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Factors Deterring Enhanced Application of Alternative Dispute Resolution (ADR) in Criminal Litigation in Ethiopia: The Case of Wolaita, Southern Ethiopia

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Abstract

This research intended to reveal factors deterring enhanced implementation of ADR to resolve disputes involving crime in Ethiopia, particularly in Wolaita Nation. Quantitative research design was used. Deep analysis of legal provisions and self-completed questionnaire were used to collect pertinent data. Ambiguity within the law; contradiction between the law and criminal justice policy; lack of adequate level of awareness about ADR & its significant in criminal litigation; unwillingness of the crime victim & the attitude of employees of the government institutions directly involved in the administration of criminal justice in the research area that states that ADR less helps to attain the objectives of the Criminal Law; & absence of specific department within government institutions administering Criminal Justice System that is empowered to promote the implementation of ADR are the major factors hindering enhanced use of ADR to resolve disputes involving crime. Besides legal reform, awareness creation to the general public at the community level & continuous training should be given to investigative police, public prosecutors & judges concerning the conceptual framework of ADR & its significance to resolve conflicts involving crime.

Key words: *Alternative Dispute Resolution; Criminal Disputes; Criminal Litigation; Crime Victim; Offender.*

CHAPTER ONE

1. Introduction:

1.1. Background and 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.¹ Criminal justice is the system of practices and institutions of governments directed at upholding

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

social control, deterring and mitigating crime or sanctioning those who violate laws with criminal penalties and rehabilitation efforts.² 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.³ 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.⁴

The use of ADR to resolve dispute involving crime is significant in maintaining close and continuing relationships in every community.⁵ 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.⁶ 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.⁷ 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.⁸ 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.⁹ 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.¹⁰ Customary justice systems provide access to justice for marginalized or impoverished communities that may otherwise have no other options for redress.¹¹ Due to

² Mahua Gulfam, *Introducing 'Alternative Dispute Resolution in Criminal Justice System: Bangladesh Perspective'*, *Banglavisian* Vol. 13, No. 1, (2014)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.

³ 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.

⁴ Id, p. 4.

⁵ Street, „The Language of Alternative Dispute Resolution”, *Alternative Law Journal* 194, (1992)4.

⁶ Melissa Lewis and Les Mc Crimmon, op.cit., n. 3, pp. 8.

⁷ NILS CHRISTIE, „Conflicts as Property”, *British Journal of Criminology*, Vol.17, Issue 1, (1977)7.

⁸ Melissa Lewis and Les Mc Crimmon, op.cit., n. 3, pp.100.

⁹ Kariuki Muigua & Kariuki Francis, „ADR, Access to Justice and Development in Kenya”, at 2., www.strathmore.edu/.../ADR%20access%20to%20justice%20and%20development%20. Accessed 20 May 2017.

¹⁰ 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.

¹¹ 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 Accessed 16 August 2017.

Factors Deterring Enhanced Application of Alternative Dispute Resolution (ADR)... Awol Alemayehu Dana
aforementioned 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,¹² even after passing through the procedures and penalties in the formal criminal court. All types of criminal cases which range from petty offences to serious crimes, such as negligent homicide as well as inter-ethnic and inter-religion conflicts can be and are being resolved via customary dispute resolution mechanisms in many nations, nationalities & peoples of Ethiopia.

1.2. Objectives of this Study: To explore factors deterring enhanced implementation of ADR to resolve disputes involving crime in the Criminal Justice System, particularly in Wolaita.

1.3. Research Methodology:

1.3.1. Study area description: Under the current Federal Structure of Ethiopia, the name Wolaita Zone¹³ indicates both the name of the area and Omotic language speaking nation,¹⁴ located in the State of Southern Nation, Nationalities & Peoples Regional State of Ethiopia, one nine states comprising federal government.¹⁵ It is located at about 330 KMs south west of Addis Ababa. It is bordered on the South by Gamo Gofa Zone, on the West by Omo River, on the North-West by Kambata Tambaro Zone, on the North by Hadiya Zone, on the North-East by the Oromo State, on the East by Bilate River and on the South-East by Lake Abaya. The administrative center of the Wolaita Zone is Soddo Town. The current total population of the Wolaita is estimated to be above 2,463,000.¹⁶

For administrative purpose, Wolaita Zone is divided into 12 Woreda,¹⁷ and 3 unicipal administrations. In each of those administrative units, there is police office, justice

¹² Endalew Lijalem Enyew, „Ethiopian Customary Dispute Resolution Mechanisms: Forms Of Restorative Justice“, *African Journal on Conflict Resolution*, Vol.14, No.1, (2 014)126.

¹³ The Revised Constitution, 2001, of the Southern Nation, Nationalities & Peoples (SNNP) Regional State Proclamation No.5/1995 (herein after Revised Constitution of SNNPR), see Art. 80, Para.1. Under the current federal structure of Federal Democratic Republic of Ethiopia, „Zone“ means an administrative structure functioning below States/Regions.

¹⁴ Yilma Teferi, Dispute Resolution and Reconciliation Mechanisms in Wolaita, Customary Dispute Resolution Mechanisms in Ethiopia: The Ethiopian Arbitration and Conciliation Center, Addis Ababa, (2011)103-104.

¹⁵ The Constitution of the Federal Democratic Republic of Ethiopia (herein after called the Constitution of FDRE), Proclamation No. 1/1995, Art. 47, Para.1 (7).

¹⁶ See the Central Statistics Agency (CSA), 2016, People and Housing Censes Report

¹⁷ Revised Constitution of SNNPR, Art. 90. Accordingly, „Woreda“ means the administrative unit below Zone Structure and comprises of several kebele administrations. Kebele is the lowest administrative unit under the current Federal Structure of Ethiopia.

office and first instance courts. Besides, there is justice department & high court at zonal level. Among Woreda & Municipal administrative units, 5 Woreda (41.66%); 2 (66.66%) Municipal administrations were included. Accordingly, Sodo Zuria, Humbo, Kindo Koysha, Boloso Sore and Damot Gale Woreda; Sodo and Bodit municipal administrations; & were covered. Indeed, zone justice department & high courts were included.

1.3.2. Study design: The type of research conducted was both survey and descriptive research. To achieve the objective of this research, quantitative research type was employed.

1.3.3. Subjects of the study: Investigative police officers, public prosecutors, and judges of both first instance and high court were the target population of this research. Accordingly, the target population of the study is 118 in number. Even if an attempt is made to incorporate all of them in this research, 72 (61%) of them were participated due to different constraints.

1.3.4. Sampling techniques: To sample research area among administrative units, both simple random and purposive sampling techniques were used by taking in to account their accessibility & convenience to collect pertinent data. Hence, one Woreda; one municipal administration; Wolaita Zone High Court, and Justice Department Public Prosecution and Charge Administration Core Process were sampled through purposive sampling due to their accessibility & conveniences. The remaining 4 Woreda and 1 municipal administration were selected through simple random sampling. Since the total number of target population is 118, purposive sampling technique was used to incorporate all of them.

1.3.5. Sources of data: Both primary & secondary sources of data were used. The sampled population, the Constitution of FDRE (1995), Criminal Code of the FDRE (2004), Criminal Procedure Code of Ethiopia (1961) & Criminal Justice Policy of the FDRE (2011) were primary sources while as books, scholarly articles, and government reports of Wolaita Zone Justice Sectors were secondary sources employed in this research.

1.3.6. Tools of data collection: To collect the pertinent data self-completed questionnaire was used.

1.3.7. Method of data analysis: To analyze the collected raw data, descriptive statistics like frequencies & percent were used.

1.3.8. Ethical considerations: Being patient, friendly and smooth communications were the usual ethics of the researcher during data collection. Besides, I had depended on the principles of informed consent by explaining the purpose of the research to the respondents to attain their prior consent.

CHAPTER TWO

2. Conceptual & Legal Framework for ADR in General:

2.1. Definition of ADR: 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.¹⁸ It is simply defined as “[a] procedure for settling a dispute by means other than litigation . . . [.]”¹⁹ ADR is a general term used to define a set of approaches and techniques aimed at resolving disputes in a non- confrontational way.²⁰ In short, it means alternative or appropriate methods and processes to prevent and resolve conflicts and disputes.²¹ ADR is usually described as a method of resolving disputes between parties without resorting to formal court-based adjudication.²² It is stated that the name ADR is an outmoded acronym that survives as a matter of convenience only.²³ 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.²⁴

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.²⁵ 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 resolve the issues between them.”²⁶ 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,

¹⁸ 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.

¹⁹ BLACK'S LAW DICTIONARY (2009, 9th edn.)91.

²⁰ Yona Shamir, Alternative Dispute Resolution Approaches and Their Application, Israel Center for Negotiation and Mediation, Israel, UNESCO, SC-2003/WS/43, (2003)2.

²¹ Id, p. 37.

²² Melissa Lewis and Les Mc Crimmon, op.cit., n. 6.

²³ 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.

²⁴ Shipi M. Gowok, op. cit., n. 10, pp. 266.

²⁵ Mahua Gulfam, op. cit., n. 2, pp.207.

²⁶ National Alternative Dispute Resolution Advisory Committee of Australia, „ADR Terminology: A Discussion Paper” , (2002)2.

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

Factors Deterring Enhanced Application of Alternative Dispute Resolution (ADR)... Awol Alemayehu Dana mini-trials, arbitration, and use of ombudsman, or any combination thereof.²⁷ 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.”²⁸ Accordingly, in restorative process there is 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.”²⁹ 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.”³⁰

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.

²⁷ 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.

²⁸ 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.

²⁹ United Nations Office on Drugs and Crime, „Handbook on Restorative Justice Programs" , *Criminal Justice Handbook Series, New York*, (2006) 6.

³⁰ Cormier, „Restorative Justice: Directions and Project" " <https://www.publicsafety.gc.ca/lbrr/archives/cnsgl-2002-00000726-eng.pdf>." Accessed 20 August, 2017.

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.³¹ The other scholar said that ADR mechanisms mainly consist of negotiation, conciliation, mediation, arbitration and a series of hybrid procedures.³² Still the other one stated that generally ADR is classified as negotiation, mediation, arbitration & conciliation.³³ 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.³⁴ 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.³⁵ 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.³⁶ It is argued that in criminal justice context, the term ADR encompasses victim/offender mediation (VOM); family group conferencing (FGC); victim offender-panels (VOP); victim assistance programs; community crime prevention programs; sentencing circles; ex-offender assistance; community service; plea bargaining; school programs.³⁷ According to the UN Economic and Social Council, restorative process includes mediation, conciliation, conferencing, and sentencing circles.³⁸

Victim-offender Mediation programs were adopted first in Ontario, Canada in the early 1970s; & later on in that decade, similar programs was developed throughout the United States, the United Kingdom and Europe.³⁹ Later on, Family Group Conferencing is first originated in New Zealand in the 1980s.⁴⁰ 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

³¹ Kariuki Muigua & Kariuki Francis, op.cit., n. 9, pp.3.

³² See Muigua K, „Setting Disputes through Arbitration in Kenya“, *Glenwood Publishers Limited*, (2012)1-19.

³³ Shipi M. Gowok, op. cit., n. 20.

³⁴ Mahua Gulfam, op.cit., n. 2.

³⁵ Yona Shamir, op. cit., n.16.

³⁶ Melissa Lewis and Les Mc Crimmon, op.cit., n.18.

³⁷ id, p.1 & 5.

³⁸ UN Economic and Social Council, op.cit., n.24.

³⁹ Melissa Lewis and Les Mc Crimmon, op.cip. n.3, pp.9.

⁴⁰ New Zealand, the Children, Young Persons and Their Families Act in 1989.

Factors Deterring Enhanced Application of Alternative Dispute Resolution (ADR)... Awol Alemayehu Dana
1994 Justice Platt Report on Judicial Reform.⁴¹ In Bangladesh Criminal Procedure Code, compromise is adopted to resolve some types of crimes.⁴² 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.⁴³

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“ .⁴⁴ It is argued that only the aforementioned four programs are considered „restorative practices“ in strict sense⁴⁵ 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.⁴⁶ 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.⁴⁷ Here, one can logically infer that reconciliation one form of ADR allowed to be used in criminal litigation. However, the 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. Indeed, this provision restricts the role of ADR to be used during private prosecution.

Similarly, the Criminal Procedure Code of Ethiopia authorizes the „Athibia Dagna“ to resolve minor 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 through

⁴¹ 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.

⁴² The Code of Criminal Procedure of Bangladesh, ACT No. V of 1898, section 345.

⁴³ Canadian Criminal Code, R.S.C., 1985, c. C-46, Section 718, Para.2 (e).

⁴⁴ 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.

⁴⁵ *Id.*, pp.29-30.

⁴⁶ 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).

⁴⁷ Criminal Procedure Code of Ethiopia, Negarit Gazeta Extraordinary Issue No.1 of 196, Art.151, Para.2.

„Compromise“⁴⁸ under Article 223; however, similar to aforementioned provision this provision lacks clarity. Therefore, one may argue that both reconciliation & compromise those forms of ADR, which are allowed to be used in the criminal justice system context.

In Ethiopia, using ADR to resolve disputes involving crime is one of the prevailing cultures in different nations & nationalities. For instant, mediation in Arsi Oromo;⁴⁹ „Awaasiya’ & ‘Heera cimaa” in Wolaita;⁵⁰ & „ye bête-zemed gubae’ (family council) in the central highlands of Amhara and Tigray region.⁵¹

2.3. Legal frameworks for ADR in Ethiopia:

2.3.1. 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.⁵² Under the Criminal Procedure Code of Ethiopia, discretionary power is vested with the crime victim to petition complaint or not against the offender if the alleged offences are punishable up on private complaint.⁵³ In such type 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.⁵⁴ Hence, it is the crime victim (s) discretion to prosecute the offender or not in such cases.⁵⁵

⁴⁸ 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”.

⁴⁹ See Jetu Edossa, „Mediating Criminal Matters in Ethiopian Criminal Justice System: The Prospect of Restorative Justice”, *Oromia Law Journal, Vol.1, No.1*, (2012)100.

⁵⁰ See 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.

⁵¹ 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.

⁵² Endalew Lijalem Enyew, op. cit., n.12.

⁵³ Criminal Procedure Code of Ethiopia, Art.13 and 21, Para.1.

⁵⁴ Id, Art.19-21. Accordingly, it is defined that the offence shall be deemed to be flagrant where the offender is found committing, or attempting to commit it, or has just committed it, or when the police are immediately called to the place where the offence has been committed, or a cry for help has been raised from the place where the offence is being, or has been committed. The offence shall be deemed quasi-flagrant after the offence has been committed if the offender who has escaped is chased by witnesses or by members of the public or when a hue and cry has been raised.

⁵⁵ Ibid, Art.13.

On the other hand, in such kind of crimes, if the parties to the dispute are willing to resolve their dispute through ADR process, the Criminal Procedure Code of Ethiopia do 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 warrant the conviction of the offender according to Article 42, paragraph 1(a), of the Criminal Procedure Code of Ethiopia, the crime victim or his/her legal representative can prosecute the offender privately if the alleged crime is punishable up on private complaint. This procedure is called private prosecution.⁵⁶ During private prosecution, the court is authorized 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; and before asking whether the accused pleads guilty or not.⁵⁷ If the reconciliation is effective, it will be recorded in the file & it has similar effect with the judgment of the court.⁵⁸ The law does not enumerate the outcomes of such reconciliation; however, it is clear that it terminates the prosecution; & it precludes prosecution of the suspect on similar crime in the future. Another controversy is that whether such record can be 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,⁵⁹ when such offender becomes convicted by committing another crime in the future. Nevertheless, 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.⁶⁰

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. Regarding this point, 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 prosecution.⁶¹

Hence, it can be considered advantageous if it is possible to resolve crime cases during pre-trial stages or at early stages of criminal litigation.

On the other hand, the Criminal Procedure Code of Ethiopia empowers Atbia Dagna to settle by compromise all cases of minor offences such as insult, assault, petty damage to

⁵⁶ Ibid, Art. 42, Para.1 (a) & Art.44, Para.1.

⁵⁷ Ibid., see op. cit. n.47.

⁵⁸ Ibid.

⁵⁹ Criminal Code of the Federal Democratic Republic of Ethiopia (herein after Criminal Code of FDRE), Proc. No. 414/2004, Art. 188.

⁶⁰ Criminal Procedure Code of Ethiopia, Art. 153.

⁶¹ Id, see op. cit., n.62.

Factors Deterring Enhanced Application of Alternative Dispute Resolution (ADR)... Awol Alemayehu Dana
property or petty theft where the value of the property stolen does not exceed Ethiopian five birr.⁶²

However, the law is not clear as regards the manner how Atbia Dagna assume such power; & its status in the Criminal Justice System is ambiguous. Indeed, the rights & duties of the crime victim & the offender in the process; & the expected outcomes of the process are not clearly provided therein.

2.3.2. Under the Constitution of Federal Democratic Republic of Ethiopia: The Constitution of FDRE has acknowledged the rights of the Nation, Nationality and Peoples of Ethiopia⁶³ to develop & promote their own culture.⁶⁴ Moreover, it imposes duty up on both the state and federal government⁶⁵ 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.⁶⁶ Furthermore, it declares its supremacy and any law or customary practice that contradicts with it is declared “null and void.”⁶⁷ 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.⁶⁸

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 under paragraph 5 of Article 34.⁶⁹ Thus, the word „dispute“ under aforementioned provision may not be necessarily construed to mean as it refers to only „civil litigation“ as stated by Endalew Lijalem Enyew;⁷⁰ 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 Ethiopia. Therefore, it is

⁶² Ibid, Art.223.

⁶³ Constitution of the FDRE, Art. 39, Para.2. It proclaims that every Nation, Nationality and Peoples in Ethiopia has the right to develop and promote culture.

⁶⁴ Id, 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.

⁶⁵ Ibid., Art. 85, Para.2. See Art.50, Para.1, which states that the FDRE comprises the Federal and the state members.

⁶⁶ Ibid, Art. 91, Para.1.

⁶⁷ 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.

⁶⁸ 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.

⁶⁹ Constitution of FDRE, Art. 34, Para.5.

⁷⁰ Endalew Lijalem Enyew, op. cit., n.12, pp.126.

Factors Deterring Enhanced Application of Alternative Dispute Resolution (ADR)... Awol Alemayehu Dana
not sound to conclude that the Constitution of FDRE disregards the role of ADR in criminal litigation.

2.3.3. 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.⁷¹ Those are crimes punishable up on public prosecution & those punishable up on private complaint.⁷² Particularly, it 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.⁷³ Accordingly, the discretionary power is vested with the crime victim or his legal representative 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.⁷⁴ 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 private complaint.

2.3.4. Under the criminal justice policy of federal democratic republic of Ethiopia:

Even if a policy is not recognized as law,⁷⁵ 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 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.⁷⁶ Accordingly, in those cases 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.⁷⁷ 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.

⁷¹ Criminal Code of FDRE, Art.211-213.

⁷² *Id.*

⁷³ *Ibid*, Art. 212.

⁷⁴ *Ibid*, Art.70, Para.1.

⁷⁵ Criminal Procedure Code of Ethiopia, Art. 3, which states that “law shall include proclamations, decrees, orders and any subsidiary legislation...”.

⁷⁶ FDRE Criminal Justice Policy, Approved by the FDRE Council of Ministers, 2011, Art.3.9, Para.b.

⁷⁷ *Id.*

Above all, the Criminal Justice Policy of the FDRE has introduced new idea with regard to the type of crimes to be resolved through 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.⁷⁸ 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.⁷⁹ 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.⁸⁰

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.

More interestingly, 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. It provided no exception as regarding the type of institutions that can involve in the promotion of ADR. However, 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;⁸¹ 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;⁸² 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.⁸³ Moreover, it imposes duty up on all federal as well as regional criminal justice system actors to be committed to effectively implement the policy.⁸⁴

⁷⁸ Ibid., Art. 4, Para.6 [2(1)].

⁷⁹ Criminal Code of FDRE, Art. 106.

⁸⁰ Id.

⁸¹ FDRE Charities and Societies Proclamation, Proc. No.621/2009, Art. 14, Para.2 (m) and Art. 14, Para.5.

⁸² FDRE Criminal Justice Policy, see Art. 4, Para.6 [2(5)].

⁸³ Id, Art.4, Para.6 (1).

⁸⁴ Ibid, Art.7, Para.1(c).

CHAPTER THREE

3. Discussion:

3.1. Demographic Variables of Participants:

3.1.1. Age of respondents: Among 72 participants, 30.6% of them are aged from range 20-30; 45.8% of them are aged from range of 31-40 years; and 22.2% of them are aged above 41 years. Based up on this, the participants may have significant exposure to know the application of ADR to resolve conflicts involving crime.

3.1.2. Education level of participants: Among the total respondents, 37.5% of them are diploma in law and 54.2% of them are degree in law graduates; hence, they account 91.75% from the total participants. Hence, this create confident to conclude that all of them have ability to understand each specific questionnaire and the information they have given may be considered legitimate to achieve the objective of this research.

3.1.3. The respondents employment history in their current position: Since all of the respondents are the employees of government institutions of Criminal Justice System such as the investigative police officers, public prosecutors and judges, the author expects that the more their year of service in their current position, they are highly exposed to know the practice of ADR in the Criminal Justice System and the challenges it has been facing. Hence, among the total respondents, more than 72% of them have been working in the Criminal Justice System for more than eight years. Hence, this is significant factor that indicates the respondents have some sort of knowledge about ADR, and its use within the commune to settle crime cases.

3.2. Discussion: Accordingly, mainly close ended questions were provided for the respondents. The author has provided certain items as hindering factors, and the factors were taken from the study conducted in other jurisdictions, the author's personal observance and experience. The respondents were required to choose among the following alternatives to each of the given factors. (1) Strongly agree, (2) agree, (3) neutral, (4) disagree, and (5) strongly disagree. Accordingly, their response is as follows.

3.2.1. Problems Associated with the Law and Policy:

I. Lack of clarity within the law: Both the Criminal Procedure Code of Ethiopia and Criminal Law of FDRE impliedly allow the crime victim & the offender to settle their dispute through ADR provided that the alleged crime punishable up on private complaint. This is because the former under paragraph two of Article 151 demands the trial court to attempt to reconcile both sides before hearing during private prosecution; however, the law remains silent in the case of public prosecution of similar crimes. Moreover, the law does not specifically prescribe the parties that can play role in ADR process; it does not prescribe the rights & duties of both sides in the ADR process; & it does not enumerate the expected outcomes of the process as well. As regards this, among the respondents

67% strongly agree and 28% agree that lack of clarity within the law concerning the implementation of ADR to resolve conflicts involving crime is one of the major factors hindering its enhanced application in criminal litigation in general.

I. Contradiction between the laws and criminal justice policy: The Criminal Justice Policy of FDRE has introduced new concepts concerning the types of crimes subject to ADR. Accordingly, it states that if the alleged crime is punishable with simple imprisonment or punishable up on complaint or if the suspect is juvenile offender, or he/she has been not punished repeatedly or the offence entail simple imprisonment then they can be subject to ADR. On the other hand, only crimes punishable up on private complaint are subject to ADR under the law. Thus, there is apparent contradiction between the law and Criminal Justice Policy. Having this into account, the later states that any laws contradicting with it will be amended; however, none of those laws has been reformed in so far. 100% of the participants have acknowledged this as one of the existing challenge in the field.

3.2.2. Problems associated with perception:

I. Unwillingness of the crime victim: ADR by its very nature requires the willingness of both sides of parties to the dispute. Particularly, the willingness of the crime victim has great role to resolve the dispute through ADR. For example, from 2012/3- 2014/5, among conflicts involving crime that are resolved through ADR in Wolaita Zone, around 56% were settled by the initiation of the suspect and when the victim agreed.⁸⁵ In this regard, 30% and 35% of the respondents strongly agree and agree respectively that unwillingness of the crime victim is one of the major factors hindering the application of ADR process. On the other hand, 35% of the respondents have shown neutral status. Accordingly, This may be because of lack of awareness the significance of resolving his case through ADR or either due to his/her perception that his/her damage will be maintained only through formal criminal proceeding or his/her mistrust on those who will involve in the ADR process. However, further research is required.

II. The perception that using forms of ADR in criminal litigation less helps to attain the objects of criminal law: The purpose of Criminal Law of FDRE is to preserve the peace and security of the society by preventing the commission of crime through punishment as a major means.⁸⁶ It further states that once a crime is committed, punishment is important to deter the offender from committing another crime and to make them a lesson to others.⁸⁷ There is an attitude among the Criminal Justice System actors that expressed as using ADR in criminal litigation is not appropriate means to attain aforementioned purpose of criminal law. As regards this, 21% and 48% of the participants strongly agree and agree respectively that the attitude „using ADR in criminal

⁸⁵ Wolaita Zone Justice Sector Annual Reports, 2012-2015.

⁸⁶ Criminal Code of FDRE, see the preamble & Art.1.

⁸⁷ Id, Art.1.

Factors Deterring Enhanced Application of Alternative Dispute Resolution (ADR)... Awol Alemayehu Dana
litigation less helps to attain the objectives of criminal law" as one of the challenge hindering to implement ADR in criminal litigation.

3.2.3. Institutional Problem: The Criminal Justice Policy of the FDRE presuppose that there exist both government institutions and NGOs which are specifically intended to promote the implementation of ADR to resolve conflicts involving crime. However, 100% of the participants confirmed that there is no formally established department within government institutions involved in Criminal Justice System such as police, justice department or courts that is empowered to involve actively in promotion of ADR. Indeed, 100 % of the participants confirmed that there are no NGOs of any kind in Wolaita Zone that promotes the implementation of ADR to resolve crime case.

Under the Criminal Procedure Code of Ethiopia, the court is empowered to attempt to reconcile the crime victim and an offender during private prosecution before hearing the case; however, 100% of the participants confirmed that there is no private prosecution in the practice. Besides, under the Criminal Procedure Code of Ethiopia, Atbia Dagnias is empowered to settle by compromise all cases of minor offences of insult, assault, petty damage to property or petty theft where the value of the property stolen does not exceed five birr. However, 100% of the participants confirmed that there is no institution named as such in Wolaita Zone in so far. Indeed, 100% of the participants strongly agreed that lack of formally established institution by law to promote using ADR to settle conflicts involving crime is one of the challenges hindering its enhanced application in Wolaita Zone.

CHAPTER FOUR

4. Conclusion & Recommendation:

4.1. Conclusions: Since the 1960s ADR mechanisms are acknowledged to be played their role in civil litigation in Ethiopia.⁸⁸ On the other hand, one can construe that the emphasis given to the role of ADR in criminal litigation is very minimal. This is because even if the Criminal Procedure Law of Ethiopia allows using reconciliation, which is one type of ADR, to resolve crimes punishable up on private complain during private prosecution. However, there is no practice of private prosecution in the study area. This may be because of the crime victims may not know this right. On the other hand, the Criminal Procedure Code does not either allow or preclude using ADR during public prosecution provided that the alleged crimes fall under the category of crimes punishable up on complaint.

⁸⁸ Civil Code of Ethiopia, op.cit., n. 44, Art.3307-3346. Accordingly, compromise, conciliation, & Arbitration are adopted as dispute resolution methods in civil litigation.
Volume-IV, Issue-II September 2017

There is no consensus as to which types of crimes are 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. Hence, the former prescribes crimes punishable up on private complaint; and when the suspect of the alleged crime is juvenile offender or the offender has been not punished repeatedly & the alleged offence entail simple imprisonment as a punishment are subject to ADR; however, this is not supported by law.

There is no law that defines the term ADR in the context of criminal justice system; that prescribes the stage at which the case should be referred to ADR; the institutions or persons authorized to involve actively in the ADR process & their respective responsibilities; the rights and duties of parties to the dispute in the ADR process; & the expected outcomes of ADR process.

There is no department in police office, justice department & courts of any level that concerns with the promotion of ADR to resolve conflicts involving crime. Similarly, there are no NGOs promoting the same in the study area.

Moreover, unwillingness of the crime victim & the perception that using ADR in criminal litigation less helps to attain the objectives of criminal law are also some those factors hindering its enhanced implementation.

4.2. Recommendations:

I. To the government of FDRE: At first place, to avoid ambiguity within the law concerning the role of ADR at national level, either the existing laws should be amended or new legislation shall be enacted. The new legislation or amendment should obviously define the term ADR in the context of criminal justice; it should indicate the type of crimes subject to ADR; it should establish the department within the government institutions involved in the administration of criminal justice 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; & its expected outcomes.

As regards the forms of ADR to be used in the context of criminal justice, a detailed and comprehensive study should be conducted to find out how to better organize or institutionalize them so as to ensure its uniform application in criminal litigation throughout the country. For example, the government of FDRE should take into consideration other countries experiences such as Australia, USA, Canada, and New Zealand. Moreover, the government of FDRE 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 encourage both national and international NGOs to involve actively in the promotion of ADR in the criminal justice system; hence, the FDRE Proclamation No.621/2009 that authorizes only those NGOs that secure 90% of

Factors Deterring Enhanced Application of Alternative Dispute Resolution (ADR)... Awol Alemayehu Dana
their fund from local source to involve in the promotion of conflict resolution should be repealed.

II. To the local government: Awareness creation concerning the conceptual framework of ADR, & the significance of using ADR to resolve conflicts involving crime should be done to the public in large at kebele level. Indeed, both short term & long term training should be given to the investigative police, public prosecutors & judges concerning the role of ADR in the criminal justice context.

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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