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# Exploring the Effectiveness of ADR in Criminal Matters in Tanzania: A Comparative Study with England

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## ABSTRACT

*This article explores the effectiveness of Alternative Dispute Resolution (ADR) mechanisms in criminal matters within Tanzania, with a comparative analysis of practices in England. Despite the incorporation of reconciliation and plea bargaining in Tanzania's legal framework, these ADR mechanisms are limited in scope and application, which constrains their potential benefits in promoting restorative justice, through a combination of doctrinal, empirical, and comparative research methodologies.*

*Thus, this article entails and identifies critical legal gaps and challenges in the current ADR practices in Tanzania. It highlights the need for substantial reforms to expand ADR mechanisms to include a broader range of restorative justice options.*

**Keywords:** *Alternative Dispute Resolution (ADR), Criminal Law, Restorative Justice, Criminal Matters, Reconciliation, Plea-bargaining, Victim-Offender Mediation.*

## I. INTRODUCTION

The integration of Alternative Dispute Resolution (ADR) mechanisms into criminal justice systems has emerged as a significant development in achieving more effective resolutions to criminal disputes. In Tanzania, ADR mechanisms such as reconciliation and plea bargaining are incorporated into the criminal justice framework; however, their application is relatively limited compared to practices observed in other jurisdictions, notably England. This raises questions about the effectiveness of Tanzania's ADR processes in addressing a broad spectrum of criminal cases and their alignment with international restorative justice standards.

This article investigates the current state of ADR in Tanzania's criminal justice system, examining the practical and legal challenges associated with its application. It aims to uncover the extent to which ADR is integrated into the Tanzanian legal framework and how it compares with best practices from England. Furthermore, the research seeks to identify areas for improvement and propose recommendations for expanding and enhancing ADR mechanisms

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to better serve justice and address the needs of all parties involved.

## II. HISTORICAL BACKGROUND OF ADR IN CRIMINAL LAW IN TANZANIA

### (A) General Introduction to ADR in Tanzania

Alternative Dispute Resolution (ADR) in Tanzania is deeply embedded into customary law and community-based conflict resolution practices. Before the formalization of the legal system, Tanzanian communities relied on local leaders and elders to mediate disputes. These traditional mechanisms prioritized social harmony and conciliation over punitive measures, forming the foundational principles upon which modern ADR practices in Tanzania were later built.<sup>2</sup>

In the pre-colonial era, Tanzanian societies practiced informal justice systems, whereby respected community figures, such as elders, played pivotal roles in resolving conflicts through mediation, conciliation, and reconciliation. These methods were grounded in restorative justice principles that aimed to restore relationships and maintain social cohesion rather than impose punitive sanctions on wrongdoers. However, during the colonial period, the British colonial administration introduced a formalized legal system that often clashed with the traditional conflict resolution practices. Despite the colonial government's efforts to impose formal justice mechanisms, customary law continued to function, particularly in rural areas where traditional leaders retained authority in resolving local disputes.

Following Tanzania's independence in 1961, Tanzania maintained a dual legal system that permitted the continued application of customary law alongside statutory law. Recognizing the value of traditional dispute resolution, the Tanzanian government sought to formalize and integrate these mechanisms into the national legal framework.

### (B) The Growth of ADR in Criminal Matters

Article 107A(2)(d) of the Constitution of The United Republic of Tanzania, 1977,<sup>3</sup> lays the foundation for the application of ADR in Tanzania. As it mandates that the courts promote and encourage dispute resolution in the administration of justice. This constitutional principle has helped pave the way for the gradual integration of ADR mechanisms into both civil and criminal matters.

The formal development of ADR in Tanzania can be traced to 1993, when the late Chief Justice Nyalali invited two Judges from the Superior Court of Washington, D.C., to participate in a Judicial Conference in Arusha.<sup>4</sup> These Judges presented papers on ADR practices in the United

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<sup>2</sup> Mussa, M.K.G. (2020). HISTORY OF ADR IN TANZANIA. *Karim*. <https://www.academia.edu>.

<sup>3</sup> The Constitution of the United Republic of Tanzania of 1977 as Amended.

<sup>4</sup> Lukumay, Z.N. (2016) *A Reflection on Court - Annexed Mediation In Tanzania*. LST Law Review, Vol. 1, Issue

States, which sparked interest among Tanzanian legal authorities. Following this conference, a decision was made to identify ADR methods that could be adapted to Tanzanian conditions.<sup>5</sup> By 1994, ADR, in the forms of mediation, negotiation, and arbitration, was incorporated into the Civil Procedure Code through Government Notice No. 422.<sup>6</sup>

This laid the foundation for the subsequent incorporation of ADR into criminal law. As Section 163 of The Criminal Procedure Act, CAP 20 R.E. 2022,<sup>7</sup> introduced reconciliation as a viable ADR option in specific criminal cases. In 2019, plea bargaining was introduced through the Written Laws (Miscellaneous Amendment) Act No. 4 of 2019<sup>8</sup> which was later incorporated into the Criminal Procedure Act CAP 20 R.E 2022. The implementation of plea bargaining was further elaborated through The Criminal Procedure (Plea Bargaining) Rules of 2021,<sup>9</sup> which provided detailed guidelines for applying plea bargaining in criminal proceedings.

Despite these legal advancements, Tanzania's criminal justice system continues to face challenges in effectively dispensing justice through ADR. The integration of ADR into criminal law remains a work in progress, with significant efforts still needed to expand its application and address existing legal barriers.

### III. HISTORICAL BACKGROUND OF RESTORATIVE JUSTICE IN CRIMINAL LAW IN ENGLAND

Howard Zehr emphasized that before globalization, justice was largely a community matter, in which crimes were being addressed through informal processes. Early community justice systems emphasized restitution and reconciliation, aligning closely with restorative justice principles. However, the emergence of formal legal structures in Europe eventually displaced these community-based processes, shifting the responsibility for justice from individuals and communities to the state.<sup>10</sup>

The modern restorative justice movement began in the 1970s in North America. One notable example was the initiative of two probation officers in Kitchener, Canada, who facilitated a meeting between victims and offenders in a case of vandalism in 1974. This meeting allowed the parties to address the offense directly and collaboratively determine how amends could be

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<sup>1</sup> January-June 2016.

<sup>5</sup> Ibid.

<sup>6</sup> G.N No.422 of 1994.

<sup>7</sup> The Criminal Procedure Act, CAP 20 R.E. 2022.

<sup>8</sup> the Written Laws (Miscellaneous Amendment) Act No. 4 of 2019.

<sup>9</sup> The Criminal Procedure (Plea Bargaining) Rules of 2021.

<sup>10</sup> KKIENERM. (2019). *Crime Prevention & Criminal Justice Module 8 Key Issues: 1. Concept, Values, and Origin of Restorative Justice*. Wwww.unodc.org. <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html>.

made. The success of this meeting led to the creation of the Victim-Offender Reconciliation Program (VORP), which was supported by the Christian Mennonite Committee and later expanded to other regions.

The mid-20th century saw a gradual shift towards restorative justice, largely due to growing awareness of the limitations of purely punitive justice systems. The introduction of victim-offender mediation (VOM) and community service programs marked the beginning of restorative practices in England.<sup>11</sup> Early initiatives, such as the establishment of Community Justice Centers in the 1990s, aimed to provide forums for dialogue between victims and offenders. These centers focused on repairing harm and facilitating reconciliation, though they faced challenges related to funding and integration into the wider justice system.<sup>12</sup>

Significant legislative advancements were made with the passage of the Youth Justice and Criminal Evidence Act of 1999,<sup>13</sup> which introduced provisions for victim-offender mediation in youth justice cases. The goal was to provide opportunities for rehabilitation and to involve victims in the justice process. Further, the Crime Victims Act of 2014<sup>14</sup> embedded restorative justice practices within the broader legal framework, particularly emphasizing victims' rights.

Today, restorative justice in England is integrated into both pre- and post-sentence phases of criminal justice. It can occur at any stage of the process, including after conviction, and is increasingly considered during sentencing, particularly for young offenders. England's extensive experience with restorative justice provides valuable lessons for countries like Tanzania, which are in the early stages of incorporating ADR into their criminal justice systems.

### **(A) An Overview of Restorative Justice**

Restorative justice prioritizes repairing the harm caused by criminal behavior and fostering healing among all parties involved, including victims, offenders, and the community. This approach shifts the focus from punishment to dialogue, accountability, and mutual understanding. Restorative justice involves processes like victim-offender mediation, family group conferencing, and community restitution, where offenders take responsibility for their actions and work towards making amends.<sup>15</sup> The goal is to restore relationships damaged by the

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<sup>11</sup> Davey, L. (2005, March 4). *The Development of Restorative Justice in the UK: A Personal Perspective*. Iirp.edu. <https://www.iirp.edu/news/the-development-of-restorative-justice-in-the-uk-a-personal-perspective>.

<sup>12</sup> United Nations Office on Drugs and Crime. (2019). *Crime Prevention & Criminal Justice Module 8 Key Issues: 1. Concept, Values, and Origin of Restorative Justice*. Wwww.unodc.org. <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html>

<sup>13</sup> and the Youth Justice and Criminal Evidence Act of 1999.

<sup>14</sup> the Crime Victims Act of 2014.

<sup>15</sup> Moran, K. L. (2017). *Restorative justice: a look at victim-offender mediation programs* [Review of *Restorative justice: a look at victim-offender mediation programs*]. Vol. 4, no. 1.

crime and to provide a platform for victims to voice their experiences and needs. This method seeks to humanize the justice process, ensuring that victims feel heard and that offenders understand the impact of their actions. By emphasizing restitution and reconciliation, restorative justice aims to heal the wounds caused by crime and to rebuild trust within the community. This approach aligns with values of empathy, compassion, and shared responsibility, promoting a more holistic view of justice that goes beyond punitive measures.<sup>16</sup>

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>17</sup> Furthermore, in the 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.<sup>18</sup> 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>19</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. Restorative justice can also be defined as 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 the crime, such as the 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>20</sup>

Restorative justice mechanisms mainly include ADR mechanisms, some of which include:-

**a. Victim-offender mediation (VOM)**

This mechanism is a structured process that brings the victim and the offender together in a safe and controlled environment to discuss the crime and its impact. This mediation is facilitated by

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<sup>16</sup> Ibid.

<sup>17</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>18</sup> Ibid.

<sup>19</sup> United Nations Office on Drugs and Crime, (2006) 'Handbook on Restorative Justice Programs', Criminal Justice Handbook Series, New York.

<sup>20</sup> Government of Canada, P. S. and P. C. (n.d.). *Information archivée dans le Web*. Publications.gc.ca. Retrieved May 7, 2024, from <https://publications.gc.ca/collections/Collection/JS42-107-2002E.pdf>

a mediator who guides the conversation to ensure it is constructive and respectful. The primary objective of VOM is to provide a space for the victim to communicate how the crime has affected them, ask questions, and receive answers directly from the offender. For the offender, this process is a chance to take responsibility for their actions, offer apologies, and discuss ways to make restitution. VOM aims to humanize both parties, breaking down stereotypes and fostering empathy.

It is particularly beneficial in cases where the offender is willing to acknowledge their wrongdoing and is committed to making amends. Successful mediation can lead to a mutually agreed-upon restitution plan, which might include financial compensation, community service, or other restorative actions. VOM not only helps heal the victim but also rehabilitates the offender by promoting personal accountability and preventing future criminal behavior.

#### **b. Sentencing Circles**

In which this is a more formal mechanism where a group of community members, victims, offenders, and justice officials gather to discuss the crime and its consequences. The circle collectively decides on an appropriate sentence or plan for the offender, which often includes restitution, community service, or other reparative actions. This approach combines traditional sentencing with restorative practices, aiming to balance justice with the needs and perspectives of all parties involved.

#### **c. Family Group Conferencing**

This involves a broader circle of participants, including the offender's and victim's family members, community members, and sometimes professionals like social workers or counselors. In this setting, the affected parties gather to discuss the offense, its impact, and potential ways to address the harm. The conference aims to create a collaborative plan that supports the victim's needs, holds the offender accountable, and reintegrates the offender into the community. This approach is often used in cases involving juveniles or community-based offenses and emphasizes collective problem-solving and support.

### **IV. AN OVERVIEW OF ADR IN CRIMINAL MATTERS IN TANZANIA**

In Tanzania, ADR in criminal proceedings is established under the two mechanisms provided under the law, namely reconciliation and plea-bargaining.<sup>21</sup>

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<sup>21</sup> Mashamba, J. C., & Kiwara, K. (2018). *Criminal Litigation Practitioner's Manual*. Theophil Primary Bookshop & Publishers. Dar es Salaam, Tanzania.

### **(A) Reconciliation**

Reconciliation in criminal matters involves a process where both the victim and the offender engage in a dialogue facilitated by a neutral third party. The goal of reconciliation is not only to hold the offender accountable but also to acknowledge the victim's suffering and work towards mutual understanding and healing. This process allows the victim to express their feelings and impact the offender's actions directly. For the offender, it provides an opportunity to understand the consequences of their actions and to make amends in a meaningful way.

Reconciliation can be particularly effective in cases where the underlying goal is to restore peace and harmony within the community.<sup>22</sup> It emphasizes restorative justice principles, which focus on the needs of the victims, offenders, and the community, rather than solely on punitive measures. Thus it emphasizes restoring relationships and addressing the emotional and social damage caused by the crime.

Reconciliation is provided under section 163 of The Criminal Procedure Act CAP 20 R.E 2022<sup>23</sup>. This section permits the court to facilitate reconciliation between the victim and the offender as an alternative to traditional adversarial proceedings, specifically for offenses of a personal or private nature. The court has the discretion to promote reconciliation in cases involving common assault or offenses that are deemed personal or private. This provision is based on the principle that, in certain circumstances, resolving disputes amicably through dialogue and mutual agreement can serve the public interest better than imposing punitive measures.

However, if reconciliation fails or the parties are unable to reach a satisfactory agreement, the court retains the authority to proceed with the trial. In such cases, the reconciliation efforts are not considered, and the case continues through the traditional judicial process. This provision ensures that while reconciliation is encouraged, it does not preclude the pursuit of justice through conventional legal means if an agreement cannot be achieved.

Therefore, this reflects an approach that inserts restorative principles into the criminal justice system, allowing for more flexible and humane resolutions to specific types of offenses. It provides an alternative to the traditional punitive system, focusing on repairing relationships and addressing the personal and private aspects of certain crimes. Nonetheless, the application of this provision is limited to a narrow range of offenses, primarily common assault, and similar

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<sup>22</sup> Murodov B. B. (2016); STATE INSTITUTE OF RECONCILIATION IN THE MODERN CRIMINAL LAW OF FOREIGN COUNTRIES. *Int. J. of Adv. Res.* 4 (Jun). 1265-1269] (ISSN 2320-5407).

<sup>23</sup> *Supra Note 6.*



cases, which restricts its broader potential impact on the criminal justice system.

### **(B) Plea Bargaining**

Plea bargaining is another mechanism in Tanzania, introduced through the Written Laws (Miscellaneous Amendment) Act No. 4 of 2019<sup>24</sup> which was later incorporated in The Criminal Procedure Act CAP 20 R.E 2022. The Criminal Procedure (Plea Bargaining) Rules of 2021<sup>25</sup> were also made under section 194H of The Criminal Procedure Act CAP 20 R.E 2022<sup>26</sup> for better carrying out of the provisions of plea bargaining in the Act.<sup>27</sup>

The plea bargaining process involves negotiations between the prosecution and the defense. The defense and the prosecutor discuss terms under which the defendant might plead guilty to a lesser charge, which helps to expedite the resolution of the case and reduce the burden on the court system. Once an agreement is reached, it is presented to the court for approval. The judge reviews the terms to ensure fairness and that the defendant is making an informed decision. If approved, the plea bargain is formalized, and the case is resolved without a full trial.

The implementation of plea bargaining is governed by The Criminal Procedure Act, CAP 20 R.E. 2022, and further detailed in The Criminal Procedure (Plea Bargaining) Rules of 2021. These regulations outline the procedures for negotiating and implementing plea bargains, specifying eligibility criteria and roles for the prosecution, defense, and judiciary. Despite its advantages in reducing case backlogs and providing more predictable outcomes, plea bargaining in Tanzania faces challenges such as limited public and professional understanding of the process. Concerns also exist about ensuring fairness and avoiding undue pressure on defendants to accept plea deals. Effective implementation requires thorough training for legal practitioners and robust oversight to uphold justice principles.

## **V. LEGAL FRAMEWORK OF ADR IN CRIMINAL MATTERS IN TANZANIA**

### **(A) The Constitution of the United Republic of Tanzania (URT) of 1977, as amended.**

The Constitution of the United Republic of Tanzania is known to be the mother of the law of the state. This means that no enacted law should contradict with the Constitution otherwise it will be declared null and void.<sup>28</sup>

The constitution lays a foundational legal basis for the promotion and utilization of Alternative

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<sup>24</sup> *Supra Note 8*

<sup>25</sup> *Supra Note 9.*

<sup>26</sup> S.194H *Supra Note 6.*

<sup>27</sup> Plea Bargaining Rules now in force – FB Attorneys. (n.d.). Retrieved from <https://fbattorneys.co.tz/plea-bargaining-rules-now-in-force/>September 10, 2023.

<sup>28</sup> *Supra Note 3.*

Dispute Resolution (ADR) mechanisms within the country. Article 107A (2) (d) explicitly mandates the judiciary to promote and enhance dispute resolution among persons involved in disputes, thereby encouraging the use of ADR methods. It provides that in delivering decisions in civil and criminal matters in accordance with the laws, the Court shall observe the following principles, that is to say, to promote and enhance dispute resolution among persons involved in the disputes.<sup>29</sup>

Additionally, Article 13(6) (a) supports the determination of disputes by courts or any other agency, implicitly recognizing the legitimacy of ADR mechanisms outside formal litigation processes. It ascertains that to ensure equality before the law, the state authority shall make procedures that are appropriate or which take into account the following principles, namely: when the rights and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing and the right of appeal or another legal remedy against the decision of the Court or the other agency concerned;<sup>30</sup>

These constitutional provisions underscore the importance of ADR in Tanzania's legal system, as it provides a broad mandate for its application in legal matters including criminal matters.

#### **(B) The Criminal Procedure Act, CAP 20 R.E. 2022**

The Criminal Procedure Act outlines specific ADR mechanisms applicable in criminal cases in Tanzania. Two mechanisms are ascertained, namely Reconciliation and Plea Bargaining. Section 163 of the Act permits reconciliation in certain cases, particularly those involving common assault or offenses of a personal or private nature, where imposing a penalty may not be in the public interest. This provision allows the parties involved to reach an amicable settlement, thus avoiding formal litigation and the potential for adversarial outcomes. By clearly stating that in the case of proceedings for common assault or for any other offense of a personal or private nature, the Court may, if it is of the opinion that the public interest does not demand the infliction of the penalty, promote reconciliation and encourage and facilitate the settlement, 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 be stayed.<sup>31</sup>

Sections 194A to 194D<sup>32</sup> Introduce plea bargaining as a formal ADR mechanism in criminal proceedings. These sections allow the accused and the prosecution to negotiate charges and sentencing recommendations, thereby resolving the case through mutual agreement instead of

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<sup>29</sup> Article 107A (2) (d) *ibid.*

<sup>30</sup> Article 107A (2) (d) *ibid.*

<sup>31</sup> S. 168 *Supra Note 6.*

<sup>32</sup> S. 194 *ibid.*

a full trial.

Furthermore, Section 194F<sup>33</sup> specifies the offenses for which plea agreements shall not apply, ensuring that serious crimes are exempt from this process and must undergo the full judicial trial.

**a. Magistrates Courts and Primary Courts Criminal Procedure Code**

The Magistrates Courts' Third Schedule, particularly the Primary Courts Criminal Procedure Code, includes Item 4, which aims to promote reconciliation in criminal matters. This provision aligns with the wider aims and objectives of ADR by encouraging parties to resolve their disputes amicably, thus reducing the burden on the formal judicial system and fostering community harmony.<sup>34</sup>

**b. The Criminal Procedure (Plea Bargaining) Rules, G.N. No.180 of 2021**

The Criminal Procedure (Plea Bargaining) Rules, introduced through Government Notice No. 180 of 2021, provide a detailed procedural framework for the implementation of plea bargaining in Tanzania.<sup>35</sup> These rules enable the accused and the prosecution to negotiate charges and sentencing recommendations to resolve a case through mutual agreement, avoiding the need for a full trial. The rules allow plea agreements to be initiated by either the prosecutor or the accused, and parties can negotiate the dropping of charges, lesser charges, agreed facts, and sentencing terms.

If the Court accepts the plea agreement, it becomes binding on the parties. However, if the Court rejects the agreement, the case reverts to regular trial procedures. The rules emphasize voluntary participation by the accused, based on provided legal advice, and prohibit coercive plea bargaining. Additionally, victims must be notified of plea discussions, and they also have the right to express their views on the plea agreement for the Court's consideration. The rules also stipulate detailed procedures such as the filing of the written plea agreement, court inquiries to the accused, victim impact assessment, and sentencing, ensuring a fair and transparent process.

## **VI. LEGAL FRAMEWORK OF ADR IN CRIMINAL MATTERS IN ENGLAND**

### **(A) The Sentencing Act 2020**

The Sentencing Act 2020, often referred to as the Sentencing Code consolidates the law on sentencing in England and Wales. While it primarily focuses on streamlining sentencing laws

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<sup>33</sup> S. 194 *ibid*.

<sup>34</sup> The Primary Court Criminal Procedure Code (Third schedule) of CAP 11 R.E 2019.

<sup>35</sup> *Supra Note 9*

to make them clearer and more accessible, it does touch on restorative justice within the broader context of sentencing.<sup>36</sup>

A restorative justice requirement under the Sentencing Act 2020 is defined as an obligation for the offender to participate in activities that involve one or more victims.<sup>37</sup> These activities aim to make the offender aware of the impact of their offense on the victims and to provide an opportunity for victims to express their experiences and the consequences of the crime. The Act ascertains that for a restorative justice requirement to be imposed, consent must be obtained from all participants involved. This ensures that all parties are willing to engage in the restorative process.

Courts are required to consider obtaining a pre-sentence report before sentencing an offender. These reports can include recommendations on the suitability of restorative justice for the specific case, providing the Court with comprehensive information to inform their sentencing decision.

The Act allows for the inclusion of restorative justice activities as part of community orders. These orders can mandate that the offender participate in restorative justice activities, which may involve direct or indirect communication with the victim, community service, or other reparative actions. Restorative justice is particularly emphasized within the youth justice system.<sup>38</sup> Youth rehabilitation orders can include restorative justice requirements, promoting rehabilitation, and reparation among young offenders. This aligns with the goals of reducing reoffending and supporting the reintegration of young offenders into society.

### **(B) The Victims' Code of 2015, R.E. 2020**

The Victims' Code sets out the rights of victims within the criminal justice system and includes provisions for restorative justice. It ensures that victims are informed about the availability of restorative justice and are given the opportunity to participate if they choose. The Code emphasizes the need for victim consent and the importance of providing support and information throughout the restorative justice process.<sup>39</sup> The Victims' Code outlines specific rights and entitlements for victims, ensuring they are treated with respect, sensitivity, and dignity. For example, victims have the right to be kept informed about the progress of their case, including key decisions such as charging, bail, and court proceedings.<sup>40</sup> If a victim reports a

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<sup>36</sup> The Sentencing Act of 2020.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> The Victims' Code of 2015, R.E. 2020.

<sup>40</sup> Ibid.

burglary, they are entitled to regular updates from the police on the investigation's status, ensuring they are not left in the dark.

One of the significant aspects of the Victims' Code is its emphasis on restorative justice. Victims are informed about the availability of restorative justice services and how they can participate. For instance, if a victim of vandalism wishes to meet the offender to discuss the impact of the crime, they are entitled to information on how to arrange such a meeting through restorative justice programs. Restorative justice practices facilitated under the Victims' Code include various scenarios where victims and offenders engage in dialogue to repair harm.<sup>41</sup> For example, in a case of minor theft, the offender might meet with the victim in a mediated session to apologize and discuss ways to make amends, such as community service or restitution.

### **(C) Gaps and legal challenges**

#### **a. The limited scope of ADR mechanisms in Tanzania's criminal justice system.**

Unlike in areas such as England, where restorative justice is embedded within the legal framework and offers a broad array of mechanisms, Tanzania's ADR provisions under CAP 20 R.E 2022<sup>42</sup> are notably restricted, primarily to reconciliation and plea bargaining. This limitation not only diminishes the broader application of restorative justice but also creates practical obstacles in the pursuit of more humane and community-focused resolutions to criminal matters.

One of the primary challenges posed by the limited ADR options is the difficulty in addressing the diverse needs of both victims and offenders within the criminal justice system. Reconciliation, while effective in certain cases, is often inadequate in handling the complexities of many criminal matters. This is because reconciliation is only based on cases of common assault or offenses of a personal or private nature as seen under Section 163.<sup>43</sup>

This situation shows that there is a real need for more ADR mechanisms that can handle a wider range of crimes, giving more opportunities for healing and resolution outside the courtroom. Thus, it is seen that without a broader range of restorative justice programs, such as victim-offender mediation the system is limited in its ability to offer tailored solutions that meet the specific needs of all parties involved. This lack of diversity in ADR mechanisms means that many cases that might benefit from a restorative approach are left to the adversarial court

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<sup>41</sup> Ibid.

<sup>42</sup> *Supra Note 7.*

<sup>43</sup> Ibid.

process, which may not always serve the best interests of justice or community harmony.

In contrast, England has developed a more comprehensive and integrated approach, offering a broader range of restorative justice mechanisms that are embedded within its legal framework. This allows for a more flexible and tailored application of ADR across a variety of offenses, extending beyond the narrow focus seen in Tanzania. In England, restorative justice is enshrined in law through several legislations including the Victims' Code of 2015, R.E. 2020<sup>44</sup> sets out the rights of victims within the criminal justice system and includes provisions for restorative justice. It ensures that victims are informed about the availability of restorative justice and are given the opportunity to participate if they choose. And The Sentencing Act 2020<sup>45</sup> While it primarily focuses on streamlining sentencing laws to make them clearer and more accessible, it also elaborates on restorative justice within the broader context of sentencing. As it states, these activities aim to make the offender aware of the impact of their offense on the victims and to provide an opportunity for victims to express their experiences and the consequences of the crime.

These laws introduce measures that encourage the use of restorative justice, particularly through the establishment of community resolutions and conditional cautions. These mechanisms allow offenders to take responsibility for their actions, make amends to the victim, and avoid the traditional court process, even in cases involving more serious offenses than those typically addressed by Tanzania's ADR mechanisms. The law ascertains that despite the gravity of the crime, the courts acknowledge the positive impact of a restorative approach, where the offender and the victim engage in a process that leads to the offender making amends and the victim feeling a sense of closure.

Therefore, this shows that England's legal framework for ADR in criminal matters provides a wider range of restorative justice options that can be applied thus, ensuring that the justice system addresses the needs of victims, offenders, and the community in a holistic manner. By contrast, the Tanzanian system has restricted the use of reconciliation and plea-bargaining underscoring the need for reform. Expanding ADR mechanisms in Tanzania to cover a broader range of criminal cases similar to the approach in England, could enhance the effectiveness of the criminal justice system, providing more opportunities for resolution, healing, and rehabilitation across various types of offenses.

The international legal frameworks, including the United Nations Basic Principles on the Use

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<sup>44</sup> *Supra Note 32.*

<sup>45</sup> *Supra Note 29.*

of Restorative Justice Programmes in Criminal Matters (2002),<sup>46</sup> provide a critical foundation for understanding and addressing the challenges of implementing ADR in criminal matters, particularly in countries like Tanzania. By broadly defining restorative justice as processes like mediation, conciliation, conferencing, and sentencing circles, the Basic Principles encourage the adoption of a variety of ADR mechanisms within national legal systems.<sup>47</sup> However, it can be seen that there is a limited scope of ADR in Tanzania, where only reconciliation and plea bargaining are recognized under the Criminal Procedure Act, this shows a significant gap compared to the international standards set forth by these UN principles. This gap underscores the need for Tanzania to expand its ADR mechanisms in criminal matters to align more closely with international best practices, ensuring that a wider range of crimes can be addressed through restorative processes that focus on healing and restitution.

The United Nations Convention on the Rights of the Child (1989)<sup>48</sup> provides further insight into the importance of ADR in criminal matters, particularly concerning juvenile offenders. Article 40(3)(b) of the CRC advocates for alternative measures, including ADR, for dealing with children in conflict with the law, emphasizing community-based interventions and restorative justice practices. This provision is crucial for countries like Tanzania, where the current ADR mechanisms in criminal matters may not sufficiently address the specific needs of juvenile offenders. By encouraging the use of non-punitive approaches that focus on the welfare and rehabilitation of young offenders, the CRC highlights the need for legal systems to prioritize the best interests of the child. The limited scope of ADR in Tanzania, which primarily focuses on adult offenders, suggests a significant legal challenge in adequately addressing the needs of juvenile offenders through restorative justice processes.

The Council of Europe Recommendation No. R (99) 19 concerning Mediation in Penal Matters (1999),<sup>49</sup> provides a blueprint for integrating mediation into criminal justice systems across Europe. This recommendation highlights the value of mediation in reducing recidivism, alleviating court caseloads, and providing victims with a sense of closure and justice. By advocating for the availability of mediation at any stage of the criminal process and emphasizing voluntary participation and respect for the rights of both victims and offenders, the Recommendation outlines principles that could be highly relevant to Tanzania.

Literature has identified that one of the challenges affecting the effectiveness of ADR in

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<sup>46</sup> United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002)

<sup>47</sup> Ibid.

<sup>48</sup> The United Nations Convention on the Rights of the Child (1989)

<sup>49</sup> The Council of Europe Recommendation No. R (99) 19 concerning Mediation in Penal Matters (1999)

criminal Matters lies in the absence of structured restorative justice programs that could serve as alternatives for diverting cases. This gap limits the availability of options that prioritize healing and resolution over traditional punitive measures.<sup>50</sup> Without these programs, the criminal justice system in Tanzania lacks the capacity to channel appropriate cases into restorative justice pathways, thereby missing opportunities for more humane and community-based solutions.

Empirical evidence collected from interviews and questionnaires conducted with various legal experts reveals that the low utilization of ADR mechanisms is reflected in the limited number of cases where ADR is used, particularly in comparison to the overall volume of criminal matters handled by the judiciary. As a result, the potential for ADR to alleviate the burden on courts and offer more personalized justice solutions remains largely untapped. Despite the recognition of ADR as a beneficial tool for resolving disputes, legal professionals report that the current law does not provide sufficient guidance on how ADR should be applied to criminal cases. Consequently, a significant number of criminal disputes that could potentially be resolved through ADR are left unaddressed by these mechanisms.

Furthermore, the findings from the empirical data indicate that the low number of cases utilizing ADR mechanisms raises concerns, particularly when considering the overall number of criminal disputes handled by the judiciary. It is not convincing that ADR is being utilized to its full potential, given the significant volume of criminal cases that could benefit from such mechanisms. The failure to fully integrate ADR into the criminal justice system suggests that the legal framework needs to be reformed to expand the range of criminal matters that can be resolved through ADR. Addressing these legal gaps would not only increase the use of ADR but also improve the overall effectiveness of the criminal justice system in Tanzania.

#### **b. The limited number of offenses addressed to the use of ADR**

Reconciliation is only based on cases of common assault or offenses of a personal or private nature as seen under Section 163 of the Act which specifically permits reconciliation in certain cases, particularly those involving common assault or offenses of a personal or private nature, where imposing a penalty may not be in the public interest. This provision allows the parties involved to reach an amicable settlement, thus avoiding formal litigation and the potential for adversarial outcomes. By clearly stating that, in the case of proceedings for common assault or for any other offense of a personal or private nature, the Court may, if it is of the opinion that the public interest does not demand the infliction of the penalty, promote reconciliation,

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<sup>50</sup> Kilekamajenga, Ntemi N. (2018). *Supra* note 6. Pg.22.



encourage, and facilitate the settlement, in an amicable way, of the proceedings. Alternatively, on terms of payment of compensation or other terms approved by the Court, and may thereupon order the proceedings to be stayed.<sup>51</sup>

This shows that this practice is only applicable under certain offenses whilst excluding others. This is further elaborated in the case of *Republic v. Muhidin Twalibu [1989] TLR 8 (HC)*,<sup>52</sup> Where the Court addressed the applicability of Section 163 of the Criminal Procedure Act. It emphasized that ADR could be applied to cases of common assault or offenses of a personal or private nature. It clarified that offenses like burglary and stealing do not fall within the scope of ADR, as these are not personal or private matters suitable for reconciliation.

As well as the case of *Republic v. Sempeto Vincent [1985] TLR 202 (HC)*<sup>53</sup> Where the Court considered whether grievous harm, a felony under Section 225 of the Penal Code,<sup>54</sup> could be subject to ADR, which ruled that grievous harm is outside the scope of offenses for which reconciliation can be promoted. The trial court magistrate had exceeded his jurisdiction by attempting to promote reconciliation in this case despite his good intentions.

This limitation means that many offenses that could be resolved through dialogue and mutual understanding are instead forced through the traditional court system. This situation shows that there's a real need for more ADR mechanisms that can handle a wider range of crimes, giving more opportunities for healing and resolution outside the courtroom. Thus, it is seen that without a broader range of restorative justice programs, such as victim-offender mediation the system is limited in its ability to offer tailored solutions that meet the specific needs of all parties involved. This lack of diversity in ADR mechanisms means that many cases that might benefit from a restorative approach are left to the adversarial court process, which may not always serve the best interests of justice or community harmony.

As opposed to England, The law ascertains that despite the gravity of the crime, the courts acknowledge the positive impact of a restorative approach, where the offender and the victim engage in a process that leads to the offender making amends and the victim feeling a sense of closure. Further, restorative justice is also applied in cases involving grievous bodily harm. The victim and offender participate in a restorative meeting, which plays a significant role in the sentencing decision. The court recognizes that the restorative justice process has facilitated healing for the victim and demonstrated the offender's genuine remorse. This application of

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<sup>51</sup> S. 168 *Supra Note 6*.

<sup>52</sup> *Republic v. Muhidin Twalibu [1989] TLR 8 (HC)*.

<sup>53</sup> *Republic v. Sempeto Vincent [1985] TLR 202 (HC)*

<sup>54</sup> S.225 of The Penal Code CAP 16 R.E. 2022.

ADR in a serious felony case highlights the flexibility and inclusivity of the English system, which allows restorative justice to complement traditional sentencing, even in cases involving significant harm.

Therefore, this shows that England's legal framework for ADR in criminal matters is not limited to minor or personal offenses. Instead, it provides a range of restorative justice options that can be applied to both minor and serious crimes, ensuring that the justice system can address the needs of victims, offenders, and the community in a holistic manner. By contrast, the Tanzanian system has restricted the use of reconciliation and plea-bargaining for only a narrow category of offenses underscoring the need for reform

Empirical data collected from interviews and questionnaires with legal experts indicate that ADR is applied to specific offenses, leaving a large portion of criminal matters outside its scope. Legal professionals note that while ADR has proven effective in resolving disputes, its current application is restricted by law, where ADR is not extended to more different cases. This limitation poses a substantial challenge to the legal system, as numerous criminal disputes that could potentially benefit from restorative justice approaches, remain unaddressed by ADR mechanisms, thus contributing to the setback in the resolution process and leaving courts burdened with cases that might otherwise be resolved through alternative means.

**c. The lack of rules governing reconciliation in Tanzania's criminal justice system.**

Reconciliation in criminal matters involves a process where both the victim and the offender engage in a dialogue facilitated by a neutral third party. The goal of reconciliation is not only to hold the offender accountable but also to acknowledge the victim's suffering and work towards mutual understanding and healing.<sup>55</sup> This process allows the victim to express their feelings and impact the offender's actions directly. For the offender, it provides an opportunity to understand the consequences of their actions and to make amends in a meaningful way.

Reconciliation can be particularly effective in cases where the underlying goal is to restore peace and harmony within the community. It emphasizes restorative justice principles, which focus on the needs of the victims, offenders, and the community, rather than solely on punitive measures.<sup>56</sup> Thus it emphasizes restoring relationships and addressing the emotional and social damage caused by the crime. This provision gives powers to courts to divert certain cases,

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<sup>55</sup> Metz, T. (2019). Reconciliation as the aim of a criminal trial: ubuntu's implications for sentencing. *Constitutional Court Review*, 9(1). <https://doi.org/10.2989/ccr.2019.0005>.

<sup>56</sup> Ibid.

especially cases of common assault and those of a personal or private nature, from the ordinary adversarial criminal justice processes to ones focused on reconciliation. Diversion therefore seeks to promote reconciliation in an amicable and harmonious way, and in so doing, stay the proceedings until an agreement is reached.

In reconciling the parties, compensation to the victim may be awarded and punitive measures may be waived. Where reconciliation fails, the court may proceed with the normal trial. The same applies in primary courts where similarly, rule 4(2) of the Primary Courts Criminal Procedure Code<sup>57</sup> echoes the provisions of the Criminal Procedure Act, obliging courts to promote reconciliation in criminal cases. According to this law, where reconciliation is reached, the complainant may withdraw the charge.

However, these legal provisions have rarely been applied effectively or are often implemented with issues. Firstly, no specific rules have been made to execute section 163 of the CPA as it clearly provides under section 163 (7) of the CPA that the minister may in consultation with the chief justice, make rules for better implementation of the provisions of this section but up to date no clear rules have been made.<sup>58</sup> Secondly, reconciliation efforts are usually left to the parties involved, without the assistance of a mediator ideally, an impartial mediator should guide the restorative justice process, but in practice, it is often handled by family members who have a vested interest in the dispute. Furthermore, the courts are not bound to divert a case for reconciliation – these provisions are discretionary. As a result, the law has been used in only a few cases, despite the fact that there are many offenses that may be fit for reconciliation.

Drawing valuable lessons from England's comprehensive and structured approach to ADR in criminal matters. England's criminal justice system integrates restorative justice as a core component, enshrined in key legislations whilst providing rules and guidelines for each party. For instance, England has a code of practice for victims of crime<sup>59</sup> where it ascertains clear rules and procedures of restorative justice in several areas including what the police are required to comply with when addressing the victim during the course of the chosen RJ mechanism as well as the Council of Europe Recommendation No. R (99) 19 concerning Mediation in Penal Matters (1999)<sup>60</sup> also stresses the importance of mediation at all stages of the criminal justice process, advocating and providing clear rules for voluntary participation and protection of the rights of all parties.

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<sup>57</sup> The Primary Courts Criminal Procedure Code (Third schedule) of CAP 11 R.E 2019.

<sup>58</sup> *Supra Note 7*.

<sup>59</sup> Code of Practice for Victims of Crime in England and Wales (Victims' Code).

<sup>60</sup> The Council of Europe Recommendation No. R (99) 19 concerning Mediation in Penal Matters (1999)

Several literatures identify that some of the significant challenges that rest in the reconciliation process is that firstly, it is often entrusted to the parties involved, rather than being overseen by a neutral third party or trained mediator.<sup>61</sup> Ideally, a skilled mediator would facilitate the dialogue between the victim and the offender, ensuring that the process remains impartial and focused on achieving a fair resolution. However, in practice, this role is frequently assumed by family members who may have a vested interest in the outcome of the dispute. This is due to the lack of specific rules governing the reconciliation process. Therefore, this can undermine the fairness and effectiveness of the reconciliation process, as personal biases and emotions can interfere with the goal of achieving genuine understanding and restoration.

Empirical data gathered from interviews and questionnaires filled out by various stakeholders in the Tanzanian legal system highlighted that reconciliation lacks a proper guidelines process.

#### **d. The discrepancy found in the law that ascertains plea bargaining in Tanzania**

Plea bargaining is a legal mechanism whereby the accused agrees to plead guilty to a lesser charge or to one of several charges in exchange for a more lenient sentence or the dismissal of other charges. This practice is intended to expedite the resolution of cases, reduce court backlogs, and allow the prosecution to secure a conviction without the need for a full trial. In Tanzania, plea bargaining is relatively new and was formally introduced through amendments to the Criminal Procedure Act (CAP 20 R.E. 2022),<sup>62</sup> specifically by the Written Laws (Miscellaneous Amendments) (No. 4) of 2019,<sup>63</sup> which introduced Section 194A into the CPA. This section allows the prosecution and the accused, with the assistance of their legal representatives, to negotiate a plea bargain. The negotiation process involves discussions on the reduction of charges or the potential sentence that may be imposed upon the accused's plea of guilty. It requires that any plea bargain agreement must be in writing and signed by both parties, including the prosecutor and the accused or their legal representative. This is crucial to ensure that the agreement is clear and binding. The plea bargain agreement must be presented before the court. The court plays a supervisory role in ensuring that the agreement is fair, that the accused has entered into it voluntarily, and that they understand the consequences of their plea. The court, after receiving the plea bargain agreement, may either accept or reject it. If accepted, the court will proceed to enter a conviction based on the guilty plea and impose the agreed-upon

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> *Supra Note 8.*

sentence. If rejected, the case proceeds as if the plea bargain negotiations never took place. If the court rejects the plea bargain, the discussions and the details of the plea bargain cannot be used against the accused in the subsequent trial. This provision ensures that the rights of the accused are protected during the plea bargaining process.

Unfortunately, the law has several discrepancies including that rule no 21 (2) of the plea bargaining rules of 2021<sup>64</sup> conflicts with the amendments of the CPA R.E 2022. Further, it is seen that the amendments of the CPA have ousted the discretionary powers of the trial court in sentencing the accused as far as the plea agreement is concerned. The judiciary has ascertained this through the case of *DPP V Hamis Mustafa Mwinyimvua and Another Criminal Appeal No.87 of 2022 TZHC 14600*.<sup>65</sup>

These legal discrepancies suggest the need for further reforms to harmonize the plea bargaining provisions with the broader criminal justice system, ensuring that the rights of the accused are fully protected while maintaining judicial oversight and fairness in sentencing. Addressing these issues is essential to the effective and just application of plea bargaining as a form of ADR in Tanzania.

**e. The discretionary nature of ADR referral by the court in Tanzania's criminal justice system.**

In Tanzania's criminal justice system, the use of reconciliation generally depends on the court's decision to refer a case to ADR. This means that ADR processes cannot be initiated independently by the parties involved (the victim and the offender) without judicial involvement. In addition, it ascertains that it is not mandatory for cases to be referred to ADR. Unlike in civil cases, in criminal cases, the court must first determine that the case is appropriate for ADR, based on the nature of the offense and whether the use of ADR serves the interests of justice.

Taking into consideration Section 163 of the Criminal Procedure Act<sup>66</sup>, the court has the discretion to refer cases involving common assault or offenses of a personal or private nature to reconciliation. This occurs when the court believes that the public interest does not demand the infliction of penalties and that a more amicable settlement between the parties may be beneficial. The court may promote and facilitate such reconciliation and then stay the formal legal proceedings if the parties agree to a resolution. However, the court has the final say in

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<sup>64</sup> *Supra Note 9.*

<sup>65</sup> *DPP V Hamis Mustafa Mwinyimvua and Another Criminal Appeal No.87 of 2022 TZHC 14600.*

<sup>66</sup> Section 163 *Supra Note 6.*

determining whether ADR is suitable for the case at hand.

The need for court referral creates a procedural requirement, meaning that even in cases where ADR might be advantageous, the parties cannot pursue it on their own unless the court has first evaluated and approved the case for ADR. It also means that ADR is not accessible for all criminal matters, and its use is dependent on the court's discretion. This highlights a limitation in the accessibility of ADR, as it places the decision in the hands of the judiciary rather than the parties. It can also contribute to the underutilization of ADR in criminal matters if the courts are not proactive in referring cases or if the legal framework does not mandate its broader use.

In contrast, England's legal framework for ADR in criminal matters provides a more structured approach. Restorative justice is embedded within the criminal justice system through several legislations, such as the Victims' Code 2015 (R.E. 2020)<sup>67</sup>. The law promotes restorative justice but also mandates that victims be informed of their rights to participate in restorative processes. Courts are encouraged to consider ADR at various stages of the criminal process, with specific provisions for its application in both minor and serious offenses. Further, the Sentencing Act emphasizes the use of restorative justice as part of the sentencing process.

Tanzania criminal justice could learn from England's approach which is more inclusive by implementing voluntary and mandatory referral mechanisms for ADR in eligible cases. This would ensure that more cases benefit from restorative justice, helping to alleviate the burden on courts while promoting more humane resolutions to criminal disputes.

The United Nations Basic Principles on the Use of Restorative Justice Programs in Criminal Matters (2002)<sup>68</sup> apart from encouraging member states to adopt a wide range of restorative justice mechanisms, including mediation, conferencing, and reconciliation, at all stages of the criminal justice process. It also ascertains the principles that advocate for the voluntary and informed participation of both victims and offenders, but they also stress that states should establish clear policies to promote the use of restorative justice.

Through the empirical evidence, gathered experts have noted that the current legal framework does not provide sufficient guidance on when and how courts should refer cases to ADR, resulting in a limited number of cases benefiting from alternative dispute resolution mechanisms. The data shows that ADR is underutilized, particularly in cases where reconciliation or mediation could have been more appropriate than traditional court proceedings.

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<sup>67</sup> Code of Practice for Victims of Crime in England and Wales of 2015 R.E. 2020.

<sup>68</sup> The United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002)

## VII. CONCLUSION

Despite the few promising ADR mechanisms provided under the law, there is still a critical need for substantial legal reforms in Tanzania. Expanding ADR mechanisms beyond the current scope to include a wider array of restorative practices—such as victim-offender mediation could significantly enhance the criminal justice system’s effectiveness. Aligning these mechanisms with international restorative justice principles and ensuring legislative support would not only alleviate court backlogs but also promote more equitable, community-focused resolutions. This approach would foster an environment where justice serves to heal rather than merely punish, reducing recidivism and supporting the rehabilitation of offenders.

The potential benefits of such reforms are many, such as offering a pathway toward a more inclusive and effective justice system in Tanzania. By integrating comprehensive ADR practices, the Tanzanian criminal justice system stands to advance significantly in delivering justice that is filled with fairness and restorative values, thus marking a great shift toward a more humane and responsive justice framework.

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