

# The Status of Alternative Dispute Resolution (ADR) in Criminal Justice System under the Legal Frameworks of Ethiopia & Its Challenges

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## Abstract

This article intended to reveal the status of ADR in the criminal justice system under the legal frameworks of Ethiopia. Thus, the 1995 Constitution of the FDRE, the 1961 Criminal Procedure Code, the 2004 Criminal Code and the 2011 Criminal Justice Policy of Ethiopia are the primary concern of this study. Thus, systematic analysis of statutory provisions and legal principles involved therein, or derived there from, and logical and rational ordering of them is used as the main study mechanism. The result shows that the term ADR & what constitutes it in the context of criminal justice system; the parties that can play role in the process & their respective responsibilities; & the rights & duties of the crime victim & the offender the process; & the expected outcomes of the process are not clearly prescribed by law. Besides, there is inconsistency between the law and criminal justice policy of the country concerning the type of crimes subject to ADR.

**Keywords:** ADR; Disputes Involving Crime; Criminal Justice System; Ethiopia

## 1. Introduction

### 1.1. Background & Justification of the Study

Criminal justice system means the system of law enforcement, adjudication and correction that is directly involved in the apprehension, prosecution, and control of those charged with criminal offenses.<sup>1</sup> Criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime or sanctioning those who violate laws with criminal penalties and rehabilitation efforts.<sup>2</sup> Throughout the 1970s and 1980s, a range of dispute resolution processes such as mediation, conciliation, and arbitration, gained popularity as an alternative to traditional litigation.<sup>3</sup> The use of ADR processes in criminal matters is a relatively new phenomenon in western countries and the increased interest in the application of ADR processes to the criminal justice was borne from a general dissatisfaction with traditional adversarial methods of dispute resolution.<sup>4</sup>

The use of ADR to resolve dispute involving crime is significant in maintaining close and continuing relationships in every community.<sup>5</sup> Other motivations for the implementation of ADR include: case management; cost effectiveness and efficiency; and the desire to create a more appropriate and culturally flexible system for dealing with offenders.<sup>6</sup> Formal legal process robs individuals of the right to full participation in the dispute resolution process and it has made conflicts the property of lawyers.<sup>7</sup> Traditional theories of criminal justice, on the other hand, view criminal act as largely as a matter between the offender and the state, and it disregards the use of ADR to resolve crime cases.<sup>8</sup> Formal mechanisms for conflict management have not always been effective in managing conflicts; & this has necessitated a shift towards informal mechanisms for conflict management, including ADR and traditional dispute resolution mechanisms.<sup>9</sup> In a society where the majority of the population is poor; where there is widespread illiteracy, lack of access to justice, & high cost and scarcity of lawyers, ADR is the best method of conflict resolution.<sup>10</sup> Customary justice systems provide access to justice for marginalized or impoverished communities that may otherwise have no other options for redress.<sup>11</sup> Due to

<sup>1</sup> Larry J. Siegel and John L. Worrall, *Introduction to Criminal Justice*, Wadsworth, Cengage Learning, Printed in the United States of America, (2010, 13<sup>th</sup> edn)4.

<sup>2</sup> Mahua Gulfam, (2014), *Introducing 'Alternative Dispute Resolution (ADR) in Criminal Justice System: Bangladesh Perspective'*, *Banglvision* Vol. 13, No. 1, pp.206; Md. Alamin, 'Introducing Alternative Dispute Resolution in Criminal Litigation: An Overview', *Journal of Research in Humanities and Social Science*, Vol.3, Issue 11, (2015) 68.

<sup>3</sup> Melissa Lewis and Les Mc Crimmon, 'The Role of ADR Processes in the Criminal Justice System: A view from Australia', at ALRAESA Conference, at Imperial Resort Beach Hotel, Entebbe, Uganda, (2005)1.

<sup>4</sup> Id, p. 4.

<sup>5</sup> Street, 'The Language of Alternative Dispute Resolution', *Alternative Law Journal* 194, (1992)4.

<sup>6</sup> Melissa Lewis and Les Mc Crimmon, op.cit., n. 3, pp. 8.

<sup>7</sup> NILS CHRISTIE, 'Conflicts as Property', *British Journal of Criminology*, Vol.17, Issue 1, (1977)7.

<sup>8</sup> Melissa Lewis and Les Mc Crimmon, op.cit., n. 3, pp.100.

<sup>9</sup> Kariuki Muigua & Kariuki Francis, 'ADR, Access to Justice and Development in Kenya', at 2. [www.strathmore.edu/.../ADR%20access%20to%20justice%20and%20development%20](http://www.strathmore.edu/.../ADR%20access%20to%20justice%20and%20development%20). Accessed 20 May 2017.

<sup>10</sup> Shipi M. Gowok, 'Alternative Dispute Resolution in Ethiopia - A Legal Framework', p.277. <https://www.ajol.info/index.php/afrev/article/viewFile/41054/8478>. Accessed 19 August 2017.

<sup>11</sup> Customary Justice: Challenges, Innovations and the Role of the UN International Development Law Organization (IDLO), at 55, [https://worldjusticeproject.org/sites/default/files/customary\\_justice\\_idlo.pdf](https://worldjusticeproject.org/sites/default/files/customary_justice_idlo.pdf). Accessed 16 August 2017.

forementioned rationales the use of ADR in criminal justice system is increasing from time to time throughout the world.

In many regions of Ethiopia, the customary norms are more strong, relevant, and accessible than imposed and top-down legal norms; & people tend to use the customary dispute resolution mechanisms for reconciliation and in order to control acts of revenge, even after passing through the procedures and penalties in the formal criminal court.<sup>1</sup> Others argued that all types of criminal cases which range from petty offences to serious crimes, such as homicide as well as inter-ethnic and inter-religion conflicts can be and are being resolved via customary dispute resolution mechanisms in many regions of the country.<sup>2</sup> Hence, the essence of this article is not an exhaustive description of ADR & its components in Ethiopia, but an illustrative analysis to show its legal status, trend and strength.

## 1.2. Objectives of the Study

### 1.2.1. General Objective

To assess the status of ADR in the criminal justice system under the legal frameworks of Ethiopia.

### 1.2.2. Specific Objectives

- ✓ To identify the legal & policy gaps with respect to acknowledging the implementation of ADR process to resolve conflicts involving crime in Ethiopia;
- ✓ To recommend legal or policy reform to adopt ADR & to enhance its role in the Criminal justice system of Ethiopia.

## 1.3. Study Design

This is doctrinal legal research. Hence, systematic analysis of statutory provisions and legal principles involved therein, or derived there from, and logical and rational ordering of the legal propositions and principles is used as the main study mechanism.

## 1.4. Source of Study

The Constitution of the FDRE (1995), the Criminal Procedure Code (1961), the FDRE Criminal Code (2004) and the FDRE Criminal Justice Policy are the primary concern of this study; hence, they are used as primary sources for this study. Besides, journal articles & books are used as secondary sources.

## 2. Conceptual Framework For ADR In General

### 2.1 Definition of Alternative Dispute Resolution

Different scholars define ADR in different ways. Conflicting parties would agree to settle their disputes outside the traditional court system; hence, this alternative method of resolving disputes came to be known, naturally, as alternative dispute resolution.<sup>3</sup> It is simply defined as “[a] procedure for settling a dispute by means other than litigation . . . [.]”<sup>4</sup> It is a general term used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational way.<sup>5</sup> In short, it means alternative or appropriate methods and processes to prevent and resolve conflicts and disputes.<sup>6</sup> ADR is usually described as a method of resolving disputes between parties without resorting to formal court-based adjudication.<sup>7</sup> It is stated that the name ADR is an outmoded acronym that survives as a matter of convenience only.<sup>8</sup> The terms ADR and conflict resolution are used interchangeably and it refer to a wide range of processes that involve non-violent dispute resolution outside of the traditional court system.<sup>9</sup> ADR is also known as external dispute resolution; & it refer to formal dispute resolution processes in which the disputing parties meet with a professional “third party” who assist them to resolve their dispute.<sup>10</sup> Hence, there is no uniform definition for ADR in general.

According to National ADR Advisory Committee of Australia, ‘ADR’ is broadly defined as ‘processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to

<sup>1</sup> Endalew Lijalem Enyew, ‘Ethiopian Customary Dispute Resolution Mechanisms: Forms Of Restorative Justice’, *African Journal on Conflict Resolution*, Vol. 14, No. 1, (2 014)126.

<sup>2</sup> Cited by Endalew Lijalem Enyew, id, p. 15.

<sup>3</sup> Michael J. Broyde, ‘Multicultural ADR and Family Law, A Brief Introduction To The Complexities Of Religious Arbitration’, *Cardozo Journal of Conflict Resolution*. Vol. 17, (2016)793.

<sup>4</sup> BLACK’S LAW DICTIONARY (2009, 9<sup>th</sup> edn.)91.

<sup>5</sup> Yona Shamir, Alternative Dispute Resolution Approaches and Their Application, Israel Center for Negotiation and Mediation, Israel, UNESCO, SC-2003/WS/43, (2003)2.

<sup>6</sup> Id, p. 37.

<sup>7</sup> Melissa Lewis and Les Mc Crimmon, op.cit., n. 4.

<sup>8</sup> Thomas J. Stipanowich, ‘ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution’, *Journal of Empirical Legal Studies*, Volume 1, Issue 3, (2004)845.

<sup>9</sup> Shipi M. Gowok, op. cit., n. 10, pp. 266.

<sup>10</sup> Mahua Gulfam, op. cit., n. 2, pp.207.

resolve the issues between them.<sup>1</sup> According to the USA Administrative Dispute Resolution Act of 1996, "Alternative Means of Dispute Resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and use of ombudsman, or any combination thereof.<sup>2</sup> Therefore, in different legal systems, ADR is defined in different ways.

At international level, there is no declaration or covenant that specifically defines or even uses the term ADR. Instead there is instant of defining the term 'Restorative Process'. For instance, according to the UN Economic & Social Council, "Restorative Process" means "any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator."<sup>3</sup> Accordingly, in restorative process there shall be a facilitator who facilitates the victim & the offender to resolve their dispute. Besides, any other individual or community member affected by the alleged crime will be involved in the process if appropriate.

On the other hand, according to the UN Office on Drugs & Crime, the term 'Restorative Justice' is defined as "a process for resolving crime by focusing on redressing the harm done to the victim (s), holding offender (s) accountable for their actions and, often also, engaging the community in the resolution of that conflict."<sup>4</sup> Accordingly, the goal of restorative justice is redressing the harm caused to the victim & making the offender accountable for his/her unlawful actions. Besides, the process involves the community. According to Cormier, "Restorative Justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by crime such as victim(s), offender and community to identify and address their needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration, and prevents future harm."<sup>5</sup>

To sum up, even if the phrase, i.e. ADR, lack precise definition, it is commonly understood that it is a generic term used to describe range of procedures designed to provide a way of resolving a dispute as an alternative to formal court litigation or administrative tribunal. Hence, it encompasses all means of dispute resolution other than court litigation and administrative tribunals.

## 2.2. What Constitutes ADR in the Context of Criminal Justice System

In general, the term ADR encompasses different mechanism of resolving dispute, other than formal court litigation & tribunals. However, different scholars provide different types of dispute resolution mechanism as the component of ADR in general. One scholar said that ADR refers to all decision-making processes other than litigation, including but not limited to negotiation, enquiry, mediation, conciliation, expert determination and arbitration.<sup>6</sup> The other scholar said that ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.<sup>7</sup> Still the other one stated that generally ADR is classified as negotiation, mediation, arbitration & conciliation.<sup>8</sup> The other writer stated that the term ADR includes, in narrow sense, only those processes in which the decision finally arrived at with the consent of the disputant parties; while as in wider sense, it includes arbitration along with negotiation, mediation and conciliation.<sup>9</sup> On the other hand, it is stated that ADR covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution.<sup>10</sup> However, the main concern of this Article in this particular section is to reveal that which types of dispute resolution methods are popular & mostly in use to resolve conflicts involving crime.

However, most of the literature dealing with ADR contains little or no reference to its use in the criminal justice context, and most criminal law texts do not utilize ADR terminology.<sup>11</sup> It is argued that in criminal justice context, the term ADR encompasses victim/offender mediation (VOM); family group conferencing (FGC);

<sup>1</sup> National Alternative Dispute Resolution Advisory Committee of Australia, 'ADR Terminology: A Discussion Paper', (2002)2.

<sup>2</sup> <https://www.ag.gov.au/AlternateDisputeResolution/.../NADRAC%20Publications/A>. Accessed 16 May 2017.

<sup>3</sup> 'The USA Administrative Dispute Resolution Act of 1996', Pub. Law 104-320, (amending Pub. Law 101-552 and Pub. Law 102-354 chapter 5 title 5), 571(Definition), Art.2, '<https://www.ferc.gov/legal/adr/ADR-PL104-320.pdf>.' Accessed 21 May 2017.

<sup>4</sup> United Nations Economic and Social Council, 2002, Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, Economic and Social Council Resolution, E/2002/INF/2/Add.2, Art. 1.

<sup>5</sup> United Nations Office on Drugs and Crime, 'Handbook on Restorative Justice Programs', *Criminal Justice Handbook Series*, New York, (2006) 6.

<sup>6</sup> Cormier, 'Restorative Justice: Directions and Project' '<https://www.publicsafety.gc.ca/lbrr/archives/cnsgl-2002-00000726-eng.pdf>.' Accessed 20 August, 2017.

<sup>7</sup> Kariuki Muigua & Kariuki Francis, op.cit., n. 9, pp.3.

<sup>8</sup> See Muigua K, 'Setting Disputes through Arbitration in Kenya', *Glenwood Publishers Limited*, (2012)1-19.

<sup>9</sup> Shipi M. Gowok, op. cit., n. 20.

<sup>10</sup> Mahua Gulfam, op.cit., n. 2.

<sup>11</sup> Yona Shamir, op. cit., n.16.

<sup>12</sup> Melissa Lewis and Les Mc Crimmon, op.cit., n.18.

victim offender-panels (VOP); victim assistance programs; community crime prevention programs; sentencing circles; ex-offender assistance; community service; plea bargaining; school programs.<sup>1</sup> According to the UN Economic and Social Council, restorative process includes mediation, conciliation, conferencing, and sentencing circles.<sup>2</sup>

Victim-offender Mediation programs were adopted first in Ontario, Canada in the early 1970s; & later on in that decade, similar programs was adopted throughout the United States, the United Kingdom and Europe.<sup>3</sup> Later on, Family Group Conferencing is first originated in New Zealand in the 1980s.<sup>4</sup> Subsequently, Australia becomes the second jurisdiction to introduce a statutory-based FGC scheme next to New Zealand. Court connected ADR was born into the Ugandan Judicial system in the mid-1990s following the 1994 Justice Platt Report on Judicial Reform.<sup>5</sup> In Bangladesh Criminal Procedure Code, compromise is adopted to resolve some types of crimes.<sup>6</sup> In Canada, the whole spectrum of ADR such as VOM, Sentencing Circles, FGC & community crime prevention programmes are adopted in the Criminal justice system expressly.<sup>7</sup>

Nowadays, it is widely accepted that when the term Restorative Justice is used in a criminal justice context, it can refer to any of the following four programs: (i) 'Victim-Offender Mediation', (ii) 'Family Group Conferences', (iii) 'Healing and Sentencing Circles' and (iv) 'Community Restorative Boards'.<sup>8</sup> It is argued that only the aforementioned four programs are considered 'restorative practices' in strict sense<sup>9</sup> because these forms fully meet the following three requirements, which, according to the restorative literature, are considered forms of RJ: (i) involve victims, offenders and their community (ii) in direct (face to face) or indirect meetings (iii) so that they, and no one else, can determine how best to deal with the offence.<sup>10</sup> To sum up, in modern context ADR in the context of criminal justice system should encompass mainly aforementioned ones; however, elaborating those mechanisms one by one is not the scope of this article.

In Ethiopian criminal justice system, even if the term ADR is not clearly defined, the Criminal Procedure Code of Ethiopia demands the court to try to reconcile the crime victim & the accused during private prosecution.<sup>11</sup> However, this provision lacks clarity because the term 'reconcile' is not defined; the manner how it shall be conducted; the parties who shall participate in the process & their respective responsibilities; and the duties & rights of the victim & the offender in the process are not clearly prescribed. Similarly, the Criminal Procedure Code of Ethiopia authorizes the 'Athibia Dagna' to resolve through 'compromise'<sup>12</sup> offences such as insult, assault, petty damage to property or petty theft where the value of the property stolen does not exceed five Ethiopian Birr;<sup>13</sup> however, this provision does not prescribe the status of 'Athibia Dagna' in the criminal justice system; it failed to prescribe how compromise procedure works; it does not indicate the rights & duties of both sides of parties to the dispute like that of aforementioned provision.

Under the Criminal Justice Policy of FDRE, an emphasis is given to introduce 'plea bargaining' to be implemented in the criminal justice system;<sup>14</sup> however, it is not approved by law. On the other hand, using ADR to resolve disputes involving crime is one of the prevailing cultures in different nations, nationalities & peoples of Ethiopia.<sup>15</sup> For example, mediation in Arsi Oromo;<sup>16</sup> 'shucha cimaa' (elders of villages) in Wolaita;<sup>17</sup> & 'ye

<sup>1</sup> Id, pp.1 & 5.

<sup>2</sup> UN Economic and Social Council, op.cit., n.24.

<sup>3</sup> Melissa Lewis and Les Mc Crimmon, op.cip. n.3, pp.9.

<sup>4</sup> New Zealand, the Children, Young Persons and Their Families Act in 1989.

<sup>5</sup> Geoffrey Kiryabwire, 'The Development of the Commercial Judicial System in Uganda: A Study of the Commercial Court Division, High Court of Uganda', 2 *J. Bus. Entrepreneurship & L.*; (2009) <https://www.scribd.com/.../Mediation-in-Commercial-Court-of-Ug-by-Kiryabwire> Accessed 20 June 2017.

<sup>6</sup> The Code of Criminal Procedure of Bangladesh, ACT No. V of 1898, section 345.

<sup>7</sup> Canadian Criminal Code, R.S.C., 1985, c. C-46, Section 718, Para.2 (e).

<sup>8</sup> Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy*, European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), (2007)29.

<sup>9</sup> Id, pp.29-30.

<sup>10</sup> Wachtel, T. and McCold, P., 'Restorative Justice in Everyday Life', in J. Braithwaite and H. Strang (eds) *Restorative Justice and Civil Society*, Cambridge: Cambridge University Press, (2001).

<sup>11</sup> Criminal Procedure Code of Ethiopia, Negarit Gazeta Extraordinary Issue No.1 of 196, Art.151, Para.2.

<sup>12</sup> Civil Code of Ethiopia, Proclamation No. 165 of 1960, Art. 3307. It defines 'Compromise' as "A contract whereby the parties, through mutual concessions, terminate an existing dispute or prevent a dispute arising in the future".

<sup>13</sup> Criminal Procedure Code of Ethiopia, Art. 223.

<sup>14</sup> Federal Democratic Republic of Ethiopian Criminal Justice Policy, 2011, Approved by the Council of Ministers, section 4, Para. 4.5.1. & 4.5.4.

<sup>15</sup> Constitution of the Federal Democratic Republic of Ethiopia (herein after Constitution of FDRE), Proclamation No. 1/1995, which has come into full force and effect as of the 21st day of August, 1995, Art.39, Para.5. Accordingly, a "Nation, Nationality or People" is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

<sup>16</sup> Jetu Edossa, 'Mediating Criminal Matters in Ethiopian Criminal Justice System: The Prospect of Restorative Justice', *Oromia Law Journal*, Vol.1, No.1, (2012)100.

<sup>17</sup> Ayele Tariku, 'STATE FORMATION AND DISPUTE RESOLUTION MECHANISM IN ETHIOPIA: A CASE OF WOLAITTA PEOPLE', *European Scientific Journal*, Vol.11, No.23, (2015)240-254.

*bête-zemed gubae* (family council) in the central highlands of Amhara and Tigray region.<sup>1</sup> Even if the manner how it works & the types of crimes subject to ADR are different, using ADR to resolve disputes involving crime is common practice throughout the country nowadays. To sum up, the types of ADR under the context of criminal justice system is not well defined & prescribed under the legal frameworks of FDRE.

### 3. Legal Frameworks For the Role of ADR in Criminal Justice System

#### 3.1. Legal Frameworks for ADR Under International Law

At international level, even if there is no clear and specific binding law in this regard, there are provisions within international human rights laws that encourage using and promoting good culture. For example, the Universal Declaration of Human Right entitles everyone the right to participate freely in the cultural life of the community;<sup>2</sup> the International Covenant on Economic, Social and Cultural Rights compels states to recognize the rights of everyone to take part in cultural life;<sup>3</sup> and the ICCPR allows the establishment of 'Ad Hoc Conciliation Commission' with a view to reach up on an amicable solution to the matter on the basis of respect for human rights enshrined therein.<sup>4</sup> Thus, the ICCPR, directly or indirectly, has also shown that customary law is part of a people's culture. Since ADR encompasses all cultural dispute settlement methods, it is logical to conclude that aforementioned international human rights instruments promote the use of ADR in Criminal Justice System.

Many conferences held under the sponsorship of the United Nations Economic, Scientific, and Cultural Organization have emphasized the central role of governments in promoting cultural development. For instant, the 1970 Inter-governmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies<sup>5</sup> stressed that all governments are responsible for the adequate financing and appropriate planning of cultural institutions and programs. In 1972, the Intergovernmental Conference on Cultural Policies in Europe suggested that governments have a duty to promote the right to culture. Two years later, the UNESCO Seminar on the Promotion and Protection of Human Rights of National, Ethnic and Other Minorities encouraged public financing to support local customs.<sup>6</sup> Therefore, UN system does not discourage using ADR to resolve conflicts involving crime; however, the concerned states should take appropriate action to make it conform with human rights standards.

UN Guideline on the Role of Prosecutors prescribes that in accordance with national laws prosecutors shall give due consideration to waiving prosecution; discontinuing proceedings conditionally or unconditionally; or diverting crime cases from the formal justice system, with full respect for the rights of the suspects and the victim(s).<sup>7</sup> Here, diverting crime cases from the formal justice system may be construed to mean referring the case to ADR. Indeed, it states that UN member states should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.<sup>8</sup> Here, the discretionary power is vested on states to enact national legislation concerning how to implement ADR in their respective Criminal Justice System.

However, it does not mean that all types of crime cases are necessarily subject to ADR. Rather, States can restrict through their national legislation that ADR should not to be used to exonerate the offender from criminal liability in case of grave offences. With regard to this point, UN Economic & Social Council states that the use of restorative justice does not prejudice the right of States to prosecute alleged offenders.<sup>9</sup> It further state that its outcome includes responses and programs such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.<sup>10</sup> Furthermore, it states that the results of such agreements should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgments and where that occurs, the outcome should have the same status as any other judicial decision or judgment and should preclude prosecution in

<sup>1</sup> Assefa Fiseha, 'Customary Dispute Resolution Mechanisms and the Rule of Law: Areas of Convergence, Divergence and Implications', *Justice and Legal System Research Institute (JLSRI), Addis Ababa, Ethiopia, No. 1(2013)117*.

<sup>2</sup> Universal Declaration of Human Rights, Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948, see Art. 27.

<sup>3</sup> International Covenant on Economic Social & Cultural Rights, which is adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, Entry into force: 3 January 1976, Art. 15.

<sup>4</sup> International Covenant on Civil and Political Rights Adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, Entry into force: 23 March 1976, Art. 42.

<sup>5</sup> Final Report, Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies. Venice, 24 August—2 September 1970.

<sup>6</sup> Lynn Berat, 'Customary Law in a New South Africa': *A Proposal, 15 Fordham Int'l L.J. 92 (1991)23*.

<sup>7</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: Report Prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), Principle 18.

<sup>8</sup> Id.

<sup>9</sup> UN Economic & Social Council, op.cip., n.24, Preamble, Para.7.

<sup>10</sup> Id, Art.3.

respect of the same facts.<sup>1</sup> However, it does not expressly indicate whether the restorative outcome may include withdrawal of charge or not; and in which type of offences that its outcome will preclude prosecution. Accordingly, States can identify in which types of crimes the outcomes of ADR will be withdrawal of charges through their national legislation.

To sum up, having the above arguments into account, even if there is no binding specific international law that prescribes the application of ADR to resolve disputes involving crime, the UN system in general & international human rights instruments in particular encourage states parties to them to implement ADR in their respective criminal justice system as per their own national laws.

### **3.2. Legal Frameworks For ADR in Ethiopia**

#### **3.2.1. Under the Criminal Procedure Code of Ethiopia.**

Under the Ethiopian Criminal Procedure Code, crimes are categorized into two types. Those are crimes punishable upon public prosecution & those punishable only up on private complaint. The former refers to those types of crimes in which the interest of the community in large or the state is considered affected & in those types of crimes whether the crime victim has petitioned his/her complaint against the suspect is not a prerequisite to set justice in motion. While the later refers to those types of crimes in which the victim is considered the individual person, who is the direct victim of the alleged crime; & it is stated that those types of crimes imply a higher degree of private interest than public interest.<sup>2</sup> Under the Criminal Procedure Code of Ethiopia,<sup>3</sup> discretionary power is vested with the crime victim to petition complaint against the offender if the alleged offences are fall under the category of crimes punishable up on private complaint. In those types of crimes, justice comes into motion up on when the crime victim or his/her legal representative petitions complaint before police or public prosecutor even in case when the alleged crime is flagrant one.<sup>4</sup> Therefore, if the crime victim & the offender are willing to settle their dispute through ADR process in the case when the alleged crime is punishable up on private complaint, the Criminal Procedure Code of Ethiopia does not expressly preclude them.

Moreover, in case when the public prosecutor refuses to prosecute the offender if he/she believes that the evidence collected does not warranty the conviction of the offender according to Article 42, paragraph 1(a), of the Criminal Procedure Code of Ethiopia, similarly this law authorizes the crime victim or his/her legal representative to prosecute the offender privately if the alleged crime is punishable up on private complaint. This procedure is called private prosecution.<sup>5</sup> During private prosecution, the same law empowers the court to attempt to reconcile the injured party and offender on the day fixed for first hearing before reading out and explaining the charge to the accused.<sup>6</sup> Moreover, the law states that if the reconciliation is effective, it will be recorded in the file & it has similar effect with the judgment of the court.<sup>7</sup> However, this provision does not define the term 'reconcile'; it does not prescribe the role of court & the respective rights & duties of the crime victim & the offender in the process; it does not enumerate the expected outcomes the process. Particularly, it is supposed that if reconciliation is effective, it will terminate the prosecution; & it will preclude prosecution of the offender on similar crime in the future. On the other hand, aforementioned provision does not clearly prescribe whether the effect of reconciliation encompasses exoneration of the offender from criminal liability (Emphasis added). Another controversy is that whether such record is considered as a criminal record against the accused in the future? This is because if it is considered criminal record, it can be considered as one of the aggravating circumstances during assessment of sentence<sup>8</sup> when the same offender becomes convicted of committing another crime in the future. On the other hand, the same law is silent as regards whether the court can reconcile the crime victim & the offender when the alleged crime is punishable up on private complaint during pubic prosecution. Therefore, the Criminal Procedure Code of FDRE failed to address aforementioned issues. Nevertheless, it declares that if such reconciliation is impossible, the court continues to hear the case as an ordinary prosecution by following the rules of procedures laid down under Articles 123 to 149 of the Criminal Procedure Code of Ethiopia.<sup>9</sup>

Since the main rationale of referring cases to ADR is to reduce the case load of courts, either judiciary or administrative tribunal, and to save time and resource of the litigation & disputant parties, the stage at which a case is referred to ADR is highly crucial. The Criminal Procedure Code of Ethiopia empowers the trial court to attempt to reconcile the injured party and offender during on the day of first hearing in case of private

<sup>1</sup> Ibid, Art. 15.

<sup>2</sup> Endalew Lijalem Enyew, op. cit., n.12.

<sup>3</sup> Criminal Procedure Code of Ethiopia, Art. 13 and 21, Para. 1.

<sup>4</sup> Id, Art. 19-21.

<sup>5</sup> Ibid, Art. 42, Para.1 (a) & Art.44, Para.1.

<sup>6</sup> Ibid., see op. cit. n.43.

<sup>7</sup> Ibid.

<sup>8</sup> Criminal Code of the Federal Democratic Republic of Ethiopia (herein after Criminal Code of FDRE), Proc. No. 414/2004, Art. 188.

<sup>9</sup> Criminal Procedure Code of Ethiopia, Art. 153.

prosecution;<sup>1</sup> this is encouraging. Moreover, it is best if the law should authorize using ADR to resolve disputes involving crime during pre-trial stages.

On the other hand, the Criminal Procedure Code of Ethiopia empowers '*Atbia Dagna*' to settle by 'compromise' offences such as insult, assault, petty damage to property or petty theft where the value of the property stolen does not exceed Ethiopian five birr.<sup>2</sup> However, aforementioned law does not define compromise; the manner how it should be conducted; and it does not prescribe the manner how '*Atbia Dagna*' assumes such power & its status in the criminal justice system. Indeed, the rights & duties of the crime victim & the offender in the compromise process; & its expected outcomes are not clearly provided therein.

### **3.2.2. Under the Constitution of Federal Democratic Republic of Ethiopia**

The Constitution of FDRE has acknowledged the rights of the Nation, Nationality and Peoples of Ethiopia to develop & promote their own culture.<sup>3</sup> Moreover, it imposes duty up on both the state and federal government<sup>4</sup> to support the growth and enrichment of cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the constitution itself on the basis of equality.<sup>5</sup> Furthermore, it declares its supremacy and any law or customary practice that contradicts with it is declared "null and void."<sup>6</sup> Hence, as far as those cultures & traditions do not contradict with aforementioned principles there is possibility to develop & promote them. Therefore, it is logical to deduce that the cultures & traditions of Ethiopian nations and nationalities are given a due recognition and protection under the Constitution of the FDRE.<sup>7</sup>

The Constitution of FDRE allows the adjudication of disputes relating to personal and family laws in accordance with customary & religious laws with the consent of parties to the dispute.<sup>8</sup> Thus, the word 'dispute' under aforementioned provision may not be necessarily construed to mean it refers to only 'civil litigation' as stated by Endalew Lijalem Enyew;<sup>9</sup> rather it may encompass criminal litigation as well. Indeed, the phrase 'disputes of personal nature' under the above provision may be construed to mean those types of crimes punishable up on private complaint under the context of both the Criminal Procedure Code of Ethiopia and Criminal Code of FDRE. Therefore, it is not sound to conclude that the Constitution of FDRE disregards the role of ADR in the criminal justice administration.

### **3.2.3. Under the Criminal Code of Federal Democratic Republic of Ethiopia**

Similar to that of the Criminal Procedure Code of Ethiopia, crimes are classified into two under the Criminal Code of Federal Democratic Republic of Ethiopia.<sup>10</sup> Those are crimes punishable up on public prosecution & those punishable up on private complaint.<sup>11</sup> Particularly, the Criminal Code of FDRE proclaims that no charge shall be instituted against the offender unless the injured party or his legal representative institutes a complaint if the alleged crime falls under the category of crimes punishable upon private complaint.<sup>12</sup> Accordingly, the discretionary power is vested with the crime victim to petition complaint against the offender.

More specifically, the Criminal Code of FDRE proclaims that if the alleged crime falls under the category of offences punishable upon private complaint, the offender is not liable to punishment where it is done with the consent of the victim or his legal representative.<sup>13</sup> Hence, it is logical to conclude that the Criminal Code of FDRE impliedly allows the crime victim & the offender to use ADR to settle their dispute if the alleged crime is punishable up on private complaint. However, it does not specifically define the term ADR; it does not prescribe what constitutes ADR in the context of criminal justice system; and it does not expressly enumerate the types of crimes subject to ADR process.

### **3.2.4. Under the Criminal Justice Policy of Federal Democratic Republic of Ethiopia**

Even if a policy is not recognized as law,<sup>14</sup> the Criminal Justice Policy of the Federal Democratic Republic of Ethiopia authorizes the injured party and the offender to resolve their dispute through ADR provided that the

<sup>1</sup> Id, see op. cit., n.64.

<sup>2</sup> Ibid, see op. cit., n.45.

<sup>3</sup> Constitution of FDRE, Art. 39, Para.2. It proclaims that every Nation, Nationality and Peoples in Ethiopia has the right to develop and promote culture.

<sup>4</sup> Id, Art. 85, Para.2. See Art.50, Para.1, which states that the FDRE comprises the Federal and the state members.

<sup>5</sup> Ibid, Art. 91, Para.1.

<sup>6</sup> Ibid, Art.9, Para.1 states that the Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect.

<sup>7</sup> Endalcachew Bayeh, 'The Place of Customary and Religious Laws and Practices in Ethiopia: A Critical Review of the Four Modern Constitutions', *Social Sciences. Vol. 4, No. 4, (2015)92*.

<sup>8</sup> Constitution of FDRE, Art. 34, Para.5.

<sup>9</sup> Endalew Lijalem Enyew, op. cit., n.12, pp.126.

<sup>10</sup> Criminal Code of FDRE, Art.211-213.

<sup>11</sup> Id.

<sup>12</sup> Ibid, Art. 212.

<sup>13</sup> Ibid, Art.70, Para.1.

<sup>14</sup> Criminal Procedure Code of Ethiopia, Art. 3, which states that "law shall include proclamations, decrees, orders and any subsidiary legislation...".

alleged criminal act entail simple imprisonment as a punishment under the Criminal Code of the FDRE or if it falls under those types of offences punishable up on private complaint.<sup>1</sup> Accordingly, the victim and the suspect can resolve their dispute through ADR either before the charge is framed; or in any stage before decision is rendered by trial court.<sup>2</sup> Consequently, when they express the fact that their dispute is resolved through ADR to the public prosecutor, then the charge will be withdrawn and the suspect will be exonerated from criminal punishment.

Above all, the Criminal Justice Policy of the FDRE has introduced new idea with regard to the type of crimes subject to ADR. Accordingly, it allows the following types of crimes to be resolved through ADR: (a) crimes punishable up on private complaint; and (b) when the suspect of the alleged crime is juvenile offender or the offender has been not punished repeatedly & the offence entail simple imprisonment as a punishment.<sup>3</sup> According to the Criminal Code of FDRE, 'simple imprisonment' refers to a kind of sentence applicable to crimes of a not very serious nature committed by persons who are not a serious danger to society, and it may extend for a period from ten days to three years.<sup>4</sup> However, simple imprisonment may extend up to five years having regard to gravity of the crime, or where there are concurrent crimes punishable with simple imprisonment or the offender has been punished repeatedly.<sup>5</sup> Thus, the Criminal Justice Policy of the FDRE has given due emphasis to enhance the application of ADR in the Criminal justice system by enlarging the scope of crimes subject to it. However, there is apparent contradiction between the Criminal Procedure Code of Ethiopia & Criminal Law of the FDRE in right hand side and Criminal Justice Policy of the FDRE on the left hand side because the later introduced new concept as regards the types of crimes subject to ADR process. Having this contradiction into account, the Criminal Justice Policy of the FDRE states that any laws contradicting with it will be amended;<sup>6</sup> however, none of those laws has been reformed in so far. Moreover, Criminal Justice Policy of the FDRE has introduced the concept of 'plea-bargaining';<sup>7</sup> however, it is not approved by law.

The Criminal Justice Policy of the FDRE presuppose that there exist both government institutions and NGOs which are specifically intended to involve in promotion of using ADR in the Criminal Justice System. On the other hand, the FDRE Proclamation No.621/2009 authorizes only those NGOs that secure 90% of their fund from local source to involve in the promotion of conflict resolution;<sup>8</sup> hence, this is also one of the discouraging factors within the law. Moreover, the Criminal Justice Policy of the FDRE prescribes that the public prosecutor has great role in employing ADR in the Criminal Justice System, particularly in identifying the type of offences and giving decision whether or not a certain crime case should be settled by ADR or not;<sup>9</sup> however, this is not supported by law.

As regards the time when the case shall be referred to ADR, the Criminal Justice Policy of the FDRE prescribes that if the alleged crime falls under those kinds of crimes allowed to be resolved through ADR it can be referred to it at any stage of criminal proceeding by the request of the public prosecutor, or the suspect, or by the initiation of the court.<sup>10</sup> Here, an important issue is that it allows using ADR during pretrial litigation. Moreover, it imposes duty up on all federal as well as regional criminal justice system actors to be committed to effectively implement the policy.<sup>11</sup> However, the main challenge for implementing those principles adopted under the Criminal Justice policy is that both the Criminal Procedure Code & the Criminal Code of FDRE are contradicting with it. Thus, the policy remains a mere document since its approval up to now.

## 4. Conclusion & Recommendations

### 4.1. Conclusion

Since the 1960s ADR mechanisms are acknowledged to be played their role in civil litigation in Ethiopia.<sup>12</sup> On the other hand, one can logically conclude that the emphasis given to the role of ADR in criminal litigation under the legal frameworks of Ethiopia is minimal having regards to the following findings.

Under both the Criminal Procedure Code & the Criminal Law of FDRE, the discretionary power is vested with the crime victim to petition complaint against the suspect if the alleged crime falls under the category of offences punishable up on private complaint. Hence, even when the offence is flagrant one justice shall not

<sup>1</sup> FDRE Criminal Justice Policy, op. cit., n.45, Art.3.9.

<sup>2</sup> Id.

<sup>3</sup> Ibid., Art. 4, Para.6 [2(1)].

<sup>4</sup> Criminal Code of FDRE, Art. 106.

<sup>5</sup> Id.

<sup>6</sup> FDRE Criminal Justice Policy, Art.7, Para.1 (a).

<sup>7</sup> Id, op. cit., n.46.

<sup>8</sup> FDRE Charities and Societies Proclamation, Proc.No.621/2009, Art. 14, Para.2 (m) and Art. 14, Para.5.

<sup>9</sup> FDRE Criminal Justice Policy, see Art. 4, Para.6 [2(5)].

<sup>10</sup> Id, Art.4, Para.6 (1).

<sup>11</sup> Ibid, Art.7, Para.1(c).

<sup>12</sup> Civil Code of Ethiopia, op.cit., n. 44, Art.3307-3346. Accordingly, compromise, conciliation, & Arbitration are adopted as dispute resolution methods in civil litigation.

become into motion unless the crime victim petitioned complaint against the suspect by him/herself or through his/her legal representative; thus, one can deduce that impliedly those laws allow using ADR to settle those types of offences. However, those laws do not expressly authorize using ADR in criminal justice system.

The Criminal Procedure Code demands the court to try to reconcile the parties in the dispute during private prosecution when the alleged crime is those kinds of offences punishable up on private complaint; however, it does not require the court to reconcile the victim & offender during public prosecution of the same types of crimes. Indeed, it failed to define the term 'reconcile' & it does not enumerate the rights & duties of the crime victim & the offender; it does not prescribes the expected outcomes of the process as well. Similarly, the Criminal Procedure Code it authorizes '*Atibia Dagna*' to try to reconcile both sides through compromise in case of minor crimes fall under their jurisdiction. However, neither the Federal Courts establishment Proclamation nor regional courts establishment proclamations of nine regional governments failed to acknowledge the power of '*Atibia Dagna*'. Hence, the manner how it assumes power is not clearly provided. Moreover, there the term 'compromise' is not defined therein; and it failed to prescribe the respective duties & rights of the victim & offender in the compromise process. The criminal justice policy of the FDRE tried to introduce 'plea-bargaining' to be used in the criminal justice system; however, this is not supported by law in so far & the policy remain a mere document.

There is no consensus as to which type of crimes shall be subject to ADR under the criminal justice system of FDRE. This is because; there is inconsistency between the Criminal Justice Policy of FDRE at right hand side; & the Criminal Procedure Code of Ethiopia at the left hand side. This is because the later expressly allows using ADR to resolve only offences punishable upon private complaint during private prosecution; however, the former authorizes to resolve through ADR all types of crimes that entail simple imprisonment as a punishment against the offender provided that the offender is not habitual offender, or the offender is juvenile or women even during public prosecution.

Under Article 34, paragraph 5, of the Constitution of the FDRE allows using customary or religious laws to resolve disputes related to personal & family laws with the consent of parties to the dispute; however, this provision is vague & subject to interpretative arguments concerning whether it authorizes using ADR to resolve disputes involving crime. To avoid those interpretative arguments, it is best if the Constitution of FDRE should acknowledge the role of customary dispute resolutions method in the criminal justice system plainly. Moreover, the FDRE Proclamation No.621/2009 authorizes only those NGOs that secure 90% of their fund from local source to involve in the promotion of conflict resolution. Accordingly, international NGOs are precluded from involving in the promotion & development of ADR in general in Ethiopia & this seam not fair.

Therefore, lack of clarity within the law; & contradiction between the law in one hand and Criminal Justice Policy on the other hand are the major problems in the field. On the other hand, those laws directly concerning the Criminal justice system such as the Criminal Procedure Code of Ethiopia, the Criminal Code of FDRE & others do not specifically define the term ADR; the stage at which the case should be referred to ADR; the institutions or persons authorized to involve actively in the ADR process; the rights and duties of parties to the dispute in the process; & the expected outcomes of ADR process.

#### **4.2. Recommendations**

At first place, to avoid ambiguity within the law, either the existing laws should be amended or new legislation shall be enacted. The law should obviously define the phrase ADR; indicate the type of crime (s) that can be resolved through ADR; establish the department within government institutions such as police office; justice office & courts that can play their role in promoting & implementing ADR; and it should prescribe their specific rights & duties in the process of ADR. The law should prescribe the stage at which the dispute involving crime shall be referred to ADR; the manner how ADR process should be conducted; the respective rights and duties of the parties to the dispute in the process of ADR; & the expected outcomes of ADR process. Besides, the scope of crimes subject to ADR should be clearly provided; hence, it should conform at least to the Criminal Justice Policy of the FDRE.

As regards the types of ADR to be implemented in the criminal justice context, a detailed and comprehensive study should be conducted to find out how to better organize or institutionalize them so as to ensure uniform application throughout the country. To this end, it is best if the government should consider the experiences of other countries such as Australia, USA, Canada, and New Zealand. Moreover, it is best if the FDRE government should adopt the UN Economic and Social Council Basic Principles on the use of Restorative Justice Programmes in Criminal matters.

The legal frameworks of FDRE should authorize both national and international NGOs in the promotion & development of ADR in the criminal justice system without restriction. Accordingly, the FDRE Proclamation No.621/2009 that authorizes only those NGOs that secure 90% of their fund from local source to involve in the promotion & development of conflict resolution should be repealed.

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### **Competing Interest**

The author declares that this research work is original and it has never been published in any other journal. Besides, other people's works and materials I have used have been duly acknowledged.

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