

EXPLORING THE SUITABILITY OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN TANZANIA CRIMINAL CASES

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ABSTRACT

Alternative dispute resolution is currently widely accepted in the dispute settlement sector. However, there are arguments against its acceptance because of several its effectiveness in criminal matters. This paper applied for documentary review under the premise of the applicability of the alternative dispute resolution in criminal matters in Tanzania. Under such general concern, the paper centred on two main questions as the first is whether the alternative dispute resolution can meet the standards of criminal justice as expected. The second is the scope of the criminal matters, which entitle the parties to employ the alternative dispute resolution instead of using the litigation. The paper observed that the application of alternative dispute resolution in criminal matters in Tanzania is limited in terms of the scope and effectiveness in rendering criminal justice. The paper recommends the amendment of the permitting laws to clear silence and loopholes therein.

Keywords: Dispute, Alternative Dispute Resolution, Criminal Matters, Court

INTRODUCTION

Alternative dispute resolution methods are the need of the hour to resolve the criminal cases as well. It is the best alternative system of settling the cases pending before the court without litigation. Alternative dispute resolution involves a process much less formal than the traditional court process. Besides, it includes the appointment of a third party to preside over a hearing between the parties consensually. It includes different forms such as negotiationⁱ, mediationⁱⁱ, conciliationⁱⁱⁱ, and arbitration^{iv}. It applies to high-profile labour disputes, divorce actions, and personal injury claims.^v

The applicability of alternative dispute resolution has been a talk of many ages as far as dispute settlement is concerned. The application of ADR has been gaining momentum because of the speed, informality, expensiveness and voluntariness.^{vi} The observation made in the case of *Hillmond Investments v CIBC*^{vii} states that the Alternative dispute resolution helps parties solve disputes efficiently without resort to formal litigation and with a minimum of judicial interference.

The experience of the applicability of the ADR shows much space in civil matters as compared to criminal matters. Few cases show that there is usage of ADR in criminal matters. For instance, the case of *Republic v Muhidin Twalibu*^{viii} shows in which criminal matters the alternative dispute resolution may apply. The Court observed that the alternative dispute resolution applies to criminal matters of common assault or of personal or private nature. The paper undertakes exploration on the extent of the applicability of the ADR in criminal matters in Tanzania. Besides, there are different arguments raised for and against its use in criminal matters. The paper undertakes a legal adventure to examine the essence behind the applicability of the ADR in criminal matters. The paper examines the law that allows the application of the ADR in criminal matters to expound whether promotes or demotes the administration of criminal justice in Tanzania.

The paper's organisation features an overview of the alternative dispute resolutions and their situational analysis in Tanzania. Then, the paper explores alternative dispute resolution through the bird's eye view in international law. Next, the paper examines the applicability of the ADR in criminal matters with the particularity of Tanzania through the laws, which are in force in

Tanzania. Moreover, the paper weighs the advantages and disadvantages of ADR in criminal matters in Tanzania. Furthermore, the paper analyses the effectiveness of the law dealing with the ADR in criminal matters. Finally, the paper concludes on the subject of the ADR regarding the criminal matters in Tanzania.

BACKGROUND OF ADR

Disputes are disagreements between two or more persons. The disputes include controversies, misunderstandings, and arguments upon the particular subject matter. The disputes may involve either negotiable or non-negotiable issues between disputants.^{ix} The disputes may be short term or long-term depending on circumstances thereto.

The disputes inhere human society. They may have different forms. Some are violent. Others are non-violent. Violent disputes involve physical forces to resolve competing claims or interests.^x The physical forces applied may be with arms or without arms. Non-violent disputes do not involve physical forces between members of the community.

There are several reasons, which cause disputes. Nevertheless, the variation of interests among members of society leads to the occurrence of disputes.^{xi} The interests of persons have their bases on their needs and want. The needs and wants may have different hierarchies between different persons. The hierarchy of needs and wants are without which no one can live and sustain life.^{xii}

Disputes are inevitable in society.^{xiii} The disputes have a lot of impact on societies. Thus, the need for settlement or resolution of the disputes came into the mind of the people. Thereafter, human beings have been inventing various ways and procedures of settling disputes. For instance, people have been using negotiation, mediation, arbitration, adjudication in resolving their disputes.

The methods of settling disputes have categorised into two major types. These are adjudicative and consensual settlements.^{xiv} On one hand, adjudicative settlements involve the use of courts of law in settling disputes through the application of the law as well as the court determines the outcome. On the other hand, the consensual settlements deal with mechanisms other than the

use of courts of law in settling disputes and the parties determine the outcome.^{xv} Consensual settlements involve the use of alternative dispute resolution in the resolution of the disputes.

The origins of ADR trace to traditional societies. Traditional societies, without the trappings and paraphernalia of the modern state, had no coercive means of resolving disputes. Therefore, consensus building was an inevitable and necessary part of the dispute resolution process. The court system only developed as a necessary by-product of the modern state. Societies in Africa, Asia and the Far East were practising non-litigious means of dispute resolution long before the advent of the nation-state, for the building of long-term relationships, was the bedrock on which those societies rested.^{xvi}

In the western world, Ancient Greece had the roots of alternative dispute resolution. It is a mythological deduction of the early arbitration.^{xvii} The procedure of arbitration set up by the Greeks was surprisingly formal. Parties chose arbitrator through a lottery. The arbitrator had several duties. The primary duty was to attempt to have an amicable settlement between the parties. An appeal would be brought before the Arbitrators, who would further refer the matter to the courts. In such an appeal, Demosthenes had once alleged that one Midias had used discourteous language towards Demosthenes.^{xviii} Similarly, in Rome, there was a well-established practice of arbitration separate from the procedures of litigation. Cicero, writing before 50 BC, knew arbitration as part of the highly developed legal system of which he was the master.^{xix}

The modern ADR movement began in the United States because of two main concerns for reforming the American justice system. First was the need for better-quality processes and outcomes in the judicial system. The second was the need for efficiency of justice.^{xx}

ADR came into the African legal systems in the 1980s and 1990s because of the liberalization of the African economies, accompanied by such conditionalities as reform of the justice and legal sectors, under the Structural Adjustment Programmes. However, most of the methods of ADR that are promoted for inclusion in African justice systems are similar to pre-colonial African dispute settlement mechanisms that encouraged the restoration of harmony and social bonds in the justice system.^{xxi}

Alternative dispute resolution is not a new phenomenon in the world and Tanzania in particular. It has existed in several eras. For instance, it was in pre-colonial societies, colonial societies and postcolonial societies. Its existence has been variable because of the formality, procedures and methods. The culture determines a lot on the nature, form and methods of the alternative dispute resolution.^{xxii}

Shreds of evidence are in place to show that alternative dispute resolution applied in pre-colonial societies. For instance, the famous case of Kadume demonstrated the use of internal moot mediation in resolving the dispute between Kadume and Soine. The lineage counsellor in the Waarusha tribe mediated the dispute.^{xxiii} Thus, traditional local leaders including male and female elders played a pivotal role in conflict management.

In the colonial era, the British established the duo system of the courts in Tanganyika. The court system recognised the existence of the customary means of the settlement of the disputes among the natives. The customary means of the settlement of disputes implied the usage of the informal methods of disputes settlement. These included negotiation, mediation and arbitration based on the customary laws of the particular African community. Due to their wide powers, knowledge, wisdom and respect, the traditional leaders were accorded in the society they could resolve several disputes.^{xxiv}

In modern Tanzania, Alternative dispute resolution came in 1994. The introduction was through Government Notice No. 422. The notice amended the First Schedule to the Civil Procedure Code Act. Hence, it is now an inherent component of the country's legal system. It is through several laws such as the Civil Procedure Code Act^{xxv}, the Employment and Labour Relations Act^{xxvi}, the Criminal Procedure Act^{xxvii} and others. In recognition of its importance in civil litigation in Tanzania, ADR has been a compulsory subject in higher learning/training institutions for lawyers.^{xxviii}

ALTERNATIVE DISPUTE RESOLUTION IN CRIMINAL MATTERS

Criminal cases are court proceedings in which a person charged with having committed or omitted an act against the community or state is brought to trial and either found not guilty or

guilty and sentenced.^{xxix} They involve enforcing public codes of behaviour as embodied in the laws, with the government prosecuting individuals or institutions.^{xxx}

Handling criminal matters are different from civil suits.^{xxxi} The differences lie in who prosecutes subject matter and outcomes. The subject matter of criminal matters is the crimes and determination of guilt. The outcomes of criminal matters are punishments in different forms. Some of the punishments are death, imprisonment, fines, forfeiture, alternative sentences and many others.^{xxxii} The criminal matters prosecuted by the State. Besides, the standard of proof in criminal matters is beyond a reasonable doubt.

The often application of the alternative dispute resolution in civil cases attracted the need for its application in criminal matters. It has proved effective in ending civil legal disputes. This has triggered the urge of the same in criminal matters. Alternative dispute resolution methods help in many ways like it has the victim to get justice on time and even these methods save the time of the courts as well. However, there are some concerns on whether the applicability of the ADR in criminal matters shall render the dispensation of criminal justice. These concerns attracted the undertaking of this paper.

ADR in the criminal matters represents a shift towards 'restorative' justice.^{xxxiii} This views the crime as the violation of one-person right by another.^{xxxiv} Therefore, criminal justice should focus on repairing the victim's harm.^{xxxv}

ADR in the criminal matters contains an idea of reparation in the transitional justice aspect.^{xxxvi} The application of the ADR requires an offender to do something positive on to the victim and the society.^{xxxvii} It may involve compensation, community services for a crime committed as a part of the judicial settlement.^{xxxviii}

NATIONAL LEGAL FRAMEWORKS ON APPLICATION OF ADR IN CRIMINAL MATTERS

The urge of applying alternative dispute resolution in criminal matters was in the legal system of Tanzania. The incorporation has been through different legislation. However, the nature of

the prescription on the applicability of the ADR in criminal matters in the legislation may raise different concerns on the scope, effectiveness and legality.^{xxxix}

The application of any legal concept requires effective legal set up. Effective application emanates from effective legal set up. Hence, application of alternative dispute resolution in criminal matters depends much on how is the set of its legal regime.^{xl}

The Constitution of the United Republic of Tanzania^{xli}

It is the fundamental and organic law of a nation or state. It establishes the institutions and apparatus of government. Besides, it defines the scope of governmental sovereign powers. Moreover, it guarantees individual civil rights and civil liberties.^{xlii} It consists of the rules and practices that determine the composition and functions of the organs of central and local government in a state and regulate the relationship between the individual and the state.^{xliii}

Often, the constitution is a mother law. There are mainly two reasons for that. One, the constitution is the supreme law of the state or nation. This means there is no law that is above the constitution. The supremacy is in terms of a hierarchy of laws. Two, the constitution determines the validity of the other laws. Other laws derive their validity from the constitution. When other laws are inconsistent with the constitution, they become void to the extent of the inconsistency.^{xliv}

Article 107A (2) of the Constitution of the United Republic of Tanzania^{xlv} provides for the principles that the courts have to comply with when dispensing justice. These principles are important in the administration of both criminal and civil justice in the country. Among the principles provided is the court shall promote and enhance dispute resolution among persons involved in the disputes.

The duty of the court is to promote and enhance dispute resolution between the parties. This duty signifies that the court must encourage the parties to end their disputes because it is in the interest of the public that disputes must end. Since it has not specified specific dispute resolution, the alternative dispute resolution chips in. hence, the alternative dispute resolution is recognised implied through this article.

Besides, article 13(6) (a) of the Constitution of the United Republic of Tanzania^{xlvi} recognises the use of courts and any other agency in the determination of rights and duties of the persons. Any other agency constitutes the dispute resolution without litigation.^{xlvii} The non-litigation settlement usually involves the use of alternative dispute resolution. Thus, impliedly, the alternative dispute resolution applies to a determination of criminal rights and duties in the court.^{xlviii}

The Criminal Procedure Act^{xliv}

This is the general law as far as criminal procedure in Tanzania mainland is concerned. It is the principal legislation made by the parliament of the United Republic of Tanzania under the auspice of article 64(1) of the Constitution of the United Republic of Tanzania.¹

The general purpose of the Criminal Procedure Act is to provide for the procedure to follow in the investigation of crimes and the conduct of criminal trials and for other related purposes in the Country.^{li} It is the law that puts in place the mechanisms, institutions, ways and procedures to follow when dealing with criminal matters.

The application of the law is limited in several ways. One, the Criminal Procedure Act applies to the district court, resident magistrate court and the high court in their original jurisdictions. Hence, the Criminal Procedure Act does not apply to the primary court in its original jurisdiction. Two, the Act applies to Tanzania mainland. It is not applicable in Zanzibar.^{lii}

Section 163 of the Criminal Procedure Act^{liii} is a very good authority of application of Alternative dispute resolution in criminal cases. It provides the applicability of reconciliation in certain cases. Reconciliation is among the forms of alternative dispute resolution. Hence, allowing the application of reconciliation denotes the application of the alternative dispute resolution in criminal proceedings.

It states that in the case of proceedings for common assault or any other offence of a personal or private nature the court may promote reconciliation, encourage, and facilitate the settlement. This when the court it believes that the public interest does not demand the infliction of the penalty. This is through in an amicable way, of the proceedings or on terms of payment of

compensation or other terms approved by the court, and may thereupon order the proceedings to have stayed.

The Primary Court Criminal Procedure Code^{liv}

It is the criminal procedure law applicable to the primary courts of Tanzania. It is a third schedule to the Magistrates Courts Act^{lv}. It deals with procedures of handling criminal proceedings in the primary court in its original jurisdiction and the district court in its appellate jurisdiction.^{lvi}

Section 4(2) of the Primary Court Criminal Procedure Code^{lvii} provides for the powers of the primary court to promote the reconciliation of certain cases. It states that in the case of proceedings for common assault or any other offence of a personal or private nature the court may promote reconciliation, encourage, and facilitate the settlement. This when the court it believes that the public interest does not demand the infliction of the penalty. This is through in an amicable way, of the proceedings or on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to have stayed.

The provision shows that it is the general policy of the law to encourage reconciliation.^{lviii} Reconciliation is the coming together of disputants to end their dispute through amicable means. It is the restoration of harmony between persons or things in disputes.^{lix}

Section 163 of the Criminal Procedure Act^{lx} and section 4(2) of the Primary Court Criminal Procedure Code^{lxi} denote several aspects of the application of the alternative dispute resolution in criminal proceedings. These aspects are worthy of taking into account because they may affect in one way or another the applicability of the alternative dispute resolution in criminal proceedings in Tanzania.

One, the reconciliation applies to certain criminal proceedings. It does not apply to all criminal proceedings. The criminal proceedings, which allow the application of reconciliation, are common assault or offences of private nature or personal nature. A common assault is a summary offence that constitutes an intentional or reckless act that causes someone in fear of immediate physical harm. It is an attempt to commit battery, requiring the specific intent to

cause physical injury.^{lxii} Words alone cannot constitute an assault. Assault is a form of trespass to the person and a crime as well as a tort.^{lxiii}

Two, the reconciliation applies to certain criminal proceedings when the public interest does not demand the infliction of the penalty. It shows that reconciliation applies in the public interest demand. The court opines whether the public interest demands no imposition of penalty upon the criminal proceeding of the common assault, private or personal nature. If the court observes that the public interest does not demand infliction of the penalty, no reconciliation may apply.

Three, it is the court responsible to promote reconciliation and encourage and facilitate the settlement, in an amicable way. When the court opines that the particular criminal proceeding is of the personal or private nature or common assault on the demand of the public interest, it may promote the amicable way of settlement of the dispute between the parties. The alternative dispute resolution is of amicable methods of settling the disputes. Hence, the court has the power under the circumstance to encourage the amicable settlement of the disputes between parties in criminal proceedings.

Four, when the court has opined the undertaking of the amicable dispute settlement between the parties, it has to stay the proceeding. This connotes that the amicable settlement of the disputes has the power to stay the criminal proceeding in the court. The stay is necessary by the court of law when the amicable way of settling the dispute is a preference to the litigation process thereat.

The Criminal Procedure (Plea Bargaining) Rules^{lxiv}

These are subsidiary legislation. They set out the procedure for initiating a plea agreement. The Chief Justice of Tanzania published these rules under section 194H of the Criminal Procedure Act^{lxv}. The purpose of publishing these rules is for better carrying out of the provisions of plea-bargaining in the Criminal Procedure Act. The publication for these rules was on 5 February 2021 via Government Notice Number 180 of 2021.

Before making of the Rules, the practice has been that the accused initiates a plea bargaining request by writing a letter to the DPP through the prison authority. The Court was only involved after the conclusion of the agreement between the prosecution and the defence.

The Rules however requires the parties to a criminal offence to engage the Court from the beginning by notifying it orally or in writing of the intention to negotiate a plea agreement.^{lxvi} The Court has the power to fix a time within to conclude a plea agreement. The maximum time that the court may grant is 30 days.^{lxvii}

Unlike under the Act where disclosure of evidence depended on the type of Court an accused was at, under the Rules, the prosecutor is duty bound to fully disclose to the accused the evidence obtained during investigation to enable the accused make an informed decision.^{lxviii}

This is a big step in improving the administration of criminal justice in Tanzania. The Rules also gives the victims the right to be involved in the plea bargaining process especially to protect their right to compensation or restitution. The victim can even initiate a proposal to include compensation to him in the agreement.^{lxix} The Rules has cleared the worry of many accused and defence counsel of entering into a plea agreement of an offence punishable with a minimum statutory penalty.^{lxx}

The Rules allow the accused and public prosecutor to propose a penalty in the final plea agreement. Although the rules give the Court discretion to impose a lesser penalty than the statutory minimum penalty prescribed by the law as suggested by the parties, the suggested penalty by the parties does not bind the Court.^{lxxi}

The Rules prescribes the format of a plea agreement and the form of an application for setting aside a conviction founded on plea agreement.^{lxxii} Formerly there was no statutory format of the plea agreement.

In Tanzania, all economic offences, sexual offences, drug offences and many other offences attract severe minimum statutory penalties. Many accused have been hesitant to enter into a plea agreement for fear of sentence of such severe minimum statutory custodial sentences.^{lxxiii}

LEGAL LIMITATIONS OF APPLICABILITY OF ADR IN CRIMINAL MATTERS

The nature and extent of the application of ADR mechanisms in criminal matters in any country has been a contentious.^{lxxiv} The categories of crimes are one of the determinant for applicability of the ADR.^{lxxv} The parties involved in the crime and disputes is another determinant of the applicability of the ADR in criminal matters.^{lxxvi} The timing is of essential in the determination of the application of the ADR in criminal matters.

Since the state is one of the parties to the prosecution of a crime before a court^{lxxvii}, it is established herein that established that all applications to apply alternative dispute resolution mechanisms in criminal proceedings must involve the state through the prosecution since the state is also a complainant.^{lxxviii}

The issue of when the alternative dispute resolution may be applied is crucial and a limiting factor. The main reason is that applications to apply ADR mechanism in criminal proceedings can only be done before a final judgement has been issued.^{lxxix} Otherwise the application of ADR will not be successful since its acceptance would be tantamount to usurping the powers of the courts.^{lxxx}

One point to note is that even though the ADR has been used widely in settlement of disputes in our societies^{lxxxi}, the role of ADR in formal criminal justice system is marginal as criminal acts are perceived as an offense against the state.^{lxxxii} This assumption confers power on the state to determine guilt and punish wrongdoers.^{lxxxiii} It is assumed that parties to the criminal dispute are the state and the offender.^{lxxxiv} Alternatively, it is increasingly viewed that crime is understood as it is committed against people and a disturbance of the peace of the community.^{lxxxv}

Another point to note is that there are factors specific to the criminal context which renders mediation process unlikely to succeed because, a kind of mediation supposed to be applicable in criminal context is somewhat different from our understandings of mediation process in civil matters.^{lxxxvi}

That means, there is an assumption that in mediating civil disputants, both sides contributed to the conflict at hand, while in victim-offender mediation process there is an innocent victim, likely to be highly emotionally charged due to criminal injury, and an offender who has usually already admitted to the crime. This puts the parties at different positions when dialogue begins.^{lxxxvii}

Based on the national legal frameworks governing the applicability of ADR mechanisms in criminal matters in Tanzania, several laws allow the application of alternative dispute resolution in criminal proceedings. The relevant provisions that apply the alternative dispute resolution in criminal matters are section 163 of the Criminal Procedure Act^{lxxxviii} and section 4(2) of the Primary Court Criminal Procedure Code^{lxxxix}.

The above mentioned statutory provisions indicate to have several legal limitations as far as applicability of ADR mechanisms in criminal matters in Tanzania. Generally, in different circumstances that it is possible to obtain justice without the usage of the courts of law^{xc}. For instance, the European Court of Human Rights held that one could scarcely conceive of the rule of law without there being a possibility of having access to the courts.^{xc1} This holding shows the implied recognition of dispensation of justice without accessing the courts that is the employment of the alternative dispute.

The legal limitation here is the scope of the applicability of alternative dispute resolution mechanisms in the criminal matters.^{xcii} Despite the good side of the law on imposition of the amicable settlement of the criminal proceedings, several legal limitations as to the applicability are worthy of analysis in this paper.

Firstly, the amicable settlement of the dispute applies to the common assault or offence of private or personal nature. The concept of the offence of the private or personal nature is too wide to be just like that. However, no definition of the term offence of personal or private nature has been given. This leaves a loophole for its applicability in a real situation scenario because of the failure to define the offence of personal or private nature.^{xciii}

In the case of *Republic v Muhidin Twalibu*^{xciv}, the court observed that before applying section 163 of the Criminal Procedure Act^{xcv}, the court has to consider whether the offence is one of common assault or of personal or private nature. The court adds that the offence of burglary

and stealing is not one of common assault or of a personal or private nature. Therefore does not fall within the powers of the court to promote reconciliation.

Therefore, based on the wording of the judicial reasoning in the above case, the alternative dispute resolution is available for use in only petty criminal offences such as assault, battery and of the like. Hence, serious offences such as murder, robbery, treason cannot apply alternative dispute resolution to settle the matter.^{xcvi} Thus, not all matters can be settled through alternative dispute resolution.^{xcvii}

Secondly, the court has the discretion to prefer the amicable settlement of the criminal disputes upon the demand of the public interest. The term that public interest demand is too vast to be left without prescribing the criteria. The provision leaves discretion to the court to determine whether public interest demand or not. However, no criteria are in place to enable the court to determine whether the public interest demands or not. A weakness may affect the application of alternative dispute resolution.^{xcviii}

In the case of *Republic v Sempeto Vincent*^{xcix}, the court had this to say the offence of doing grievous harm contrary to s. 225 of the Penal Code^c is a felony and therefore it is outside the scope of those offences in respect of which the court may promote reconciliation in lieu of a penalty. Moreover, the court had this to add the court had no power to promote reconciliation in this case and therefore the trial court magistrate, his good intentions notwithstanding, acted in excess of jurisdiction.

Thirdly, the effect of the amicable settlement of the dispute is a stay of the criminal proceedings. The provision provides for the stay of the proceeding in place of the amicable settlement of the dispute. Nevertheless, it does not prescribe whether the stay shall be permanent or temporary.^{ci} It is silent on when the parties do not like the amicable settlement of their dispute, whether the criminal proceeding shall be proceeded or not. If it shall proceed on the failure of the amicable settlement of the dispute, on what procedures shall it be undertaken.^{cii}

Moreover, application of alternative dispute resolution may reduce the punishment of the offender sometimes.^{ciii} The reduction of punishment increases the de-criminalization of violence^{civ}. Consequently, the applicability of ADR in criminal matters may disadvantage the

victims of the crime while the offender benefit through plea-bargaining because prosecutors and accused are the privy to the plea-bargaining without the victims. Thus, it can rarely ensure the justice for the disadvantaged people.^{cv}

Furthermore, existence of dispute is one of the prerequisites of applicability of alternative dispute resolution.^{cv} But in certain criminal cases like rash and negligent driving, drunken driving etc.^{cvii} resulting in injuries or even death of the pedestrians, there may not be any dispute between the criminal and victim, and such difficulties limit the scope of alternative dispute resolution in criminal proceedings.^{cviii}

Besides, arbitration as part of alternative dispute resolution is less likely to be used in criminal proceedings.^{cix} Arbitration decisions are final.^{cx} There are very few exceptions where the decision arbitration can be appealed, with fraud being an obvious exception.^{cx} Additionally, certain states does not enforce decisions of arbitrators that have unfair penalty.^{cxii} The scope of arbitration is limited to specific disputes because some clauses are broad, others are narrowly.^{cxiii} If we take the case of any court then the decisions of a court, usually can be appealed to an appellate court for a variety of legal grounds and for numerous alleged procedural errors.^{cxiv}

The effectiveness of application of the alternative dispute resolution in criminal matters is questionable as it may bring the unintended results of deterring the commission of the crimes in future.^{cxv} In resolving criminal cases through the alternative dispute resolution may lead to victims being confronted with the offenders which may not provide protection for the victims where victims and offenders of crimes are referred for settlement by alternative dispute resolutions as some victims are re-victimised during the settlement and after the settlement.^{cxvi}

In general, while an attempt to balance rights has been a driving force behind the implementation of ADR as a restorative justice scheme, concern has arisen as to whether the interests of both parties can be reconciled.^{cxvii} Nonetheless, as we have noted before, this is not a problem, as the focus of ADR is not on reaching a fair bargained resolution, but instead on communication, confrontation, accountability, healing, and restoration between the victim and offender.^{cxviii} So much so that, harmonizing of rights of both offenders and victims thereby restoring the pre-existing relationship is clearly a challenge facing the use of mediation process in a criminal context.^{cxix}

CONCLUSION

There is a wide acknowledgement of the usefulness of alternative dispute resolution. The usefulness premises on the speed, cost, flexibility, voluntariness and restoration of the relationship between parties. Thus, alternative dispute resolution makes an important contribution to socio-economic development. Hence, when it is effective, socio-economic development becomes possible.

Nevertheless, there have been several concerns about the effectiveness of alternative dispute resolution in handling criminal matters in Tanzania. One is about the effectiveness of alternative dispute resolution in rendering criminal justice as expected. Two is the extent of the criminal matters to which the alternative dispute resolution can be applied to. The paper observes that it is possible to render criminal justice through alternative dispute resolution. However, the applicability of the alternative dispute resolution has been limited in terms of common assault, the offence of personal or private nature.

Therefore, the provisions of the law dealing with the usage of alternative dispute resolution in criminal proceedings have silence which may affect the effectiveness of the alternative dispute resolution. For instance, the laws do not define what about to offence of personal or private nature as well as no criteria established to know when the public interest demands no infliction of penalty on the offences. The paper recommends the amendment of the laws to become clear and certain on the application of the alternative dispute resolution in criminal matters in Tanzania.

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ENDNOTES

ⁱ Negotiation is a consensual bargaining process in which the parties attempt to reach an agreement on a disputed or potentially disputed matter. It involves complete autonomy for the parties involved, without the intervention of third parties.

ⁱⁱ It is a process that involves independent third party assists the parties involved in a dispute or negotiation to achieve a mutually acceptable resolution of the points of conflict. The third party has no decision-making powers and cannot force the parties to accept a settlement.

ⁱⁱⁱ Conciliation is a procedure of peaceful settlement of international disputes. The matter of a dispute is referred to a standing or ad hoc commission of conciliation, appointed with the parties' agreement, whose function is to elucidate the facts objectively and impartially and then to issue a report. The eventual report is expected to contain concrete proposals for a settlement, which, however, the parties are under no legal obligation to accept.

^{iv} Arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.

^v FindLaw, What is Alternative Dispute Resolution, (2020) published at <https://www.findlaw.com/hirealawyer/choosing-the-right-lawyer/alternative-dispute-resolution.html> (accessed on 5th March 2021).

^{vi} Ontario v Pizza Pizza 35 CPC (3d) 323 (Ontario, 1994).

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