disputes, notions of what makes an efficient dispute resolution system are still highly contested (Bingham 2016).

Many studies have been conducted on labour issues in Western countries (Araujo et al 2020) and Zimbabwe. Nevertheless, research on dispute resolution modes and their appropriateness is still lagging, despite the work of scholars such as Mahapa and Watadza (2015) who investigated 'The dark side of arbitration and conciliation in Zimbabwe'. Maitireyi and Duve (2011) also conducted a study on labour arbitration effectiveness in Zimbabwe, while Ndhlovu and Ndhlovu (2022) looked at the dark side of Section 63(3b) of the *Labour Act* (2015). However, there has been virtually no research on all the dispute resolution modes and their appropriateness.

Therefore, this paper seeks to provide the defining features of various labour dispute resolution models and how Zimbabwe has embraced these ADR models. The study also looks at the appropriateness of, and challenges associated with, collective bargaining, conciliation, and arbitration. Further, the research seeks to contribute to strengthening the understanding of ADR in Zimbabwe, for the key industrial relations stakeholders, such as employers, trade unions, government, employees in general, and students. Additionally, the study offers crucial lessons for resolving disputes in other nations, particularly in Africa, where the majority of countries are looking for quick and affordable dispute resolution options. The study importantly contributes to the methodology for future research on alternative labour dispute resolution modes in Zimbabwe, both regionally and internationally while also contributing to the international literature on ADR mechanisms. Thus, this article seeks to explore alternative labour dispute resolution modes in Zimbabwe drawing on the following research questions:

1. Which ADR modes have been adopted in Zimbabwe?
2. Are these ADR modes appropriate to employers and employees in Zimbabwe?
3. Do these ADR modes make it easier for employers and employees to access justice (both substantive and procedural) or do they reinforce the link between unfair access to justice and unequal power dynamics between employees and employers?

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## Literature review

This article is anchored in Gilles Trudeau's (2002) framework for determining ADR effectiveness in terms of speed, accessibility, and knowledge. When Trudeau developed the yardsticks to determine effectiveness, he was looking at the arbitration system as one method of ADR. This paper adopts the same framework in order to assess all methods of ADR. The first criterion in the framework is speed, that is, the pace with which any system operates in dispensing justice, and a paramount feature of justice delivery and effectiveness. According to Trudeau (2002), the system of dispute resolution should not be cumbersome and should allow for the expeditious handling of disputes, especially by facilitating the dispute resolution process. The efficiency aspect of dispute resolution requires that parties should have easy access to dispute resolution systems (Sithole & Munyai 2017). Parties should also know whom to approach and how to involve dispute resolution institutions in their dispute. Further, Trudeau (2002) argued that arbitration, as a mode of alternate dispute resolution, is only accessible if parties have full knowledge of how it works, as well as how readily the facilities can be accessed. This includes knowledge of the procedures and the system in general. Trudeau also averred that accessibility refers to the ease with which disputants can resort to the process, without the complication of technical considerations and complex legal paperwork. The remainder of this discussion reviews the key themes addressed by the research questions employed in this paper.

### *ADR Modes*

Negotiation, conciliation/mediation, arbitration, and adjudication are the primary dispute resolution models employed in many countries (ILO 2021). They serve as an extremely useful barometer of the level of democracy and the rule of law in modern civilisations (Araujo et al 2020). The first three are examples of consensual dispute resolution, where parties involved in the dispute decide on a resolution with or without the assistance of outside parties (Shonk 2022). Arbitration, however, is more similar to adjudication and, thus, to jurisdictional modes of dispute resolution where a third party solves issues (Araujo et al 2020).

Negotiation (often collective bargaining in employment disputes) is a process in which the parties involved in the dispute, work to identify a solution to the problem, generally with minimal intervention of a third party (Araujo et al 2020). Nevertheless, in certain institutions, the threat of industrial action can serve as a preliminary to negotiations (Araujo et al 2020). Collective bargaining is frequently regarded as the initial step in the resolution of disputes in these systems (Shonk 2022).

Conciliation is a process where a neutral third party helps the disputing parties come to a resolution by guiding them through formal processes (Araujo et al 2020). Likewise, the process of mediation helps parties to investigate the interests underlying their stances, rather than imposing a resolution (Shonk 2022). The goal of a mediator is to assist parties in reaching a lasting, consensual, and non-binding resolution, while working with them both jointly and individually (Ampeire 2017). Mediation is seen as a quick, inexpensive, and efficient ADR method.

By contrast, arbitration is a process which can resemble a court trial **in** which **the arbitrator's** rulings **are deemed to** resolve disputes (Shonk 2022). A neutral third party**, an arbitrator,** hears the arguments from the parties, settles their differences, and then renders an award or verdict (Booysen 2018). Normally, the decision is final and binding. Arbitration can be used to resolve both rights and interest disputes (Araujo et al 2020). Similar to conciliation, arbitration submissions might be either voluntary or compulsory. The submission of interest disputes to compulsory arbitration, unless in the case of essential services, is uncommon (Dupont et al 2018).

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Since different ADR modes may result in different outcomes for different parties in a dispute, it is crucial to choose the proper mode and process (Feng & Xie 2020). The use of the ADR modes outlined above presents an opportunity to replace ineffective formal ADR mechanisms with more adaptable and accessible ways of promoting peace as part of a bigger reform initiative (Sigafoos & Organ 2021).

### Appropriateness of ADR Modes

Araujo et al (2020) assert that to assess the appropriateness of ADR in claiming labour rights and accessing labour justice, five dimensions of the variable of proximity between justice institutions and citizens should be identified: geography, costs, time, culture, and visibility. They argue that Europe, geography 'appears to be a less relevant variable by which to compare ADRs and courts' accessibility' (Aruajo et al 2020, vi). Costs and time are two dimensions of proximity in which ADRs tend to present clear cross-country advantages when compared to courts. Cultural or human proximity is an important locality dimension for the creation and development of dispute resolution forums that use common sense language and familiar routines, while at the same time being trusted by citizens, which may further reduce the distance between litigants and justice institutions.

Brown's (2021) comparative study of mediation in Spain and other European countries revealed that Greece, in particular, took a brave step forward by emulating Italy's legal changes. Secondly, Greece moved towards the institutionalising of mediation into its civil and commercial procedural systems. Mediation moved from the shadows of an alternative scheme into the mainstream by being a part of the Greek regulatory system.

Elisavet (2019) indicated that the European Union (EU) had seen significant progress in the resolution of consumer disputes in the e-commerce sector following the establishment of the Online Dispute Resolution (ODR) platform. On the other hand, the ODR platform has some definite regulatory limitations. For example, consumers are not informed by the platform when traders deny the ADR resolution of their dispute. Furthermore, it is questionable whether the ODR contact points, which notify consumers after their complaints have been disregarded, contribute to the rapid settlement of disputes. Rather it may add another level of bureaucracy to the process, since this information could be provided automatically by the ODR.

### Accessibility of ADR Modes

Bushe's (2019) comparative study of ADR in Botswana, South Africa, and Zimbabwe revealed that South Africa has made commendable steps towards making labour dispute resolution accessible to all employed persons in the country. The study found that in some respects, ADR in South Africa has achieved some milestones in becoming efficient, especially when it comes to enacting legislation that supports its adoption and use. For example, the enactment of the LRA in South Africa ushered in a new labour dispute settlement regime quite different from that in force during the apartheid era which had not recognised the rights of native Africans. South Africa installed an independent regulatory body the Commission for Conciliation and Mediation and Arbitration (CCMA) to dispense ADR in labour disputes. Access to justice and rights gives the rule of law life by allowing people to exercise their rights, whether they be private or human (Bingham 2016).

By contrast, given the Labour Administration Department's responsibility for ADR processes in Zimbabwe, it is evident that ADR has several challenges. It is almost conclusive that most matters before the courts were referred by applicants for registration to enable enforcement, and that matters before the Labour Court were brought after they had failed to be enforced directly or were mediated or arbitrated upon by the tribunal. This

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is because the *Labour Act* does not provide direct access to the Labour Court for resolving employment disputes. Only matters that have been conciliated or arbitrated upon could be referred to the Labour Court for settlement. All employment disputes must be conciliated first, except when parties agree to go to voluntary arbitration. This study identified specific cases in respect of their value in analysing the efficacy of ADR in Zimbabwe. Very few matters that went to the Labour Court had been directly allocated, but rather, were referred to as a consequence of failed conciliation or arbitration. After an arbitral award is issued, it is instructive that such an award is registered with the Magistrate or High Court of Zimbabwe. In terms of the *Labour Act* and Model Law, a submission for registration of an arbitral award ought to be lodged with either the High Court or the Magistrate Court, depending on the jurisdictional value or quantum at issue in the given matter.

The study by Bushe (2019) notes that like Zimbabwe, Botswana does not have an extant ADR system that operates independently of the executive government. Rather, ADR is administered by the Ministry of Labour and Home Affairs under the auspices of the Minister and Commissioner of Labour in Botswana and the Minister and Labour Officers in Zimbabwe, respectively.

In contrast, the Republic of South Africa (RSA) has both a legislative and political will and commitment to developing an efficacious ADR system, as demonstrated by the establishment of an independent body (CCMA) that administers ADR as a labour dispute settlement mechanism (Bushe 2019). The LRA in RSA has recognised conciliation, mediation, and arbitration as labour dispute settlement mechanisms. However, in the case of Botswana and Zimbabwe, there is no independent body that administers ADR. The *Labour Act* in Zimbabwe recognises the inevitability of ADR in the form of conciliation/mediation and arbitration as a labour dispute mechanism. Conciliation and arbitration of disputes are administered by the government through its Labour Officers or in the alternative NECs. For instance, the elements of independence and unbiased decisions are an unlikely possibility if there is a dispute between an agency of government and its employees. This becomes a troublesome challenge, especially when the adjudicator of such a dispute is also a government employee from a sister ministry who may ordinarily be careful not to rule against his or her employer; as the saying goes 'he has to remember where his bread is buttered' or 'not to bite the hand that feeds him'. Sithole and Munyai (2017) also revealed that in terms of speed, the Labour Court has been faced with a backlog of cases. In terms of access, the Labour Court is accessible to all parties and is effective in handling workplace cases.

The common thread running throughout this previous research is that ADR mechanisms have been implemented by different governments worldwide. Nevertheless, in many countries, there is still a lack of water-tight laws and regulations which would ensure speedy and unbiased resolution of disputes. It is against this backdrop that we explore this field, replete with implementation challenges and bureaucracy, seeking to bring new knowledge to pique the interest of lawmakers and management leaders towards promulgating sustainable ADR laws.

## Methodology

The researchers utilised a qualitative research strategy and the interpretivism philosophy. Qualitative techniques can aid researchers in comprehending complex relationships, which is important when it comes to understanding dispute resolution system modes. When analysing these ADR mechanisms, qualitative methodologies can help researchers better grasp complex interactions. Qualitative research focuses on the views, experiences, and ways that individuals make meaning of their life (Creswell 2014). Therefore, understanding numerous realities rather than just one is important (Busetto et al 2020).

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Qualitative research concentrates on both the process taking place and the final result. Understanding how ADR modes work and their appropriateness was of considerable interest to the researchers. The research strategy and associated philosophy have empirical support from published past scholarly work (Bushe 2019; Elisavet 2019; Garbagnati 2018; Sithole & Munyai 2017).

The purposive sampling method was utilised to select 38 participants. A purposive sample's primary goal is to produce a sample that may be taken as a representative sample of the population. The basic objective of purposive sampling is to focus on particular traits of a population that are significant to the researcher to effectively respond to the research questions (Creswell 2014). Purposive sampling is a non-probability sampling approach in which a researcher chooses people with expertise, skills, and knowledge pertinent to a certain area or topic to be investigated (Busetto et al 2020). It was impossible to discuss the value of ADR without taking the voices of those who would be directly affected into consideration. The purpose of this study was to gather knowledge from significant and experienced players who provided various viewpoints on their experience of current modes of ADR. Moreover, the researchers were keen to interview participants who were not only knowledgeable but were also involved in the dispute resolution processes and litigation.

Open-ended questionnaires were sent to the 38 participants who comprised 4 labour officers, 4 designated agents, 8 trade unionists, 8 employees, 8 human resource officials (employers), and 6 legal practitioners. Unionists, employees, and employers were drawn from eight different sectors, that is, engineering, construction, commerce, catering, mining, private security, motor, and food industry. All the participants were drawn from two provinces of Zimbabwe, Harare and Midlands. Drawing on open-ended questions (Creswell 2014), the researchers sought data that delved into the opinions, experiences, and reflections of participants so that researchers could elicit information on ADR modes. Questions in the questionnaire were derived from the main research questions. The following were the main questions:

1. Which ADR modes have been adopted in Zimbabwe?
2. Are these ADR modes appropriate in Zimbabwe?
3. Do these ADR modes make it easier to access justice?

This research also considered a range of ethical factors. Firstly, participation in the research was voluntary, and research participants had the right to withdraw at any time of their choosing. Participants were thoroughly informed before the research commenced, and they were properly treated throughout the research process. Moreover, research participants were provided with consent forms before the research and signed as evidence that their participation in the study was voluntary and not coerced (Pandey & Pandey 2015). Furthermore, the identity of the research participants was kept private and confidential. Interviews were conducted with the approval of the host institutions. The researchers sought to maintain objectivity and present the true research findings.

To obtain each participant's experience, researchers used a deductive thematic analysis approach (Noel 2019). Drawing from scholarly advice (Delve et al 2023) deductive coding following a top-down approach was used. As a result, research questions were used to group the primary data to look for similarities and differences. This approach was used, since time and resources during the study were limited.

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## Findings

The research revealed that Zimbabwe adopted some ADR modes, conciliation and arbitration, in 2003 through the amendment of the *Labour Act*. However, collective bargaining had come into effect in 1985 and was seen as effective because of the one union-one industry policy. Thus, ADR in Zimbabwe has been formalised and regulated by the Labour Act. As a trade unionist explained,

> *The Zimbabwe ADR system comprises collective bargaining adopted in 1985; conciliation and arbitration adopted in 2003; and then we have a formal system, the Labour Court established in 2003. (Trade Unionist)*

The findings concur with international literature that ADR modes (negotiation, conciliation, and arbitration) have been adopted in various countries. Specifically, Araujo et al (2020) assert that there is a lot of variability within the ADR movement, as ADR modes may either follow judicially endorsed models or be independent. This bolsters the argument made by Shonk (2022) that the notion of conciliation, mediation, and arbitration as ADR processes is no longer the case because when it comes to resolving disputes, these processes and their variations have become as prevalent in many societies as litigation.

The research revealed that employees in general have little knowledge of ADR modes. The situation was worsened by the 2015 amendment to the Labour Law which compels labour officers/designated agents to issue draft rulings for disputes of rights, which in turn are then subject to confirmation by the Labour Court. Ordinary employees do not understand this. In other words, the changes have complicated the whole system and employees no longer trust the current system. One employee said,

> *I have been working for 14 years and have never been to a labour court. Cases were referred from conciliation to an arbitrator, with enforcement taking place in a Magistrate Court. (Employee)*

These findings are contrary to the assertion made by Araujo et al (2020) that ADR has recently garnered broad acceptability among the public and the legal profession. Whereas justice seekers must have faith in ADR and the courts and feel they will receive justice from them to avoid acting on their own to enforce the law (Ali 2016), this indicates that the ADR is not assisting impoverished employees.

### *Negotiation/collective bargaining*

All the participants revealed that in Zimbabwe, negotiation or collective bargaining is held at the plant level (works council) and the sector/industry level (national employment council). At the plant level, trade unions do not play a major role in negotiations. Rather employees elect workers' committee members who will represent them in the works council (Section 24 of the Labour Act). As provided for in Section 25A of the Labour Act, a works council consists of an equal number of management and employee representatives. One HR Practitioner said,

> *This is the platform where employers and employees engage each other to prevent legal battles, save time and promote productivity. (HR Practitioner)*

At the industry level, national employment councils are formed in various sectors in terms of Sections 56 and 57 of the Labour Act. Section 74 of the Labour Act provides for collective bargaining at the industry level. A Designated Agent explained,

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> *They are made up of a registered employers' organisation that advances the rights and interests of employers and a registered trade union that advances the rights and interests of employees in a particular sector or industry. (Designated Agent)*

The best way of resolving disputes under collective labour law is often regarded to be mutually beneficial collective bargaining between employers and unions (Papadopoulos et al 2021). In Zimbabwe, there is no involvement of a third party in the national employment council or works council. This is in line with the argument made by Araujo et al (2020) that negotiation is a process produced with minimum or no involvement of a third party and in which the parties to a dispute bargain to find a resolution. Therefore, negotiation in a broader sense has a stronger focus on the collective employment relationship (Shonk 2022). The International Labour Organization (2021) encourages parties to negotiate as a means to a solid foundation for industrial transformation. Negotiations at the works council must be in line with, or more favourable to, the industry collective bargaining. At both the plant level and industry level, collective bargaining agreements and codes of conduct are negotiated.

Collective bargaining is frequently regarded as the initial step in the resolution of disputes in these ADR modes (Araujo et al 2020). Participants (trade unionists and designated agents) disclosed that at the enterprise/plant level, if the dispute of rights is not resolved, an aggrieved party can approach the designated agent or the labour officer, and the conciliation process can then start. Conciliation is compulsory where the parties to a labour dispute are required to have recourse to it (Papadopoulos et al 2021). The same group of participants also affirmed that parties will be guided by the industry collective bargaining agreement when it is a dispute of interest, or if they approach their organisations and trade unions at the industry level they can present their case. If negotiations break down or parties have failed to reach a consensus at the industry level, the matter is referred for voluntary arbitration. Each party can appoint its arbitrator, and the two arbitrators can preside over the matter and devise a binding decision. It is important to note that an aggrieved party can only seek a review of the arbitral award at the High Court. The fundamental principle guiding the processes for resolving rights or interest disputes is that failure to settle through negotiation should be decided by courts or tribunals (arbitrators), as they involve the determination of pre-existing rights, duties, or obligations that both parties are required to uphold (Araujo et al 2020). Thus, the third party in this scenario at the industry/sector level is no longer helping the parties to resolve the dispute through negotiations but finalising the matter through a judgement.

The study established that both industry-level and enterprise-level negotiations were appropriate for employers and employees because it prevents industrial action and job losses and enhances productivity. Employers are comfortable with negotiations at the plant level because they dominate the negotiation process. As for employees, they seem to favour negotiations at the industry level, especially minimum wages and health and safety issues. However, trade unions and legal practitioners agreed that there are still challenges because negotiations both at the enterprise and industry levels are dominated by employers. At the industry level, trade unions are weak because of splinter unions and worsened by the fact that those splinter unions are not part of negotiations. At the enterprise level, most of the issues discussed favour the employer whilst weakening the employees, especially productivity and retrenchment issues. Southern African nations are perceived as having unequal societies that influence the balance of power between disputants, with capitalists continuing to exert dominant power (Bushe 2019).

Although the research revealed that collective bargaining is appropriate, there are other challenges surrounding this mechanism. Zimbabwe is a developing country, and information on employee rights is lacking in various sectors. The reality of the Zimbabwean labour market is that a significant fraction of workers have very little or no

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formal education, and the majority of employers are small- to medium-sized firms, which often have employees who lack knowledge of employment relations and labour law. Workers suffer as a result of a lack of education, as they are unaware of their rights and the dispute resolution modes. In the workplace, disciplinary and grievance processes are largely used to resolve internal disputes. Many small- and medium-sized indigenous businesses do not have these systems in place, and they are not employed effectively. As a result, more disputes are resolved through conciliation, and when they occur, one party is typically punished for not following the correct processes for resolving internal disputes.

### *Conciliation*

It is possible to force the hostile parties in a labour dispute to sit down and negotiate through conciliation (Araujo et al 2020). As revealed by all the participants, the conciliation process is provided for in Section 93 of the Labour Act. The conciliation process was established in 2003, and the major challenge is that it has not been examined for appropriateness or effectiveness. Labour officers (employed by the government) and designated agents (employed by the national employment councils) are the responsible conciliatory authority. An aggrieved individual approaches the labour officer or designated agent with his/her matter. Where a national employment council appoints a designated agent, the labour officer has no jurisdiction in terms of Section 63(3b) of the Labour Act (Ndhlovu and Ndhlovu 2023). Conciliation takes place when negotiations have failed or reached an impasse (Ali 2016). Therefore, where the labour relations system is underdeveloped or when the parties are not accustomed to negotiating with one another, compulsion may be favoured (Papadopoulos et al 2021).

The underlying principle of conciliation is the belief that the parties themselves are best equipped to resolve disputes (Feng & Xie 2020). No decision is imposed by the conciliator. Instead, the conciliator fosters dialogue by looking into the real issues and assists in developing and accessing options for a just, equitable, and long-lasting resolution that is agreed upon by both parties (Booysen 2018). This means that in conciliation, the parties retain control over how their disputes are resolved because they are not required to have a third party decide their case at the end (Papadopoulos et al 2021). This also confirms an observation by Shonk (2022) that third parties should be handy, but only to help the parties to the dispute find a solution to their differences that is acceptable to both of them.

Study participants (labour officers, designated agents, trade unionists, and legal practitioners) revealed that before the 2015 amendment of the Labour Act, the dispute resolution modes were negotiation, conciliation, and arbitration. The labour officer or designated agent would conciliate the case and, if the parties agree, he/she issues a certificate of settlement. If the parties fail to agree, the labour officer/designated agent would issue a certificate of no settlement and refer the matter for arbitration. With the new amendment of 2015, the labour officer/designated agent after issuing a certificate of no settlement, has the option of making, if it is a dispute of right, a draft ruling which is subject to confirmation by the Labour Court (Ndhlovu & Ndhlovu 2023). However, all participants revealed that rather than improving relations, these draft rulings have brought more confusion and setbacks, making the conciliation inappropriate. A trade unionist complained,

> *The new amendment has made the dispute resolution system worse, and we are still puzzled as to why the Labour Act was amended without sufficient consultation. When a labour officer is named as the applicant, how can he/she remain impartial? (Trade Unionist)*

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An affected employee said,

> *Just imagine when we went to Labour Court, I was told by the trade unionist that the Labour Officer was going to represent us since the ruling is in my favour and I lost the case. (Employee)*

One of the legal practitioners said,

> *The Labour Court procedures are difficult to comprehend for the average employee, and they, have no choice but to seek legal representation. The current system is lengthy and prolongs disputes. (Legal Practitioner)*

The confusion thus negatively affects the employees, while benefiting the employers. As it is, the Labour Officer is no longer resolving disputes; rather, he/she is just taking the complaints to the Labour Court. Although Araujo et al (2020) reasoned that ADR modes may follow judicially endorsed modes, there are challenges to the current dispute resolution system, especially accessibility and enforcement of rights, because disputes take a longer period to be finalised. Legal practitioners and trade unionists all concur that the 2015 amendment worsened the dispute resolution process, and they have argued that it is better to reintroduce the previous system.

ADR, like collective bargaining, conciliation, and arbitration, is frequently viewed as a better option than the more traditional processes for resolving labour issues because it is quicker and less expensive (Shonk 2022). However, trade unions and employees perceived that the conciliation of disputes of rights was inappropriate because it is costly, as there is a need for the Labour Court's confirmation of the draft ruling. There are additional costs, not only for an application, but also to cover costs for the Sheriff of the Court, and transport. Parties are engaging legal practitioners because they are not well versed in Labour Court processes. Designated agents and labour officers revealed that previously, individuals could approach them at no cost and without the necessity of legal expertise or assistance. A Designated Agent said,

> *Employees are battling to submit their concerns to the district office, where they pay no costs except travel costs, thus when we make applications for confirmation at Labour Court, they develop cold feet since transport costs and labour court costs are too exorbitant. (Designated Agent)*

The introduction of draft rulings has brought adjudication or litigation to the conciliation stage, with a concomitant increase in the participation of legal practitioners, yet lawyers typically dominate litigation. Realistically, conciliation and mediation should be attractive as low-cost, flexible, and non-arbitral processes (Fells 2000). Although conciliation is not a new mechanism in employment relations, it was made compulsory in Zimbabwe as a first step before proceeding to an adjudicative process like arbitration or the Labour Court and also before permitting parties to use power tactics of industrial action like strikes or lockouts (Nkoane 2018).

Trade unions and legal practitioners concurred that when the cases were referred for arbitration, an appeal to the Labour Court was on a point of law in terms of Section 98(10) of the Labour Act. However, now with these draft rulings from labour officers/designated agents, at the Labour Court, the parties will be arguing not only on points of law but also on the same facts. Put simply, at the conciliation level parties will be wasting time waiting for a return day at the Labour Court, thus, overburdening the courts. By contrast, if it was an appeal against an arbitration award, it was going to be on point of law. This means if a Labour Officer issues a certificate of no settlement, the matter is going to be reheard and

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finalised at the Labour Court. Also, if the Labour Officer issues a certificate of settlement and the employer reneges on an agreement, the matter is going to be reheard and finalised at Labour Court. The reality is that it takes a very long time to get justice through the current dispute resolution process, unlike conciliation, where there is also decentralisation and self-responsibility in industrial relationships (Fells 2000).

In addition, when addressing disputes which come to their attention, designated agents have two options, either to pursue the conciliation route or to determine the case. As one of the Designated Agents explained,

> *When the designated agent determines the matter, the aggrieved party approaches the High Court. However, the enforcement mechanism is still a challenge for these determinations made by the designated agents. (Designated Agent)*

Determinations by designated agents are not enforceable at High Court. On the other hand, if parties try to pursue the conciliation route, designated agents still face the challenge of seeking confirmation as their draft rulings are not confirmed because they are not labour officers. This dilemma also affects labour officers who conciliate matters where a national employment council has a designated agent (Section 63(3B) of the Labour Act). Because NECs are rarely found in other towns or districts, labour officers are found to be covering many cases (Ndhlovu & Ndhlovu 2022). When it comes to confirmation at Labour Court, the draft ruling is thrown out. Thus, ADR is not appropriate due to technicalities and confusion. This confirms an argument by Araujo et al (2020) that the main concern, expressed about labour ADRs in particular, is their potential for reinforcing the power disparity between the employer and the employee. Thus, the argument that ADRs are less formal and do not include legal representation at the early stages (Shonk 2022) becomes rhetorical. Therefore, the ability of an ADR mechanism to reduce power disparities between employees and employers and make the exercise of employment rights possible will be unattainable (Dupont et al 2018).

### *Arbitration*

The arbitration process is provided for in Section 98 of the Labour Act. Equally, the Labour Court can also refer a matter for arbitration. As explained by one of the legal practitioners,

> *After issuing a certificate of no settlement at the conciliation level, the labour officer/ designated agent refers the dispute to compulsory arbitration, if it is a dispute of interest and the parties are engaged in an essential service. (Legal Practitioner)*

Arbitration can be used to resolve both disputes of interest and rights (Nkoane 2018). In systems that need compulsory arbitration, conciliation is frequently required as well (Araujo et al 2020). Also, with the agreement of the parties, the labour officer/designated agent can refer the dispute or unfair labour practice to voluntary arbitration, if it is a dispute of interest. Arbitration is voluntary when it can only be initiated with the parties' consent, and it is mandatory when either party or the government can do it on its initiative (Araujo et al 2020). This is in line with the argument by Dupont et al (2018) that submission of interest disputes to compulsory arbitration unless in the case of essential services is uncommon. The use of arbitration may therefore be either voluntary or compulsory in Zimbabwe. In the case of compulsory arbitration, the parties to the dispute enter into arbitration after conciliation or order from Labour Court. In the instance of voluntary arbitration, the decision to submit to arbitration is left up to the parties.

The Labour Act's Section 98 states that an arbitrator has the same authority as the Labour Court to hear and decide any dispute. Shonk (2022) argues that in arbitration,

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which can resemble a court trial, a neutral third party serves as a judge and makes judgements to settle disputes. Thus, arbitration is closer to adjudication and, therefore, to jurisdictional modes of dispute resolution (Araujo et al 2020). It can be concluded that collective bargaining, conciliation, and arbitration are designed to solve labour disputes and only a few complex cases spill over to the labour court.

Trade unions and employees argued that the arbitration process was appropriate because it was less costly and more effective than the current ADR system which requires draft rulings issued by labour officers. This is true considering the convenience and distance. This is the reason why participants argued that removing arbitration on disputes of rights was against Section 2A of the Labour Act which advocates for expeditious dispute resolution. One of the trade unionists explained,

> *Taking for instance aggrieved parties in Mberengwa who travel 100 kilometres to Zvishavane to access conciliation and arbitration. When it comes to the draft rulings, they add 120 kilometres because the Labour Court is in Gweru, which is a huge cost. (Trade Unionist)*

Arbitration was going to be more appropriate if the rights disputes from conciliation were referred for arbitration. Looking at the current environment where there is high unemployment dominated by the informal sector, parties are mostly concerned about rights disputes. A similar idea is promoted by Shonk (2022), who claims that ADR provides a way to provide workplace justice to more people, more quickly, and at a cheaper cost than traditional government channels.

## Discussion

It can be concluded that ADR modes (negotiation, conciliation, and arbitration) were adopted and were seen as appropriate in Zimbabwe, especially taking into consideration that people are poor and scattered all over the country. The growth of the informal sector is complemented by the informalisation of dispute resolution processes. So, ADR is necessary as a substitute for litigation. However, the conciliation process on disputes of rights has been made inappropriate by the issue of draft rulings which are subject to confirmation at the Labour Court. For the benefit of all parties involved, as well as the economy as a whole, disputes should be resolved swiftly, effectively, and fairly (ILO 2021).

Although the future of dispute resolution systems will always be debated, the modes have been embraced in various countries (Araujo et al 2020), despite a recognition of the need to take a critical analysis of whether the modes are addressing the intended purpose. The major challenge is in the conciliation process, as the legislation is failing to address the needs of the citizens or suit the employment set-up. This confirms an argument by Bushe (2019) that Southern African countries are perceived as having unequal societies that influence the balance of power between disputants, with capitalists, so continuing the exercise of uncontrolled power. Dukes and Streeck (2020) assert that if labour law is in crisis, then regaining the law's procedural focus and promoting these processes offer a possible path out of the crisis. When the law is used to establish new labour and employment institutional arrangements, the object or intent of the law is typically spelt out (Cutcher-Gershenfeld & Isaac 2018). Access to justice and rights gives the rule of law life by allowing people to exercise their rights, whether they are private or human (Bingham 2016).

There is thus potential for ADR modes to be the best processes for settling labour disputes, even though, at present the objectives for their creation are not always being met. Araujo et al (2020) assert that five dimensions of the variable of proximity between justice institutions and citizens were identified: geography, costs, time, culture, and

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visibility. These dimensions were used to assess the appropriateness of ADR in claiming labour rights and accessing labour justice. It can be said that ADR modes in Zimbabwe do not take into account proximity-related elements. Thus, while Araujo et al (2020) argued that geography seems to be a less important factor when comparing the accessibility of ADR and courts, in Zimbabwe, it is clear that geography is a major challenge. Indeed, accessing conciliation itself is a challenge. Costs and accessibility are affected by distance. Araujo et al (2020) observed that ADRs typically offer a clear cross-country advantage over courts in the proximity dimensions of costs and time. Yet this research revealed that conciliation is becoming costly to the participants. An essential aspect of closeness is cultural or human proximity (Araujo et al 2020). Again, this research revealed that participants (especially employees) have lost confidence in the current system reflecting the views of Ali (2016) who asserted that it has become very difficult for poor and marginalised people to have access to justice.

In broad terms, recourse to ADR is aimed at relieving court congestion and reducing unnecessary expenses and delays (Dukes & Streeck 2020). This improves community participation in the dispute resolution process, facilitating access to justice and resulting in more efficient dispute resolution (Araujo et al 2020). However, in Zimbabwe, it is different because, for disputes of rights, conciliation and litigation have been merged. Additionally, a stalemate at the industry level (collective bargaining) is referred for voluntary arbitration instead of conciliation. Thus, the system inherently favours overburdening the courts, and this increases costs and delays. The over-reliance on courts for the resolution of all types of disputes, even when other modes of dispute resolution might have been more appropriate, has contributed to some of the challenges that many countries in sub-Saharan Africa have had with the administration of justice (Ampeire 2017). Yet, as noted previously, the main goal of ADR is to offer a range of acceptable options for all parties to successfully resolve disputes without turning to litigation (Feng & Xie 2020).

Contrary to the highly complex structure of rules and procedures that serves as the foundation of the dispute resolution system, the majority of Zimbabwean employees and employers are ignorant of their rights, including access to ADR mechanisms. The parties that are suffering due to the effects of the inadequate ADR modalities are the workers' committees and employees in general, who must operate within the system but are unable to deal with it properly. There is no interest by the government, in raising awareness about labour rights and improving the ADR system. Indeed, the government as a policymaker is failing to employ common sense language and processes, and so, is scarcely gaining public trust. Workers typically have a poor level of awareness of their rights, and even when they do, enforcement is often restricted and problematic, with little to no noticeable impact (Ndhlovu & Ndhlovu 2023; Papadopoulos et al 2021). For the benefit of all parties involved, as well as the economy as a whole, these disputes must be resolved swiftly, effectively, and fairly (ILO 2021).

Given the current situation in Zimbabwe, where 90% of the employable population works in the informal economy (ILO 2021), employees have been positioned lower on the social ladder, with employers taking charge of processes and presenting a dominant self-being in the position of authority (Oishika 2020). Since justice is about the just enjoyment of citizenship rights rather than actual equality before the law, neither legal aid nor any other policy has completely achieved this goal (Sigafoos & Organ 2021).

## Conclusions and recommendations

The world of dispute resolution has seen a significant transformation over the past few decades, much like the world of work. The conclusion is that while ADR modes may have

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considerable potential, the practice and outcomes of collective bargaining, conciliation and arbitration in Zimbabwe have numerous flaws, even though they continue to be the key methods of ADR. These must be improved to fit the conditions that are now prevalent in each community. Most notably, they do not support provision Section 2A of the Labour Act, which promotes social justice and democracy. When ordinary workers are wholly unable to uphold their employment rights, we cannot claim that disputes are resolved quickly. Due to a very legalistic approach, protracted delays, and an increase in certificates of no settlement, which show a decreased settlement rate, the dispute resolution system, particularly conciliation, is currently under strain. For these reasons, the researchers recommend the following.

The national realities show that ADR modes require increased visibility and publicity for citizens to see them as a viable alternative to litigation. When creating a national dispute resolution system, consideration for the abilities and requirements of the parties in the employment relationship should be made. The advantages of ADR processes can only be realised if attention is given to how well the process meets the requirements and capabilities of the parties since they are the ones who are suffering under the current system. The government should consult general employees in preparation for changes to labour laws. The ADR modes need to be revised. The Labour Act, especially Section 93 of the Labour Act, needs to be amended urgently to save the parties involved in disputes. Conciliators need to be given more powers on common cause issues or disputes of rights so that a case can be finalised to avoid the conventional route of seeking confirmation at the Labour Court.

This study had methodological constraints on research strategy and sample size. Hence, future scholars can utilise the mixed approach and possibly longitudinal methodologies to better understand the subject matter. Despite these limitations, the study's conclusions offer a crucial Zimbabwean viewpoint on labour ADR.

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