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UNDERLYING DISTINCTIONS BETWEEN ADR, *SHIMGLINA* AND ARBITRATION:

A CRITICAL ANALYSIS

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Introduction

Alternative Dispute Resolution (ADR) and arbitration are forms of out-of-court dispute resolution mechanisms. *Shimglina* on the other hand, is a term sometimes used as the Amharic equivalent for the term arbitration. In the strict sense, however, very little is known about their difference. Even when recognized, the difference between ADR and Arbitration is often simplified to a matter of degree of some commonly shared element such as the extent of intervention.[1] This article attempts to challenge this view and submits that the difference between ADR and Arbitration is indeed significant and relates to a difference attributable to their underlying institutional underpinnings. The article then contrasts them with *Shimglina*.

The analysis sets out with a discussion of the main institutions of dispute resolution in Section one. Sections 2 and 3 treat the institution of arbitration as a variant of the broader institution of adjudication. The sections also analyze the defining tenets of the institution of arbitration. In Sections 4 and 5 ADR is addressed in the broader institutional context of contract. Section 6 will be devoted to the analysis of problems in terminology in the Ethiopian context with regard to *Shimglina*. And finally conclusions have been forwarded.

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[1] Jack Effron, "Alternatives to Litigation: Factors in Choosing "(1989), 52 *The Modern Law Review*,482

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1. Election, Contract and Adjudication: Underlying Models of Dispute Resolution Institutions

ADR and Arbitration represent two different institutions. In his groundbreaking theory of adjudication Lon Fuller identified election, contract and adjudication as the underlying institutions of dispute resolution. [2] While adjudication is popularly understood as mechanism of dispute resolution, contract is taken as a commercial instrument of making deals. Proper understanding of the essence of each form (of ADR and arbitration) is imperative for ease of understanding the modus operandi and nomenclatures (designations) of the various mechanisms of dispute resolution. In other words, understanding the essence of each model will help us know, what principles govern its operation, when is it being properly used, what are its uses, and when it is not being properly used.

There seems to be a confusion, and even misconception[3] in the relationship between arbitration and ADR, and so much of it is attributable to underestimating the connection between each form and its underlying institutional underpinnings. From the dimension of dispute resolution, what essentially makes each of these underlying institutions (i.e. adjudication, contract and election) different from one another is the particular way in which the disputing party participates in the process, that is, the particular way that the institution not only offers but also guarantees the party affected by the outcome of the process.[4] Thus, the institution of election offers voting as the mode of participation to the affected party, contract offers negotiation, and adjudication offers presentation of proofs and reasoned arguments.[5] While, this constitutes the crux of their difference, before an elaborate discussion is offered on their differences, let us look at what is common about these three institutions, or at least the dispute resolution dimension of each.

At a deeper level, these institutions are subtly interconnected by an individualistic ethic. The right to vote (in election), for example, derives from the recognition of man as an autonomous, rational being who is responsible for his own life, and who should therefore freely choose the people he authorizes to represent him, or the course of action he approves of.[6] Party participation by presentation of proofs and arguments is as much individualistic as participation through voting. It is premised on the assumption that to get a decision

[2] Lon L. Fuller, "Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review,* 363.

[3] One view holds the difference between ADR and Arbitration as a matter of degree of intrusiveness of the third party between the parties' affairs. See Supra n 1, p. 482

[4] *Supra* n 2

[5] *Ibid*

[6] http://www.aynrand.org.site/News2?page=NewsArticle&id=10385&news-iv-c+rl=1021

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in his favor a person has to produce more convincing evidence and arguments compared to his adversary. Thus, each party has to do by himself without assistance from the public/state.

According to Owen M. Fiss private law adjudication's individualistic bias is embedded in four notions: (1) It has no place for public interest protection; (2) The pursuit of private ends; (3) The assumption that without adjudication there will not be harmony between individuals and the purpose of adjudication is to guarantee that harmony; and (4) Finally, the assumption that the adjudicator (judge) is separate (isolated) from the disputants.[7] Other scholars have also contended that private law adjudication precedes the emergence of the state, and can to some extent, be privatized even in the modern world.[8]

Coming to the institution of contract, negotiation is even more individualistic in this respect. Backed by the ideal of freedom of contract and the subjectivity of values it underscores the basic tenets of individual choice reflected in the promises for exchange of values.

The above being said about the interconnection among the three dispute resolution institutions, an elaboration of their difference is now in order. To do that, we should first identify two aspects of the models of institutions. These are the essential elements and the optimal requirements. The essential elements are those defining features of the institution without which the institution will lose its immanent (internal) order and identity.[9] The optimal requirements are, on the contrary, those conditions that raise the institution to an ideal (perfect) level of realization.[10]

From the above analysis, the essential conditions of *election* that define its nature are that the electorate be given the opportunity to vote, "that the votes be honestly counted, that the ballot box be not 'stuffed', that certain types of intimidation be absent, etc".[11] On the other hand, the optimum conditions which will raise the participation by voting to its perfect level of realization include: an "intelligent and fully informed electorate, an active interest by the electorate in the issues, candor in discussing those issues by those participating in the public debate – conditions it is needless to say, that are scarcely ever realized in practice." [12]

The truth is of course; in most elections most voters exercise their voting rights even without the necessary information, let alone with rational analysis

[7] Owen M. Fiss, "The Social and Political Foundations of Adjudication," (1982) *6 Law and Human Behavior*, 123-125

[8] See William M. Landes and Richard A.Posner, Adjudication as a Private Good, NBER Working Paper Series No.263, University of Chicago Law School, p.18

[9] *Supra* n 2, P. 363

[10] *Ibid*

[11] *Supra* n 2, P. 364

[12] *Ibid*

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or scrupulous calculation of ends. In other words, the institution of election doesn't necessarily require the participant to be rational. Indeed, most voting choices are backed by irrational considerations such as racial, religious, or linguistic affiliations than rational analysis. It is not that these are unimportant in election. Indeed, if every voter in an election could make a rational analysis, election could have attained perfection and most disputes on the aftermath of elections could have been avoided.

The institution of *contract* likewise has its own optimum and essential conditions. The whole idea of contract rests on the idea of consensual exchange of values between two or more persons. Negotiation is the process through which this act of reciprocity (give and take) takes place. The essence of this process of *negotiation* is the freedom of choice underlying the exchange. This in other words, is what we call freedom of contract. Here, "underpinning the whole idea of contract is that the parties must act voluntarily. It is axiomatic that contractual liability stems from the parties' volition".[13] This, in most legal systems, is translated into expression of consent free from defects. So as far as a person expresses consent free from such defects as coercion, deceit, mistake, unconscionability, etc, he will be taken to have freely made his choice.

The optimum conditions in a contract may include such matters as fairness (equality) of the exchanged values, rationality of choices made by parties etc. Such are, however, not essential for the institution of contract to stand on its own feet. Since what essentially characterizes a contract is the exchange aspect, it suffices if the parties "freely" bargain and conclude their deals.

When we come to *adjudication*, like the other institutions it also has its essential as well as optimum conditions. It has already been set out that the distinguishing characteristics of adjudication lies in the fact that it confers on the disputing party a peculiar form of participation in the process; that of presenting proofs and reasoned arguments for a decision in his favor.[14] Thus, the essential conditions for an unimpaired or meaningful realization of this process mainly are that: the conferring of the opportunity to present one's evidence and arguments; attention to such proof and arguments from the bench or person to whom these presentations are made; and responsiveness of the decision (to the proof and arguments presented).

To put it differently, the pillar norms of participation of the affected party by presentation of proof and arguments mean that "(1) the adjudicator should attend to what the parties have to say; (2) the adjudicator should explain his

[13] *Ibid*

[14] Melvin A. Eisenbeg, Participation, Responsiveness, and the Consultative Process, (1992) 92Harvard Law Review, 411

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decision in a manner that provides a substantive reply to what the parties have to say; and (**3**) The decision should be strongly responsive to the parties' "proofs and arguments in the sense that it should proceed from and be congruent with those proofs and arguments."[15] The optimal conditions that will boost the institution of adjudication to its highest level of realization are such factors as the equality in all respects of the parties, such as the fact that both parties have representation by intelligent counsel, well – crafted and vigorous advocacy is made on both sides, etc.

It is now fairly clear that each of these three dispute resolution institutions (i.e., contract, election and adjudication) have differing integral demands that make them function in an orderly manner. The other (external) characteristics of the institutions emanate from each of these integral demands.

2. Arbitration as a variant of Adjudication

What really distinguishes the non judicial features of arbitration from adjudication is the fact that arbitrators are private appointees, and judges are state officials. Other aspects that are often employed to explain the difference such as the assumption that arbitration is a more flexible process, that it is less costly, that it is more prompt, that there is more party autonomy[16] in it, etc, are not essential to the distinction between Arbitration and adjudication. These assumptions are of course, either unchallenged ritualized thoughts or result from the mere private nature of the arbitrator's office. In this section, we shall examine arbitration against those distinguishing characteristics of adjudication namely, the test of attention, the test of explanation (rationality) and the test of responsiveness indicated above. We shall also analyze some practices in arbitration which I shall call diversions or abuses of the adjudicative model.

2.1. Arbitration and the requirement of attention

Arbitration as a variant of adjudication represents a form of dispute resolution that guarantees to the disputants the right to present proof and arguments. The test of attention which requires the adjudicator to be attentive to the presentations of the parties is one essential ingredient of the adjudicative process without which the mode of party participation by presenting proofs and arguments will be of no use.[17] In other words, the test of attention repre-

[15] *Id* p. 412

[16] The importance of party autonomy in making arbitration more attractive than state courts cannot however, be undermined. But, the concept is vague and relative. Thus even when there is little or no party autonomy a process may still carry the name of "arbitration."

[17] *Supra* n 14, P. 412

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sents the due process requirement of hearing. The right guaranteed by the due process doctrine is qualified as fair hearing. It incorporates such rights as the right to present one's own version of the case, the right to produce evidence, to challenge opposing evidence and argument, etc. Fair hearing also demands that the opportunities given by the bench to each party be equal.

All the above and other due process requirements are implicitly assumed in an adjudicative process. And the requirement of attention is here concerned with the arbitrator's degree of focus to party presentations. Indeed, if the arbitrator doesn't pay attention to what the parties have been arguing, refuting, and criticizing in their presentations what is the use of the presentations?

In contrast, contract doesn't guarantee any right to presentation of proof and arguments. Even if, one makes such presentations, there is again no assurance that the other party will listen to his arguments and proof.[18] Negotiation of course involves presentations, but these presentations seldom constitute evidence and/or arguments. These are more of communications often intended to discovering the real needs and interests of each other for the purpose of exchanging the right values. Sometimes therefore, a party to a contractual bargain may make a "take it or leave it" offer without engaging in any form of explanation, and still the process will not lose its essence. But, any position asserted in an adjudicative proceeding has to be supported by arguments and proofs; a party cannot get away with a "take it or leave it" approach in an adjudicative proceeding.

2.2 Arbitration and the test of explanation

Arbitration –as adjudication- is always subject to the test of rationality. This means that the arbitrator should render a reasoned award. This strict demand for rationality emanates from the nature the mode of participation of the disputing parties takes. The idea is that "if, the only mode of participation consists in the opportunity to present proof and arguments, the purpose of this participation is frustrated, and the whole proceeding becomes a farce, should the decision that emerges make no pretense whatever to rationality."[19]

As a matter of fact, rationality in adjudication presupposes an established principle on which the outcome will have to be based. Explanation (rationality) is that bond which connects the outcome with this principle. Presentations of proof and arguments are competing claims as to which of the established principles should underlie the outcome. Although rationality is not peculiar to adjudication, it is not a necessary requisite (intrinsic demand) in the other two forms (institutions) i.e. election and contract.

[18] *Supra* n 2, P. 366

[19] *Id*, P. 367

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In Lon Fuller's illustration:

> We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting…. In entering contracts men, are of course in some measure guided by rational considerations. The subsistence farmer who has a surfeit of potatoes and only a handful onions acts reasonably when he trades potatoes for onions. But there is no test of rationality that can be applied to the result of the trade considered in abstraction from the interests of the parties…the trade of potatoes for onions, which is a rational act by one trader, might be considered irrational if indulged in by his opposite number, who has a store house full of onions and only a bushel of potatoes.[20]

2.3 Arbitration and responsiveness

The other intrinsic element of the mode of participation of disputing parties by presentation of proof and arguments is responsiveness of the outcome of the proceeding to the presentations. The outcome is said to be responsive to the parties' proof and arguments if it proceeds from, and is congruent with their presentations.[21] This cannot however mean that perfect congruence must always be achieved. Yet marked digression of the final decision from the presentations made during the proceeding, will on the other hand, destroy the nature of adjudication. "[I]f the grounds for the decision fall completely outside the framework of the arguments [s] making all that was discussed or proved at the hearing irrelevant – then the adjudicative process has become a sham, for the parties participation in the decision has lost all meaning."[22]

There are many threats to this ideal in practice. One and most important is the attempt by the arbitrator to take into consideration inputs falling outside presentation of the parties in the name of public policy, public interest etc. Such would be not only an anomalous exercise, but also a dangerous one in the context of private law litigations. While, this doesn't mean that the arbiter should not base his decision on the right legal principles for parties' failure to invoke it, he should not lose the general framework of party presentation when doing so. In other words, since he controls the proceeding, the arbiter should direct the parties to make their most relevant presentations. Even when all the points on which the decision rests are touched on by the presentations, if the emphasis of the decision is on the points dealt in passing by the parties in such a way as to make them regret that had they foreseen it, they would have presented different arguments and proofs, the adjudicative proceeding will be a deception.

The discussion made thus far is fairly dispositive of the true nature of arbitration. Before we pass on to the abuses of the institution of arbitration, let us

[20] *Id*, P. 367 | [21] *Supra* n 14, P. 413 | [22] *Supra* n 2, P. 388

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see the other variants of arbitration, if any. The only form that may occur to our mind is the *rent – a judge* model which is familiar in the USA. In this process, "the disputants in an attempt to avoid the use of a regular court select a retired judge to hear and decide a … case as an arbitrator would."[23] Unlike arbitration, however, his decision can be appealed for errors of law or on the ground that the judgment was against evidence, though such appeals are rare."[24] The other type that I feel compelled to caution not to be taken as a variant is the "*umpire model.*" This is not an independent form from the arbitration model as such. The umpire is simply a person, not a process. It is an alternative to a presiding arbitrator in situations of plurality of arbitrators. An umpire is said to be "different from [the presiding] arbitrator in the sense that he or she is a person selected by the arbitrators to decide the matter in controversy where the arbitrators are unable to agree, whereas a presiding arbitrator is just an additional arbitrator who may only act together with the other arbitrators."[25] Both the *rent – a judge* model and *umpire process* do not substantially deviate from the pillar norms of the institution of adjudication. Thus, the participation by presentation of proofs and arguments and its entire derivative attributes that spring there from apply to them.

3. Abuses of the Arbitration model

Certain practices of an institution represent practices that destroy or threaten to destroy the true model. In the case of arbitration, practices that threaten it are those that render meaningless the parties' opportunities of participation in the proceeding by way of presenting proof and arguments. In this connection, three established practices can be identified.

3.1. The arbitrator acting as a settlement facilitator

The arbitrator acting as a *settlement facilitator* (or sometimes known as) the proactive arbitrator relates to an arbitration proceeding in which the arbitrator may initiate settlement at any stage during the proceeding.[26] In such cases, if the settlement succeeds, the agreement reached by the parties will be turned into an award – consent award; or if the attempted settlement is not reached, the arbitral proceeding will resume from where it stopped. But, the "participation of the arbitral tribunal during an ongoing arbitration in settlement negotiations would in reality be a mediation/conciliation process, re-

[23] Steven Vago, *Law and Society*,(Printice Hall,7th ed, 2003) 256

[24] *Ibid*

[25] Tilahun Teshome, "The Legal Regime Governing Arbitration in Ethiopia: A Synopsis," (2007) *1 Ethiopian Bar Review*, 134

[26] Hilmar Raeschte-Kessler, "The Arbitrator as Settlement Facilitator," *21Arbitration International*, 123

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quiring caucusing to be effective. During such caucusing the parties could by definition divulge secrets they would not have disclosed during the normal course of the arbitration to the arbitrator turned mediator and to other parties." [27]

This seemingly innocuous practice may be attended by many dangers. First, it may open the way to a biased arbitrator to propose settlement when he finds out that the party he favors will be prejudiced if the arbitral proceeding goes any further. One may challenge this view on the contention that since the arbitral tribunal's proposal will have effect only when it is accepted by both parties such risk will not materialize. But, the impartial picture that the arbitrator displays can convince the victimized party to innocently agree to any such proposal. Yet, even when a party is suspicious of the tribunal's proposal, it will seem risky for such party, to reject the proposal for fear that he will plant bias in the tribunal's mind unless such party is dead sure about the tribunal's bias and believes to face no greater risk in rejecting the proposal.

Assume the settlement proposal is accepted, and ends in an agreement. How will such agreement be treated? In many cases it is endorsed by the tribunal as a consent award – an ward on agreed terms- which is enforceable as an ordinary award. In other words an outcome which should have been arrived at via the adjudicative process has been reached through the back door of proposal of settlement by the tribunal. The whole process of presentation of proof and arguments has been thrown away all along. This is a clear case of abuse or perversion of the institution of arbitration.

What will happen if the attempted settlement is not successful? Obviously, the arbitrator will resume the arbitral process. Here, there is even more danger to fear. The arbitrator might have already formed his own view of the matter in the settlement negotiation process, and may find it difficult to depart from.[28] Crucial evidence which may determine the outcome might have been obtained both by the unscrupulous adversary and the bench. If this is so, then the participation by presenting proof and arguments will be impaired.

Let alone make a settlement proposal, an arbitral tribunal should not even initiate the proceeding. The institutional norms of adjudication do not allow arbitration to be initiated by the arbitrator. The very act of interfering in private affair of the parties and initiating the arbitral proceeding not only appears to negate the impartial institutional stature, but it also in most cases carries with it some degree of commitment and often a theory of "what happened".[29] In general, the main reasons as to why arbitration cannot be initiated by the arbitrator can be reduced to two:

[27] *Id.* P. 525 | [28] *Id*, P. 530 | [29] *Supra* n 2, p. 386

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> First, it is generally impossible to keep even the bare initiation of proceedings untainted by preconceptions about what happened and what its consequences should be. In this sense, initiation of the proceedings by the arbiter impairs the integrity of adjudication by reducing the effectiveness of the litigant's participation through proofs and arguments. Second, the great bulk of claims submitted to adjudication are founded directly or indirectly on relationships of reciprocity. In this case, unless the affected party is deceived or ignorant of his rights, the very foundations of the claim asserted dictate that the process of adjudication must be invoked by the claimant. [30]

3.2. Med-Arb/ Arb-Med

This is a procedure in "which the issues that were not solved by mediation are submitted to arbitration, with the same person /serving first as mediator, then as arbitrator."[31] This process is very similar to the case of arbitrator acting as settlement facilitator, (discussed above), and the problems discussed therein apply here as well.

3.3. Award without offering reasons

If rationality is an integral element of the institution of adjudication, it necessarily follows that the award be accompanied by reasons.[32] The test of responsiveness to parties' presentation is somewhat related to this issue. If reasons are not given for the decision, how would the parties know that the arbiter has taken their presentations as inputs, and has not decided on the basis of irrelevant consideration say on the throw of a dice? The outcome of an adjudicative process whether in state courts or in arbitration is often dispositive of the future conduct of the parties. If reasons are not given "the parties will almost inevitably guess at reasons and act accordingly.[33] Thus, reasoned outcomes are inseparably connected with the institutional norm of adjudication.

4. ADR as a variant of contract

Contract is one of the purest private law institutions along with and intrinsically fused into the institution of private property. Its basic and defining notion is that of freedom of will or of consent. Very roughly, the ideal of free-

[30] *Id.* P. 387; In Ethiopia Shimglina which is the Amharic translation of Arbitration can be initiated by the Shimagiles (the neutrals). Despite the approach in the Civil Code, "Shimglina is a practice that combines a hybrid of what a modern lawyer calls mediation, conciliation, compromise and arbitration proper", See *Supra* n 25,pp.117-118.

[31] *Supra* n 25, P. 357

[32] See for example, Teruo Doi, "International Commercial Arbitration in Japan", in Peiter Sanders,(edr.) International Arbitration Liber Amicorum for Martin Domke, (The Hague, 1967),72-73

[33] *Supra* n 2, p. 388

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dom of contract goes like this: 'contracting parties are rational enough to best know their interest, and make the right choice of values in the course of bargaining with each other. So, contractual obligations are freely and willfully assumed by both sides in return for reciprocal exchange of values.' This coupled with the notion of subjectivity of values, stands as the foundation of the doctrine of freedom of contract.

This is not to say that society doesn't have any interest in private contracts. Yet, any private "contract serves society only insofar as society is interested in the individual enrichment made possible by a regime of reciprocity…. If two men discover that by an agreement each can profit by giving up something he values less than the thing he receives in exchange for it, the individuals are enriched by virtue of their own evaluations of the objects of the exchange."[34] This is the reason why the outcome of a contractual bargain cannot be objectively defended. If the deal is fine for the contracting party, then it is the right deal, though it may be judged as unacceptable for on lookers.[35]

When we look at contract as a dispute resolution institution, it is again this aspect (of freedom of will) what looms larger than the others and helps us sort it out from other rival institutions of adjudication and election. This freedom of consent exercised in the process of negotiation is what constitutes the essence of the dispute resolution dimension of the institution. So if contract is the essence of ADR, then it is this freedom of contract that defines the very nature of the mode of participation through the process of negotiation.

But what does the acronym ADR stand for, after all? Many people hold that it stands for "alternative dispute resolution". In this regard, "ICC has chosen to refer to ADR as 'amicable dispute resolution' rather than the more traditional 'alternative dispute resolution.'[36] Also, the set of processes that fall into the class of ADR can better be designated as "Amicable dispute resolution" mechanisms. The former usage was developed many years ago when the business community initially in the United States of America was searching for dispute resolution mechanisms other than litigation in national courts"[37] "Amicable dispute resolution' not only corresponds well with the spirit of assisting parties toward a negotiated settlement, it also clarifies the confusion with arbitration and avoids the question 'alternative to what?'[38] In this respect, ICC has in fact shown a determined stance by coming up with

[34] *Supra* n 2, pp. 386 -387

[35] Note that legal systems have tried hard to avoid or limit the obnoxious results of this view. One typical such attempt is found in the doctrine of unconsionability - see Article 1710 of the Ethiopian Civil Code

[36] ADR International Application – Special Supplement 2003, *ICC International Court of Arbitration Bulletin*, 110

[37] *Ibid*

[38] *Id*.p.12

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unified rules for ADR in such a way as to allow parties to adapt it to the particular technique they choose-mediation, conciliation, neutral evaluation-etc; and failing agreement on the particular technique to be adopted the fallback seems to be mediation.[39]

Generally the set of forms that fall within the category of ADR include Conciliation, Mediation, [Early] Neutral Evaluation, Expert Determination, Mini-trial, Negotiation, Compromise, etc. Often the list differs from country to country.

At this juncture two questions present themselves:

a) If ADR is a contract then what does mandatory ADR mean?
b) If ADR is a contract, why should there always be a neutral third party?

4.1. Mandatory Submission to ADR

The duty to submit to ADR proceedings will come into picture mainly in two situations: (1) when the occasion envisaged in the underlying contract materializes, and (2) when courts sponsor ADR programs for some category of cases and compulsorily refer parties to such programs. In certain exceptional situations the law can prescribe ADR.

4.2. The Participation of a Neutral

The participation of neutrals almost invariably characterizes all forms of ADR except negotiation. If ADR is a contract, pure and simple, then how can such practice be vindicated? Non interested third party participation is not alien to the institution of contract, after all. Agents and brokers are typical examples in contracts. But what practical significance does neutral participation have in ADR? Is it indispensable to the institution of ADR, that its practical importance will be impaired if not its conceptual coherence? Viewed in institutional terms, the presence of neutrals serves two major types of functions. First, they may facilitate the negotiation process, by relieving the parties of the embarrassment involved in admitting fault or "by representing a disputant who has distaste or a disability for discussing face to face personally"[40] Caucusing in mediation and conciliation is exactly of such an aim. The difficulty makes the involvement of a neutral very important (indispensable). The second advantage of neutrals' involvement is bringing some element of objectivity into negotiation in order to soften individual positions.[41]

[39] ADR Rules in Force as from 1, July 2001; *International Chamber of Commerce Dispute Resolution Services-ADR.* www.iccadr.org

[40] Melvin Aron Eisenberg, "Private Ordering Through Negotiation: Dispute Settlement and Rulemaking"(1976) 89 *Harvard Law Review*, 660

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The neutral is hence a person that doesn't control any part of the proceeding;[42] neither the process nor the outcome. The parties control the whole process and the outcome, and the neutral assists them all along.

4.3 Some Misconceptions about ADR

a) ADR and Due Process of Law

Due process of law is a legal tool which aims at protecting the rights of parties in an adjudicative proceeding. It has two components: procedural and substantive. Due process is not unique to adjudication, as it can also be involved in rule making proceedings more often at the administrative level than the legislative. The most important aspect of due process in the adjudicative context is procedural due process that demands that parties in dispute be given adequate notice and fair hearing. Fair hearing is multi pronged – it includes the right to be given equal opportunity with the opposing party in the over all proceeding, the right to present one's own version of the case, the right to get all the documents and evidences produced by the opposing party against one self, the right to challenge those evidences and arguments, the right to produce one's own witnesses, and challenge through cross – examination the opposing witnesses, the right to get good and equal attention from the bench for one's presentations, etc. All these are compulsorily required in arbitration (unless waived by the parties). [43]

In ADR, there is no hearing; generally no production of evidences and arguments, no presentation of witnesses, no cross examinations etc. This does not, on the other hand, mean that ADR proceedings do not involve any kind of discussions, presentations and explanations. ADR proceedings are of course required to be much more informative of the general personal emotional and material backdrop of the dispute – A matter which cannot be attained without open and candid discussions.

However, such discussions or presentations are not made in order to convince the neutral as in arbitral hearings. What ADR gives the parties is the opportunity to really explore what the other side is looking for, and to identify the focus upon the issues. In other words, the neutral is never going to turn around and say "yes, ok you have persuaded me," and there is little point in trying to convince him of a party's arguments because ultimately the neutral has no power to impose his own view upon the parties.[44] Put differently,

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[41] *Id*, p. 662

[42] But see, *supra* n 1, p. 482

[43] Sometimes parties in arbitration waive the oral hearing component – not the documentary presentation though.

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while the presentations in arbitration are made to the neutral, they are directed to the parties in ADR.

b) ADR and the degree of neutrality of the "neutral"

It is an established tenet that the neutral in arbitration be completely neutral – impartial and independent. And, based on this any related person (whether in blood, business or marriage is deemed not neutral and hence) is unworthy, to arbitrate the dispute. Can the same be said of the neutral in ADR proceedings? From all the foregoing analysis, the answer for this question will be "not exactly." Although the third party in ADR proceedings is generally required to be neutral, there is no strict application of it, and if the parties want they can waive their right to it. X and Y may present their dispute to Y's father as a mediator or conciliator. In as far as the conciliator/mediator cannot give a binding decision the damage, if any; arising out of his partiality can be cancelled at the end. There may even be no need to wait till the end. A party who suspects the neutral of bias can quit the proceeding at the earliest possible sign of such conduct. Thus, neutrality of the third party in ADR, though it cannot be dismissed as unimportant, is not so important as in arbitration.

c) ADR, and Rationality and Responsiveness

It has already been indicated in the preceding section on arbitration that rationality is one of the intrinsic demands of the institution of Arbitration. This is because the means of participation of the parties in arbitration is by presenting proof and arguments, and such participation, as a matter of necessity, calls for a rational analysis. This particular modality of participation by the parties in the process also gives rise to another quality to the arbitration proceeding- responsiveness of the outcome of the proceeding to party presentations.

Is same expected of the process and outcome of an ADR proceeding? Not necessarily. As for the requirement of rationality, although it would lift up the institution of ADR to its optimal level of utility, it is not mandatory for its proper operation. [45] ADR as a contract essentially involves exchanging values, and no objective and rational analysis can be made as to the propriety of a particular exchange made to resolve a dispute by the parties in as far as each party had gotten its choice.

Likewise, the requirement of responsiveness, though useful in ADR as well, is not guaranteed by the institution. The final settlement may be made

[44] Toby Randle, Alternatives to Adjudication 11th Adjudication Update Seminar, http://www.google.ca/search?hl=en&q=alternatives+to+a judication

[45] *Supra* n 2

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without taking into consideration all the facts, figures and etc. made in the course of the discussions, and will still be valid. There is no mandatory requirement that it should proceed from and be congruent with the presentations made by the parties. The course that leads to the final outcome may be dictated by an unexpected event that took place at the last minute in the negotiation that falls outside the frame of party presentation.

5. Abuses in ADR

5.1. Mandatory ADR

ADR as a contract is therefore entirely dependent on the free will of the parties. Any attempt of imposing ADR on the parties counters this freedom of contract. Mandatory ADR arises in two contexts: (a) Court sponsored mandatory ADR; and (b) Court enforced ADR clause in private contracts. Legally imposed ADR doesn't exist in Ethiopia, and hence will not be discussed here.

a) Court annexed Mandatory ADR

Not all court sponsored (annexed) ADR is mandatory. But where it is compulsory it vitiates the parties' freedom of choice. Some of the reasons for courts to compel parties to attempt ADR may have to do with reducing court case load, help parties find a solution that will work better, or be timelier than determination of the court, or to offload some cases which are too complex for adjudication, etc. The first and third reasons have nothing to do with the interest of the parties. But the second reason seems to promote the interest of the parties to the dispute. It will still be paternalistic and counterproductive where it is an imposition.

There is also some empirical evidence that mandatory ADR is less attractive and effective than the voluntary one. In this regard, one scholar referring to the practice in the US has it that:

> Although no statistical data exists about the number of participants refusing to engage meaningfully in mediation, it seems that the horse led to water by the courts that mandate mediation still refuses to drink. Instead of learning and using mandatory mediation to negotiate, many participants treat mandatory mediation like another part of litigation. Parties and lawyers as ordered by the court often show up at the mediation table but do not participate in a meaningful way. In many mediations, groups of participants show the same adversarial behavior as they do in the courtroom. [46]

[46] Archie Zariski, Mandatory ADR or an ADR Mandate? Encouraging Effective Dispute Resolution http://www.google.ca/search?hl=en&q=mandatory+adr&btnG=Google+Search&meta=,

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The results of compulsory ADR are not difficult to anticipate. No matter how benevolent its ends and its promotions, compelled ADR often thwarts the parties' independence and fails to provide those sorts of procedures capable of alleviating concerns about fairness. It should come as no surprise, then that disputants resent and try to avoid compelled ADR. ADR's legitimacy is eroded by its association with compulsion. It does not look or feel "safe" to those forced to use it. [47]

b) Court enforced ADR clause in a private agreement

At times, courts may compel parties to live by their ADR agreement although one of the parties may decline to do so. The scenario occurs when a party goes to court notwithstanding an earlier agreement to resolve the dispute by ADR. However, compelling either party to respect ADR clause will not be fruitful since "[Often] after the first discussion with the neutral… either party is free to terminate the ADR proceeding."[48] The justification for such anomalous procedure lies in the fact that the process presents the voluntary nature of ADR while allowing the parties to commit themselves to the agreed ADR procedure.[49]

In effect, this means that if a party opts to refuse the ADR proceedings, it should appear before a neutral and say so. In other words, mandatory submission doesn't compel an unwilling party to participate in ADR proceedings – it however requires him to express his refusal in a particular way – by appearing in front of a neutral. The attempt here is to guarantee the freedom of the parties at the same time maintaining meaningfulness of the ADR clause. In its proper institutional context, however, compelling parties to adhere to their agreed ADR procedure means forced performance of a contract which is always disallowed by the law if it vitiates the personal liberty of a party so compelled.[50] Obviously, forcing a person to personally appear for ADR discussion and participate in it affects the personal liberty of the party so compelled.

Be that as it may, mandatory submission is a typical instance of the "*moss*" that has developed around the institution of ADR- a practice that tends to blur the true nature of ADR by confusing it with other compulsory proceedings. Whether or not such a practice is one that should be weeded out is a matter of calculating the pros and cons of doing so. Not every "*moss*" is harmful, however, and where the company of an institution by a moss is advantageous, there is no reason to abandon such company in as far as the essence of the institution is not grossly inhibited.

[47] *Ibid*
[48] *Supra* n 46, p.12
[49] *Ibid*
[50] Article 1776 of the Civil Code of Ethiopia (1960)

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5.2. ADR forms Yielding Final and Enforceable Outcomes

It has already been established so far that ADR is a contract and the process involved in it is negotiation. If the negotiation process is successful, then it will be wound up by a settlement agreement (often memorandum of settlement in mediation and conciliation). If the ADR proceeding doesn't end in settlement then there is no any agreement, as when a negotiation to conclude a contract of sale fails to succeed, there will be no agreement. If the ADR proceeding successfully ends in settlement what is the nature and effect of such settlement? Obviously such a settlement shall be binding as a contract. However, it is not final and readily enforceable in a court of law unlike an arbitration award which is directly executable. So if a party refuses to live unto the settlement that will be regarded as mere non performance of a contractual obligation.

It thus follows that, the remedies against such party are either forced (specific) performance or cancellation of the contract with or with out compensation depending on the existence of damage. So, ADR proceedings do not result in an outcome which the parties cannot refuse to live by. It is thus, perverting the institution of ADR to effect direct judicial execution of the outcome of an ADR proceeding. One of the typical practices in this line is the DAB (Dispute Adjudication Board) used in the construction sector. Under this rule, when a dispute ensues between a contractor and an employer it is referred to a dispute adjudication board or sometimes also called dispute adjudicator which has to decide the matter within 28 days. If any party is dissatisfied by the decision it has to notify his dissatisfaction to the other party and the neutral within 14 days as of the decision failing which the decision will be binding and non appealable at least provisionally.[51] Such a model diverts the notion of adjudication to the extent that it ascribes the effect of adjudication to a contractual model of dispute resolution.

It is now obvious that a clear distinction emerges between ADR and Arbitration from the foregoing analysis. This conceptual framework will also be significant as the issue of *shimgilna* is addressed below.

6. Variants of Shimglina

Shimglina, Giligil, Yezemed dangninet, and Irq: Terminology Differences or Conceptual?

These four Amharic terms are as confused in Ethiopia as ADR and arbitration. Our ultimate aim is placing each of these in their appropriate category –

[51] See, The Addis Ababa Chamber of Commerce and Sectoral Associations Adjudication Rules of 2007 Art 5(4)

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ADR or arbitration. To this end, we shall first attempt to analyze their difference, if any, or explain their sameness.

In almost all the Amharic versions of legal texts in Ethiopia, the English term arbitration is translated as either Yezemed dangninet,[52] or Shimglina,[53] or Giligil[54] or less frequently, Irq.[55] There are also provisions where any two of these terms are combined or interchangeably used at the same time.[56] Though use of two or more terms for one concept in the same provision generally suggests interchangeability, that doesn't seem to be the case in Ethiopia. On top of the fact that there is no constantly used combination in the laws, each of these terms has its distinct meaning.

6.1 Shimglina

Shimglina, which literally means elderliness, denotes dispute solution by elderly persons. It is the most rooted system in Ethiopian traditional dispute resolution scheme than the rest. Strikingly most Ethiopian nationalities have dispute resolution institutions which either literally i.e in names, composition and function correspond to Shimglina,[57] or at least in composition and function resemble it.[58] In all these cases either the name of the dispute resolution institution itself in the language of the community means dispute resolution by the elderly, or in actuality it is run by elderly persons. However, elderly

[52] See for example, the Civil Code Art. 941, 945,1765, 3325-3326, 3328-3346; the Commercial Code Art 267(2)

[53] See for example, the Civil Code Art; 973 (3),1275,(1)1472,1473, 2271, 3327; the Commercial Code Art 647(3); Revised Family Code Art.118-122; Proclamation No.550/2007,Art 6(7) & 28(1,2); Proclamation No.197/2000, Art 9(4); Proclamation No. 372/2003,Art 13(4)(c)

[54] See for example the headings of Civil Code Arts 941,945 and 1275; the Commercial Code Art 1038(1)(2)(3); Revised Family Code Art.288; Civil Procedure Code, Art.315;Proclamation No 341/2003, Arts 5(6),15(3),19(3); Proclamation 37/96 Art 22(2) ; Proclamation 273/2002, Art 7(21); Proclamation 377/2003 Art 143

[55] While there is no pure use of this word its derivative "astaraki" is used for arbitration under Article 118-122 of the Revised Family Code; and Art.945 of the Civil Code. Article 500(1) of the Commercial Code also uses "magbabat" as the Amharic translation of the term arbitration, while in the Amharic sense magbabat is a procedure more akin to mediation or conciliation which can best be translated as Irq.

[56] In the Civil Code, Art.941 uses the terms Giligil and Yezemed dangna, Art. 945 uses Giligil and Yezemed Astaraki Dangna; Art 1275 uses the terms Giligil and yeShimglina dangninet. Art 118-122 of the Revised Family Code also uses the terms Shimglina astaraki and astaraki shimagile. Atrs 316-319, - use the terms Giligil and Yebetezemed Dangninet, whereas Ats 350-357 of the same Code uses the terms Giligil and Yebetezemed Shimglina Dangninet, Regulation No 115/2005, Art 36 uses both Shimglina dangninet and yeGiligil dangninet interchangeably.

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doesn't merely signify age; it rather refers to the wisdom and social status of a person as valued by the community in question including, of course age and experience.

The other cross cutting similarity of most of these "*shimglina*" institutions is their versatility in terms of offering all qualities of what can otherwise in modern terms be offered by arbitration, conciliation, mediation, compromise, etc. This, in fact, is what typically characterizes *Shimglina* in Ethiopia as one renowned Ethiopian scholar in the field wrote.[59] In almost all cases the elders can initiate the dispute resolution process,[60] there is hearing and party presen-

[57] For example, Jaarsummaa/Jaarsa Araaraa in Dejene Gemechu, *Conflict and Conflict Resolution among Waliso Oromo of Eastern Macha: The Case of the Guma,* Dept of Sociology and Social Anthropology, Addis Ababa University, 2007, p. 43; Jarsa Biyyaa of the Oromo See Areba Abdella and Berhanu Amenew, Customary Dispute Resolution Institution of the Oromia Region: The Case of Jarsa Biyya in *Grass-roots Justice in Ethiopia: Contributions of Customary Dispute Resolution*, Alula Pankhurst and Getachew Assefa (eds), p 172 ; Qabittino of Kafa, Shiyabe of the Berta, See Bayisa Besie and Lemessa Demie, Customary Dispute Resolution in the Benishangul Gumuz with Emphasis on Shinasha Society, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), p.124; The institution of Songo of Sidama, See, Ayke Asfaw and Mekonnen Felleke, Customary Dispute Resolution in the SNNPR: The Case of the Sidama, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), pp.209-214

[58] For Example the Institution of Maro of the Afar, See Shimelis Habtewold and Getachew Talachew, Customary Dispute Resolution in the Afar Society, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds),p.96; Afocha of the Hariri People, See Biruk Haile and Jira Mekonnen, Customary Dispute Resolution In Harar, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), p.157; Odayaal of the Somali People, See Mohamed Melin Seid and Zemedie Jotte, Customary Dispute Resolution in the State of Somali: an Overview, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), p.190; Abbo Gereb of the Wajirat (Tigray), See Shimelis Gizaw and Tadesse Gessese, Customary Dispute Resolution in Tigray Region: Case Studies from three Districts, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds), p.219

[59] *Supra* n 25

[60] Shimglina in Segat Kebele of North Shewa, See Melaku Abate and Wubeshet Shiferaw, Customary Dispute Resolution in Amhara Region: the case of Wofa Legesse in Northern shewa, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds),p.108; Areba Abdella and Berhanu Amenew *Supra* note 57, page 172; Mohamed Melin Seid & Zemedie,

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tation of some sort,[61] rendition of a morally binding decision,[62] compromise,[63] no payment of fee for the services of the dispute resolution,[64] etc.

Albeit the cross cutting uniformity in which it is applied in traditional Ethiopian communities, *Shimglina* in its broader sense remains to be a catch word used to refer to any out-of-court dispute resolution mechanism.[65] The following two cases presented to the Federal First Instance Court at Dire Dawa can further illustrate how confusing the use of the term is in practice.

Jotte, *Supra* n 58, p.190; Shimelis Gizaw and Tadesse Gessese, *Supra* n, 58, p.288; Sebsib Belay,Customary Dispute Reslolution in Addis Ababa,with Reference to Yeka Kifleketema, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds),p.238, Mentewab Zelelew and Mellese Madda, Alternative Dispute Resolution in Addis Ababa:the Case of Markato, in Grass-Roots Justice in Ethiopia: Contributions of Customary Dispute Resolution, Alula Pankhurst and Getachew Assefa (eds),p.250.

[61] Shimelis Habtewold and Getachew Tala-chew, *Supra* n 58, p.98; Melaku Abate and Wubeshet Shiferaw, *Supra* n 60, p.109; Biruk Haile and Jira Mekonnen, Supra n 58, p.158; Areba Abdella and Berhanu Amenew, *Supra* n 57, p.174; Mohamed Melin Seid and Zemedie Jotte, Supra n 58, p.191; Ayke Asfaw and Mekpnnen Felleke, Supra n 57, p.209; Sebsib Belay, *Supra* n 60, p.242; Mentewab Zelelew and Mellese Madda, Supra n 60, p.251.

[62] Shimelis Habtewold and Getachew Tala-chew, *Supra* n 58, p.99; Melaku Abate and Wubeshet Shiferaw, Supra n 60, p.112; Biruk Haile and Jira Mekonnen, Supra n 58, p.160; Areba Abdella and Berhanu Amenew, *Supra* n 57, p.175; Mohamed Melin Seid and Zemedie Jotte, *Supra* n 58, p.191; Shimelis Gizaw and Tadesse Gessese, Supra n 58, p.233; Sebsib Belay, *Supra* n 60, p.243; Mentewab Zelelew and Mellese Madda, Supra n 60, p.251

[63] Shimelis Habtewold and Getachew Tala-chew, *Supra* n 58, p.100; Biruk Haile and Jira Mekonnen, Supra n 58, p.159; Mohamed Melin Seid and Zemedie Jotte, Supra n 52, p.190; Sebsib Belay, Supra n 54, p.242; Mentewab Zelelew and Mellese Madda, *Supra* n 54, p.251

[64] Shimelis Habtewold and Getachew Tala-chew, Supra n 52, p.95; Melaku Abate and Wubeshet Shiferaw, *Supra* n 54, p.110; Biruk Haile and Jira Mekonnen, Supra n 52, p.158; Mohamed Melin Seid and Zemedie Jotte, *Supra* n 52, p.191; Shimelis Gizaw and Tadesse Gessese, Supra n 52, p.232; Mentewab Zelelew and Mellese Madda, *Supra* n 54, p.251; But Sebsib Belay, *Supra* n 54, p.243-there can sometimes be fee for the shimagiles.

[65] The process of securing the release of CUD leaders carried out by the Elders led by Professor Ephrem Yisak was designated as Shimglina. Though the nature of that process still remains beyond the knowledge of the public in general, and has been recently a disputed issue between the government and some of the released CUD leadrers, the dispute has never been on whether or not it is Shimglina.

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a) *Hajji Hassan Yusuf vs Hajji Amine Usso* [66]

The case was presented by Hajji Hassan Yusuf to the Federal First Instance Court at Dire Dawa in the form of application for the execution of a decision rendered by the Oromo Nation Cultural Institution which the parties had entrusted to resolve their dispute earlier. In brief the facts of the case are as follows:

Hajji Hassan Yusuf and Hajji Amine Usso were partners in a business. They wanted to dissolve their partnership but disagreed on sharing the proceeds. Three *Shimglina* processes were held to resolve the dispute in at least two of which the outcome was a decision in *favor of Hajji Hassan* Yusuf. During the first *Shimglina*, he was awarded Birr 181,200 and in the third *Shimglina* he was awarded 115,641 Birr, plus a share of 159 TV sets in the stock. [The result of the second Shimglina was not mentioned.]

Hajji Amine Usso defied the "decision" of the shimaglina and referred the matter to another *Shimilina* by the Oromo Nation Cultural Institution (ONCI). The ONCI after conducting oral hearing and without written presentations (submissions) constituted new valuation experts with two more *Shimagiles* as observers to make a report on the accounts of the business. In the meantime the ONCI made the parties to sign an undertaking to be bound by the outcome of the proceeding. And, eventually the ONCI *Shimglina* Council with some degree of compromise decided that Hajji Amine Usso should pay his former partner 115,000 Birr and part of the proceeds from the sale of the TV sets in stock. Again Hajji Amine Usso refused to abide by the decision. Eventually Hajji Hassan Yusuf filed his application with the Dire Dawa First Instance Court for execution of the ONCI's decision invoking Arts 315,319(2) and 378 of the Civil Procedure Code as the basis of his application.

The issue is whether or not this is arbitration proceeding and the decision is an award in which case direct execution can be sought?

b) *Wro Abaynesh Tadesse vs Ato Wubshet et al (Seven respondents)* [67]

The parties had a dispute over inheritance since 1999. In April 2007 they resolved their dispute by a four member panel of *shimagiles* each side appointing two. The panel after examining the matter gave its "decision and opinion" – as it referred to what it gave. The "decision and opinion" contained five counts four of which state that the panel's decisions are based on

[66] *Hajji Hassan Yusuf vs Hajji Amine Usso (Federal First Instance Court at Dire Dawa ⁻ Civil File No 24186)*

[67] *Wro Abaynesh Tadesse vs Ato Wubshet et al (Federal First Instance Court at Dire Dawa ⁻ File No 02257)*

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the agreement of the parties (than on interpretation of legal provisions and determination of the rights based thereon.) The panel in fact did not invoke any legal provision for its "opinion and decision." What is more, the panel, interestingly enough, made all parties to sign at the end of the document which embodied its "decision and opinion."

The decision of the *Shimglina* was presented by Wro Abaynesh to the Federal First Instance Court at Dire Dawa for execution on the contention that it is an arbitral award per Art 378 of the Civil Procedure Code. The issue that would arise is whether this is arbitration, and whether the decision executable as an arbitral award?

The first case is more controversial than the second. It triggers at least two important questions: (1) what type of institution can be entrusted with the task of resolving disputes by arbitration; and (2) what procedure should be followed for a given dispute resolution proceeding to be taken as arbitration and its outcome as an enforceable award?

As far as the first question is concerned, there is no clear answer. But the general State policy seems to give this power only to selected institutions; it is only the chambers of commerce and the Ethiopia Commodity Exchange that the State has so far recognized by law to resolve disputes of their members by arbitration as per their rules [68] - institutional arbitration.[69] The Ethiopian state policy seems to be further clarified by the prohibition of the Ethiopian Arbitration and Conciliation Center (EACC) from offering the service of arbitration while the same institution is not barred from giving mediation services.[70] What makes the case of ONCI further complicated is the fact that it is a cultural institution that falls within the scope of Constitutional protection under Art.78(5) which states:

> Pursuant to sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.

But can article 78(5) of the Constitution be of any help in the above context? Note that, the above provision refers to article 34(5) of the Constitution

[68] See proclamation 341/2003 Art 5(6), 15 (3),19(3); and Proclamation 550/2007 Art 6(7).

[69] See *infra* note 71.

[70] My attempt to secure an official document evidencing the prohibition was not successful. But on phone conversation with Wro Haregewoin Ashenafi, Managing Director of EACC, it has been confirmed. Wro Haregewoin also added that the prohibition has been lifted unofficially on condition that arbitration is carried out by volunteer arbitrators and EACC exacts no fees.

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which authorizes cultural and religious dispute resolution institutions in relation to personal and family law matters only. Thus, it may literally be argued from the state policy perspective that, even if the ONCI had followed the right procedures in arbitrating the above mentioned case, its award may not be valid. But the law (both the Civil Code and the Code of Civil Procedure) nowhere prohibits arbitration by an institution. If parties can entrust resolution of their dispute to their chosen arbitrators Mr. X, Y and Z, there is no any reason why they should be prohibited from referring their dispute to an institution for the latter to resolve it for them. What is the difference between the following two scenarios?

Parties refer to a given law firm, or association of arbitrators to appoint three arbitrators from its members and resolve their dispute

Parties appoint three members from the law firm, or the association of arbitrators in question to arbitrate their dispute

Strictly speaking, there is no difference. This is not to suggest that the much treasured service of arbitration be reduced to an over-the-counter merchandize. But we cannot conjure up unnecessary prohibitions where the law lays none. Thus, there is no reason why such arbitration as in the above example will not be valid as ad-hoc arbitration.[71] Thus, the law does not prohibit ad-hoc arbitration by institutions if parties willfully submit to it. This should however, be taken with the caveat that only legally empowered institutions can make their own rules and administer arbitration (institutional arbitration).

In as far as the second question is concerned, it is pretty clear that the procedure required for arbitral proceeding is not observed. So the decision of the ONCI will be invalid as an award from that respect at least.

When we come to the second case, the only issue is how and in what form the award should be given. Can arbitrators issue their decisions without analyzing submissions of the parties solely based on their agreement? No, be-

[71] The ad-hoc vs institutional arbitration dichotomy is seldom clarified in literatures. But, arbitration will qualify as institutional arbitration if the following two conditions exist: 1. it proceeds under the auspices of an arbitration institution; 2 pursuant to the rules of such institution. The only exception to this is the widespread acceptance by many arbitral institutions to auspice arbitration per UNCITRAL Rules- See *UNCTAD International Commercial Arbitration Module,* Geneva, 2005, pp.31-32; See also Article 5 of the Revised Arbitration Rules of The Addis Ababa Chamber of Commerce and Sectoral Associations'(AACCSA) 25, December 2008 which defines ad-hoc arbitration as an arbitration in which the Institute offers secretarial services in situations where the Institute's Rules are not used.

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cause, arbitration must involve the rendition of reasoned decision which responds to the parties' arguments and proofs. In fact, the decision of the arbitrators in this case bears the signatures of all the parties involved implying it is an agreement, and not just a decision independently reached by the tribunal. And, this shows that the proceeding is not arbitration – it is conciliation in its true sense. Thus, it cannot be submitted for courts for direct execution as an award.

There are certain similarities between the institution of *shimglina* and *ex aeqo et bono* arbitration-sometimes known as extra legal arbitration.[72] But *shimglina* is broader than *ex aequo et bono* arbitration. *Ex aeqo et bono* arbitration relates to the circumstances where a tribunal decides a dispute based on standards (such as equity, fairness, and conscience) other than on any given positive law, and does not have anything to do with the procedural law applicable on arbitration.[73] It refers to the substantive law applicable on the merits of the dispute. *Shimglina* on the other hand is completely independent both in terms of the substantive as well as the procedural rules it applies. Moreover, while the outcome of an *ex aeqo et bono* arbitration is an arbitration award pure and simple, the outcome of *shimglina* is not.[74]

6.2 Giligil

Giligil on the other hand is much less commonly used in the codes though it is not devoid of confusion in its turn. The confusion in relation to this term is basically the Civil Code's use of it as the Amharic equivalent of the concept of *compromise* in Articles 3307-3325. Obviously this is not just a slip of the pen. The term *Giligil* appears in the chapter several times. Moreover, the popular and intuitive understanding of the term, indeed, conforms to a kind of amicable process of dispute resolution.[75] What is further confusing is that the Code uses this term in the chapter dealing with arbitration, i.e., Chapter two of Title XX only once under Article 3325(5) and in the rest of the chapter the term used is *Yezemed dangninet*. *Shimglina* is used only under Article 3327. But most of the proclamations issued after the codes use the term *Giligil*. The Addis Ababa Chamber of Commerce and Sectoral Association's Arbitration Rules also uses the term *Giligil*.[76]

[72] One of the assessors of this article holds that the two are the same.

[73] UNCITRAL Arbitration Rules Article 33 (1) and (2); Also see generally, Leon Trakman, Ex Aeqo Et Bono: De-Mystifying an Ancient Concept, University of New South Wales, Faculty of Law, Research Paper Number 2007-39

[74] *Supra* n 62

[75] *Supra* n 60, p. 109.

[76] The Revised Arbitration Rules of the Addis Ababa Chamber Commerce and Sectoral Associations, 25 November 2008.

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6.3 Yezemed danginet/ Yebetezemed danginet

The "*yezened danginet*" and "*yebetezemed danginet*" are much related terms. Though much more widely used in the Codes, these terms do not appear in proclamations reviewed by this writer. Nor could this writer find these terms in the several arbitration cases he reviewed.[77] This being the only discernible pattern in this respect, the terms seem to have originated in the traditional family law institutional setting. This seems to be apparent from the word "*yezemed*" which means "*of a (by blood or consanguinity) relative*." Entrusting the task of resolving disputes to the relative of both parties might have been practicable in the traditional agrarian close knit society. But using it to translate arbitration in modern Ethiopia will surely be a digression from the basic tenets of the institution, such as impartiality and independence of the arbitrator. In this respect why these terms are abandoned in the recent proclamations and in arbitral cases seems to be clear.

6.4. Irq

The term *Irq* is the Amharic translation of the term "conciliation" in the English version of the Civil Code. Title XX of the Code which contains provisions on Compromise and Arbitral submissions is fairly well organized. It is, following the formulation of the heading, divided into two chapters: Chapter One on Compromise and Chapter Two on Arbitral Submission. Section 1 thus sets out with a definition that goes: "a compromise is a contract…." Interestingly, Section 2 on conciliation doesn't give a definition for the term. The reason for this is clear; conciliation is a compromise, and thus a contract as per the general definition of compromise in Article 3307. This in a way conforms to the claim made earlier that the essence of ADR is contract.

Explaining the confusion in relation with the institution of Arbitration in Ethiopia only from the perspective of terminology may be oversimplification. There has much to do as well with the concept itself as incorporated in the codes. One typical provision having such confusion is Articles 2271of the Civil Code. The provision reads:

> Article 2271 price estimated by third party
>
> 1. The price may be referred to the arbitration of a third party.
> 2. There shall be no sale where such third party refuses or is unable to make an estimate

What the above provision calls for is an estimator when the parties (seller and buyer) fail to agree on the price. But the problem is whether we would con-

[77] More than 30 arbitration cases have been reviewed for the purpose of writing this article.

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sider the process of involving third party expert evaluation as arbitration. Certain questions arise at this juncture. Does it involve party presentation or at least the right thereto in the form of proof and arguments? Can the estimation of the third party be regarded as an award and thus binding?[78]

Moreover, the provision contemplates the likelihood of such "arbitrator" being unable to estimate the price. An arbitrator has no room (as there is none for the judge in a state court) to be unable to give decision once he rightly assumes jurisdiction unless the plaintiff withdraws his case or the parties settle their dispute outside the tribunal. No doubt this provision should have referred to conciliation instead, if not to the most appropriate current schemes such as expert determination, neutral evaluation, etc. Is article 2271 just a slip of the pen? On the face of it, it seems to be so if one reads the equivalent of Article 2271 in the Code Civil of France[79] which reads as Article 1591 and 1592.

> Art-1591: the price of sale must be determined and stated by the parties.
>
> Art-1592: it may however [sic] left to the estimation of a third person; where the person is unwilling or unable to make an estimate there is no sale.

Despite the closeness in wording between these two provisions, Article 2271 is not modeled after the above provision. The above quoted provisions from the French Civil Code Articles 1591 and 1592 are of course, the revised versions of *Act no 2000-1208 of 13 Dec. 2000.* It follows that Article 2271 is modeled after the Code Napoleon of 1804 since the latter was one of the major sources of the Ethiopian Civil Code. Indeed, Art. 1592 of the Code Napoleon uses the word arbitration just like Art.2271.

> Art. 1591: The price of sale must be determined and designated by the parties
>
> Art.1592: It may nevertheless be left to the arbitration of a third person; if such third person is not or cannot make an estimate there is no sale.

This begs the question as to what the old usage of the term arbitration was in France and possibly in the Civil Law traditions in general. There were many distinct procedures which bore the name of arbitration in medieval Europe. France for instance had three distinct procedures in the name of arbitration which were arbitration and amiable composition dealt by the Code of Civil Procedure, and arbitration dealt within the Civil Code.[80] Likewise, in medie-

[78] See the comparable provision in Articles 1472, 73 where arbitrators may be called in only to make valuation which is binding on the parties as an award.

[79] http://www.google.ca/search?hl=en&q=Code+Civile+of+France&start=10&sa=N

[80] Rene David, Arbitration in international Law, Kluwer law and Taxation Publishers, 1985, p.84

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val Italy as well three types of arbitration processes existed: arbitration proper, amiable composition, and *arbitraggio*.[81] *Arbitraggio* was a process which aimed at the completion of a contract (gap filling) – a function which is outside of the jurisdiction of the courts."[82] The amiable *compositeur* in both cases (of France and Italy) "was not bound to decide in accordance with the law, since he was regarded fundamentally, as a conciliator;…he wasn't also a conciliator pure and simple since he was regarded as empowered to impose his decisions."[83]

As time went by, however, the concept was further refined leaving behind more conciliation like procedures and sticking to the adjudicative essence. Such a development must have also been reinforced by influx of common law conceptions. Furthermore, the special need to achieve harmonization of arbitration laws to suit the growing need of uniformity in international commerce must have added the impetus for the emergence of the modern quintessence of arbitration.

6.5- Which Amharic term may be taken as equivalent to Arbitration?

The foregoing discussion might have in a way alluded that arbitration is an imported institution. If so, the writer's effort has met one of its objectives. But now is the time to be candid about it. Indeed, the main cause of the confusion is the attempt to translate the imported institution of arbitration by means of an existing (domestic) institution. Arbitration is a western institution [84] transplanted into Ethiopia along with many other institutions. This is not to undermine its importance; not every transplanted institution should be condemned, or for the mere fact that it is a transplant it should not be taken to be a threat to indigenous institutions, as far as it has important purposes to serve. There is no doubt that the major importance of arbitration lies in the

[81] *Id*, p.93

[82] *Ibid.* Rene David adds that the sense in which the word arbitraggio is used in Italy is different. It is said that Italians do not use the word arbitraggio in the context of a dispute; and their 'arbitrators' are called third persons or good men…they are asked to give a decision or an answer to the question submitted to them, not to render an award. Id.p.95. it appears that articles 1765 is inspired by this tradition.

[83] *Id*, p.87

[84] See Michel T. Moser "Arbitration in Asia: An overview in International Commercial Arbitration in Asia") *Special Supplement to (1998) ICC International Court of Arbitration Bulletin* (Nov)6-10; Fails Narimy, East Meets West: Tradition, Globalization and the Future of Arbitration, *Arbitration International,* Vol. 20, No2,2004, pp.124-125; But see Bezawork Shimelash, The Formation, Content and Effect of an Arbitral Submission Under Ethiopian Law, (1994) 17*JEL* 69

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fact that it is internationally the most recognized reliable mechanism of dispute resolution for foreign investors. Without robust system of arbitration, attracting foreign investment is indeed very difficult. The importance of arbitration for the growth of the private sector in the domestic arena cannot be downplayed as well.

Thus the transplantation of the institution into the Ethiopian legal system is not objectionable. But what term should have been used to translate it into Amharic? The best option would be to spell the word arbitration in Amharic characters and abandon the futile attempt of translating it via existing institutions. It seems too late, however to introduce such a solution at this juncture. It may create more confusion. It would thus be easier and more plausible to consistently use either "*Shimglina*" or "*Giligil dangninet*". This writer however suggests "*Giligil dangninet*" for *Shimglina* as indicated above represents a distinct, independent and salient institution that is perhaps unique to Ethiopia.

In this way we will not only resolve the confusion revolving around the institution of Arbitration and ADR in Ethiopia, we will also have one more alternative in the Ethiopian kit of ADR in the form of *Shimglina*. Thus the new law ought to give explicit recognition to conciliation-Shimglina and arbitration. Does this sound odd? May be yes, as it does not match up with the international practice. But should we always establish congruence between our institutions and the international (or rather western) institutions? In fact, many legal systems have their salient domestic dispute resolution institutions; Italy has *arbitraggio*, USA has the '*rent a judge*' scheme. If Ethiopia has *Shimglina* as a separate and distinct institution from arbitration, it would not be that strange.

Conclusions

The distinction between ADR and Arbitration has much more to do with their underlying institutional foundations than mere degree of intrusiveness of the neutral during the dispute resolution process. The belief that ADR and Arbitration can be placed along a continuum in one spectrum is thus an oversimplification of the matter. Thus, as far as their underlying institutional bases are concerned, ADR is a contract while Arbitration falls under Adjudication. It is only when each form is rightly placed in its proper institutional context that it can both be properly understood and be effectively used. Or else, any attempt of looking at each scheme outside its core institutional basis is bound to erode its essence and utility.

Thus, one position that results from this distinction is the mutual exclusiveness of ADR and Arbitration. Although one cannot deny commonalities between the two institutions as dispute resolution institutions, such common-

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alities are too little compared to their difference to justify pigeonholing them together.

In the Ethiopian context, what vaguely lies between ADR and Arbitration is *Shimglina*. Strictly speaking, this is a mixture of both Arbitration and ADR at least in terms of the process aspect. Being unique to Ethiopia, however, *Shimglina* is both pervasive throughout the country and also sometimes used as a catch word to refer to all forms of out-of-court dispute resolution mechanisms. Thus, the concept of *Shimglina* is so nebulous and imprecise to translate the concept of arbitration into Amharic. In this connection, Ethiopian law doesn't have consistent term in Amharic for the concept of arbitration, but freely uses *giligil, yezemed dangninet, irq and shimglina*.

Although none of these words hit the nail on its head with due precision, '*giligil dangninet*' seems to be preferable for it has gained better acceptance among the lawyer community, and owing to its wider use in recent legislations. Such interpretive short-term solutions will indeed serve a limited purpose, until the problems highlighted above are resolved through the enactment of comprehensive law on arbitration and ADR that sufficiently reflects the distinction between the two institutions. Meanwhile, this legislative solution is expected to accord express recognition to *shimglina* as a variant of ADR and as a deep-rooted legacy distinct from arbitration. ■