

Ethiopian customary dispute resolution mechanisms: Forms of restorative justice?

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Abstract

The customary dispute resolution mechanisms of Ethiopia are playing an important role in resolving crimes of any kind and maintaining peace and stability in the community though they are not recognised by law and not properly organised. The customary dispute resolution mechanisms are run by elders; involve reconciliation of the conflicting parties and their respective families using different customary rituals where needed; emphasise the restitution of victims and reintegration of offenders; and aim at restoring the previous peaceful relationship within the community as well as maintaining their future peaceful relationships by avoiding the culturally accepted practices of revenge. However, despite the fact that Ethiopia's indigenous knowledge base of customary justice practice has the enormous advantage of implementing the ideals of restorative justice, restorative justice has not yet taken root in the criminal justice system of Ethiopia. This article examines the legal, *de jure*, and factual, *de facto*, jurisdictions of Ethiopian customary dispute resolution mechanisms in resolving criminal matters, and explores whether they are compatible with the core values and principles of restorative justice. Based on the analysis of the relevant legislations, literature in restorative justice and customary dispute resolution mechanisms, and interviews, it is found that Ethiopian customary dispute resolution mechanisms

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are compatible with the values and principles of restorative justice. Hence, it is argued that the customary mechanisms of Ethiopia can be used as a basis to develop restorative justice programmes if they are properly institutionalised and sufficient legal recognition is provided for their functioning.

Introduction

Parallel to the formal criminal justice system of Ethiopia, societies also have their own customary ways of dealing with crime. In many regions of the country, and especially in the remote and peripheral areas, these customary dispute resolution mechanisms are more influential and applicable than the formal criminal justice system, which is considered alien to the traditional societies (Macfarlane 2007:488). In many regions of Ethiopia, the customary norms are more strong, relevant, and accessible than imposed and top-down legal norms. Moreover, experiences in different regions of Ethiopia show that people, even after passing through the procedures and penalties in the formal criminal court, tend to use the customary dispute resolution mechanisms for reconciliation and in order to control acts of revenge.

Despite these factual roles of customary dispute resolution mechanisms, however, the procedural and substantive laws of Ethiopia, including the Constitution itself, exclude their application in criminal matters. In the Constitution of the Federal Democratic Republic of Ethiopia (1994),¹ customary and religious institutions are given a constitutional right to handle personal and family matters if the conflicting parties give their consent to get decision by these institutions. Hence, the Constitution limits the mandate of the customary dispute resolution institutions only to private and family disputes by specifically excluding their application to criminal matters despite the fact that they are functioning for many types of crimes on the ground.

Based on an analysis of pertinent legislations, relevant literature on restorative justice and customary dispute resolution, and interviews, this article explores the *de jure* and *de facto* mandates of the Ethiopian customary dispute resolution mechanisms in criminal matters and their compatibility with the values and

1 Henceforth 'Constitution'.

principles of restorative justice. The first section of the article deals with the meaning, key principles, and models of restorative justice and their place in the continuum of restorative justice. The second section explores the status, mandate, and mode of operation of Ethiopian customary dispute resolution mechanisms in a general manner, followed by a discussion of their compatibility with the values and principles of modern restorative justice. The fourth section highlights the limitations associated with the Ethiopian customary dispute resolution mechanisms. Finally, section five forwards conclusions.

1. Restorative justice: Its meaning, key principles, and models

1.1 What is restorative justice?

There is no consistent and universally accepted definition for restorative justice, partly due to the growing nature of the field. However, in order to avoid the danger of misusing the concept for programmes which are not restorative, scholars provide their own working definitions in their writings. Some of the commonly used working definitions of restorative justice are provided below.

Tony Marshal (1999:5) defines restorative justice as:

A process whereby all parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.

Howard Zehr (2002:40) has refined Marshal's definition as follows:

Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible.

The most comprehensive working definition of restorative justice has been provided by Robert Cormier (2002):

Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by a crime – 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.

All of the above working definitions contain a common notion of all participating persons having a stake in a particular crime in order to address the harm, to restore the parties into their previous relationships and reintegrate the offender into the community, and to reduce future harm by preventing possible future crimes, all of which are manifestations of restorative justice values and principles.

1.2 The key principles of restorative justice

Restorative justice views criminal conflict as a violation of a relationship among victims, offenders and community (Zehr 1985:8); and the ‘property’ of those involved (Christie 1977:7). Christie argues that the conflict should be restored to their ‘legitimate owners’ who should be involved in determining the harm and repairing it. In line with such a fundamental premise, restorative justice is guided by some key principles or values which are discussed below.

The first principle of restorative justice emphasises the making of *amends* or *repairs* to the harms that resulted from the crime by imposing obligations on the offender and the communities (Zehr 2002:33). It focuses on the offender’s responsibility to understand the consequences of his/her wrongful act and to assume commitments to make *amends* for it. Making amends may take the form of concrete *restitution* in which the offender returns the property of the victim, or makes financial payments, or performs community services so as to recompense the primary victim and the community at large (Van Ness and Strong 2010:87).² It may also be *symbolic*, which involves the offender acknowledging his/her wrongful acts and making an apology, showing sincere remorse (Schmid

2 The term ‘communities’ in restorative justice discourse includes both ‘micro-communities’, also called ‘communities of care’ which are comprised of family members, friends, and others with whom the victim and the offender have meaningful personal relationships regardless of geographical location; and ‘macro-communities’ or ‘communities of place’ which consist of persons defined by geography or membership instead of emotional connections or personal relationships with the victim or the offender. These may include neighbours and residential communities (see McCold 2010:156).

2002:96). In this connection, restorative justice also imposes obligations on communities to extend support and encouragement to the offender so as to enable him/her to carry out his/her obligations to make amends (Zehr 2002:28).

Second, restorative justice *involves the legitimate stake-holders* to the crime in the process. Howard Zehr calls this principle an ‘*engagement*’, in which case ‘the parties affected by the crime, offenders, their respective family members, and members of the community, are given significant roles in the justice process’ (Zehr 2002:22). Van Ness and Strong, on the other hand, use the terms ‘*inclusion*’ and ‘*encounter*’ as separate principles of restorative justice instead of the general term, ‘*engagement*’, used by Zehr. Inclusion refers to the opportunity for direct and full involvement of stake-holders, namely victims, offenders, and community members, in the process and in the determination of the final outcome (Van Ness and Strong 2010:119). Encounter, on the other hand, means that victims are given a chance to physically meet the offender in a safe environment to discuss the crime, the harms and the appropriate responses to it (Van Ness and Strong 2010: 49, 65).³

The engagement of stake-holders in the process is a manifestation of their *empowerment*. Restorative justice processes aim to empower the victims by providing a forum in which to vent their feelings, to confront the offender in order to ask questions about the crime, and to receive answers directly from the offender. It also gives them a chance to suggest ways of resolving the crime and addressing the harm as McCold (2010:168) plausibly states that ‘what brings the most healing and the best way for individuals affected by a crime to reliably meet their needs is the very act of participating in the process and in deciding what will happen’. Similarly, restorative justice may empower the offender by giving him/her the chance to be involved in the process, in the discussion with the victim, and other members of the community; and in the determination of his own punishment. According

3 The principle of encounter does not, however, deny the possibility for indirect mediation, also called ‘shuttle diplomacy’, where, in the case of some offences, the victim and offender do not meet face to face, but where instead information is passed by the mediator between them (see Bradt and Bouverne-De Bie 2009:183, and Van Ness and Strong 2010:66).

to the punishment as ‘communication’ perspective, punishment should be a two-way communication, not a one-way directive aimed at a passive offender (Duff 1992:151). Hence, restorative justice processes aim to empower the offender instead of making him/her a passive receiver of the unilateral decision imposed by the court. Moreover, restorative justice practice empowers the communities as it enables them to identify and address the root cause of the crime so as to prevent the commission of further crimes (Zehr 2002:28). Therefore, the principle of engagement, in addition to giving victims and offenders a bigger role in the process, recognises the community’s role in the justice making process.

Third, restorative justice encourages the *voluntary participation of the parties* concerned. This principle of restorative justice requires the participation of parties in restorative justice processes to be based on their own freewill, and without any external coercion (Luna 2003:291). The voluntary participation of the victim and/or the offender also includes their freedom to withdraw such consent at any time during the process (UN Economic and Social Council 2002: Art. 7). This freedom given to the parties to freely decide whether to participate in the process or to withdraw temporarily or altogether is an important feature of restorative justice.

The fourth principle of restorative justice is that it envisions a *collaborative sanctioning process* in dealing with the crime (Schmid 2002:96). Unlike the ‘battle model’ or adversarial process of criminal justice system in which processes are guided by strict legal procedures and formalities, and outcomes are merely decided by a judge, restorative justice emphasises processes that are flexible, collaborative and inclusive; and outcomes that are mutually agreed upon rather than externally imposed (Zehr 2002: 24). This collaborative process may help the parties to discover the whole truth about the wrongdoing, as well as the causes, the harms and the consequences to their future relationships (Van Ness 2002:134–135). Restorative justice, in a collaborative interaction, gives a chance for the parties to vent their feelings, present their version of the story, and through the help of their community, to arrive at an agreement about the harm the crime has caused, the offender’s responsibility, and what should be done to restore justice (Zehr 2005:191).

The fifth principle of restorative justice aims to *restore and reintegrate the parties* into the community by focusing on and addressing harms and needs of the stake-holders of the crime (Zehr 2005:128). Since restorative justice views crime as a harm done to parties and the larger communities rather than to the state, it tries to identify and address their injuries and needs positively (Zehr 2005:128). It addresses the physical harm and material loss the primary victims may have sustained. Similarly, restorative justice also focuses on the injuries of offenders which either could be *contributing injuries*, those that ‘existed prior to the crime and provoked the wrongdoing’ such as prior victimisation (Van Ness and Strong 2010:45); or *resulting injuries* which are ‘caused by the crime itself or its aftermath’ (Van Ness and Strong 2010:45). The resulting injuries may be caused by the criminal justice system’s response, for it stigmatises and separates the offender from his/her social ties. Hence, restorative justice, through family care and community support, aims at healing the injuries of offenders thereby facilitating their reintegration into the community. In other words, restorative justice processes make it possible for reintegrative shaming to happen (Braithwaite 1989:55).⁴

Reintegrative shaming involves the community’s disapproval of the wrongdoing, and their accompanying acts to ‘reintegrate the offender back into the community of law abiding citizens through words or gestures of forgiveness, or ceremonies to decertify the offender as deviant’ (Braithwaite 1989:55). It is shaming with respect so that the shaming relates to the offender’s wrongful act and not to his/her real personality (Luna 2003:231).

In order to make the shaming process reintegrative, it must be conducted by those people whose disapproval has the greatest impact and whom the offender respects, such as his/her family, elders or close supporters, because shaming by the people who care for the offender and whom the offender

4 John Braithwaite argues that one of the most powerful ways to disapprove a wrong is shaming, which is comprised of either stigmatising shaming or reintegrative shaming. According to Braithwaite, stigmatising shaming is a characteristic feature of a retributive justice system which considers the offender as permanently deviant, thereby making reintegration into the society difficult; whereas reintegrative shaming is a process which makes the offender feel responsible, commit to undo his/her wrong, and be reintegrated into the community by censuring the wrong and receiving support.

respects is more curative. It communicates the message that the offender is forgiven and is still accepted by his/her communities, and that they are on his/her side to provide him/her support to start life afresh (Braithwaite 1989:87). Moreover, cultural rituals of apology and forgiveness are important instruments for ending stigmatisation and play a great role to make the shaming process reintegrative (Braithwaite 1989:87). The rituals may help the offender to internalise the shaming positively, and may thereby facilitate his/her reintegration into the law-abiding community. Hence, restorative justice is ultimately concerned about the *restoration of victims and reintegration of offenders* into the community, and about maintaining the well-being of the community by addressing their respective harms and needs.

The above guiding principles of restorative justice accentuate the fact that restorative justice emphasises the importance of the roles of crime victims, the offender and community members through their active participation in the justice process – roles which make offenders directly accountable to the victim and the communities they have harmed, restore the material losses of the victim, and provide opportunities for discussion and negotiation which may lead to community safety, societal harmony, and sustainable peace for all.

1.3 Models of restorative justice

In line with the above values and principles, different restorative justice models, also called restorative justice programmes or processes, have been developed around the world. The UN Economic and Social Council's resolution on basic principles for the use of restorative justice programmes in criminal matters defines a restorative justice process as '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' (UN Economic and Social Council 2002: paragraph 2). According to this definition, any process can be considered restorative, though levels of restorativeness might vary, as long as it falls within the 'continuum of

restorative justice' (Zehr 2002:54–58; Van Ness 2002:131).⁵ According to the continuum of restorative justice, a particular programme is not necessarily required to possess all the values and principles of restorative justice to qualify as a restorative justice process. It is enough for those values and principles to exist partially within the two ends of the continuum so that it will be assessed to be less or more restorative on a case by case basis even though there is no uniform and fixed standard of measurement (Van Ness 2002:131).

Though they are not equally restorative, different restorative justice programmes are functioning in different countries. The well known models of restorative justice, which are considered to be the 'hallmarks of restorative justice processes', are: Victim-Offender Mediation, Family Group Conferencing, and Sentencing Circles.

1.3.1 Victim-Offender Mediation (VOM)

Mediation is a process by which a neutral third party, who does not have the power to impose a binding decision, brings the conflicting parties together for peaceful settlement. Unlike mediating civil cases, the mediation process of criminal conflicts is known as Victim-Offender Mediation (Umbreit 2009:216–217).

Umbreit (2009:215) provides a comprehensive definition to Victim-Offender Mediation as follows:

Victim-Offender Mediation is a process which provides interested victims of primarily property crimes the opportunity to meet the offender, in a safe and structured setting, with the goal of holding the offender directly accountable for his/her behaviour while providing important assistance and compensation to the victim.

5 The 'continuum of restorative justice' is a concept which allows restorative justice processes or programmes to be evaluated as fully, mostly, partly, or non-restorative, based on the Restorative Justice Values and Principles Test (RJVPT). The continuum is important to avoid an improper dichotomisation according to which a practice is either restorative, embracing all values and principles, or non-restorative in which all values and principles of restorative justice are absent (see Van Ness 2002:131).

The referral of cases to Victim-Offender Mediation is usually made by the police, prosecutors, or judges in the form of diversion before or after prosecution, either before guilt is established or after formal admission of guilt has been obtained by the court in which case the mediation process serves as a condition of probation or mitigation of penalties (Umbreit 2009:217). The process creates a fertile environment for a joint victim-offender meeting, discussion about the particulars of the crime and a hearing of the parties' feelings. It enables the victim to tell the offender how the crime affected him/her, to receive answers to questions he/she may have, and to directly participate in the determination of a proper form of punishment for the offender; and the offender is also able to know the full impact of his/her action, to take direct responsibility for his/her behaviour and express remorse, and to participate in the determination of a plan for making amends (Van Ness and Strong 2010:67). The process usually culminates in the parties reaching an agreement to restore losses incurred as a form of the offender's punishment, determining how and in what modality the harm caused can be repaired, and how the agreement will be enforced (Van Ness and Strong 2010:67). In sum, VOM programmes seek to empower the participants to resolve their conflicts by their own in a fertile environment.

1.3.2 Family group conferencing (FGC)

Family Group Conferencing is conceptually an extension of Victim-Offender Mediation which involves other community members such as the families of the conflicting parties, the arresting police officer as well as the legal representative of the young offender (Mousourakis [2002]:43).

The practice of FGC was first developed in New Zealand, though it was subsequently adapted in Australia and is being used in different countries in various forms. The practice developed out of the traditional family conference of the Maori people with the passing of the *Children, Young Persons and their Families Act* of 1989 (CYPFA) that recognised its use for young offenders in the form of diversion (Schmid 2002:106; Mousourakis [2002]:50).

In this process, a youth justice coordinator or facilitator arranges the conference after consulting the victim's and young offender's families following a case

referral by the police, public prosecutor or the Youth Court – before the charge, or after the charge but before admission of guilt, or after the finding of guilt, respectively (Mousourakis [2002]:51). FGC allows the young offender to explain what happened and to make admission of his/her wrong (Schmid 2002:106); it enables the victim to speak about the personal impact of the criminal act and to ask questions directly to the offender; and empowers all the participants to discuss the young person's behaviour, and to share their views and recommendations about how to solve the matter and repair the harm (Van Ness and Strong 2010:69). The decision or recommendation imposed on the offender in the form of punishment may include performing community service, making reparation to the victim, or giving care or protection to the young offender him/herself, and will be binding only if it is unanimously adopted by all participants of the conference (Mousourakis [2002]:53). The young offender is required to adhere to the decisions of FGC and his/her family assumes responsibility to support him/her to comply with the decision; and if he/she fails to do so, the youth court judge can take proper penalty depending on the nature of the crime (Mousourakis [2002]:55).

Generally, FGC attempts to *empower* the victim, the offender, and their respective families by providing an opportunity to play a role in the justice process – in spite of the fact that there may be suspicion that involved professionals are dominating the decision-making process and preventing the 'legitimate owners' of the conflict from playing a central role.

1.3.3 Sentencing circle (SC)

The sentencing circle model is derived from aboriginal peacemaking practices in Canada (Van Ness and Strong 2010:69). It is a type of restorative justice process, chaired by a respected member of the community, in which the victim and the offender, their families, other community members, as well as a judge, lawyer, and police come together to discuss and recommend the type of sentence an offender should undergo (Canadian Resource Centre for Victims of Crime 2011:5). It is an alternative approach in which the judge receives a sentence opinion from the community in lieu of receiving a formal sentencing submission from the public prosecutor and the offender or his/her

defence attorney (Lilles 2001:162). The very purpose is to reach a constructive outcome or punishment which better meets the needs of the victim and the community at large, and which places more emphasis on the responsibility of the offender than on a mere incarceration.

The discussion by the community, however, is not exclusively focused on a sentencing plan for the offender, as may be literally understood from its name; instead it goes beyond the current crime and includes the extent, causes and impacts of similar crimes on victims and the community at large, and the question about what should be done to prevent similar crimes in the future (Lilles 2001:163). After a thorough discussion of the matter, the judge imposes the ‘criminal punishment’ by considering the recommendation of the community members – on the condition that the case will be returned to the formal criminal court upon non-compliance of the offender with the decision (Van Ness and Strong 2010:70).

The community problem-solving dimension is the most important aspect of sentencing circles as it places more emphasis on sufficient community involvement (Zehr 2005:260). The process is used for both young and adult offenders, and since the process is long and thorough, requiring patience and commitment from all participants, it can be used for crimes of more than minor nature (Lilles 2001:163). Therefore, sentencing circles provide the victim, the families concerned and the community at large an opportunity to express themselves, address the offender, and take part in developing and implementing a plan relating to the offender’s sentence.

2. The Ethiopian customary dispute resolution mechanisms and their mode of operation

2.1 What are customary dispute resolution mechanisms?

The customary dispute resolution mechanisms are traditional practices used to resolve conflicts and maintain peace and stability in the community. These traditional practices are deeply rooted in different ethnic groups of Ethiopia and arise from age-old practices that have regulated the relationships of the

peoples in the community (Regassa et al. 2008:58). They are associated with the cultural norms and beliefs of the peoples, and gain their legitimacy from the community values instead of the state (Jembere 1998:39). In other words, the customary dispute resolution mechanisms of Ethiopia function on the basis of local customary practices or cultural norms. However, due to the multi-ethnic composition of the country, the customary laws of Ethiopia are different from ethnic group to ethnic group and as a result they do not have uniform application all over the country.

These customary practices of Ethiopia are mostly, though not exclusively, vibrant in rural areas where the formal legal system is unable to penetrate because of a lack of resources, infrastructure and legal personnel as well as a lack of legitimacy, for the modern law is seen as alien, imposed, and ignorant of the cultural realities on the ground. Hence, in the face of such a shortage of facilities and legitimacy, the customary dispute resolution mechanisms play a very vital role in the administration of justice.

2.2 Legal pluralism and the status of customary dispute resolution mechanisms in Ethiopia

The concept of legal pluralism, referring to the existence of more than one type of law within a particular country, is opposed to the ideology of 'legal centralism' (Griffiths 1986:1–3) which believes that 'law is and should be the law of the state, uniform for all persons, exclusive of all other non-state laws, and administered by a single set of state institutions' (Griffiths 1986:1). Legal pluralism, on the other hand, recognises the existence and functioning of both the state law and customary laws within a particular country.

Woodman (1996:157) defines legal pluralism as:

... the state of affairs in which the category of social relations is within the field of operation of two or more bodies of legal norms It is the situation by which individuals are subject to more than one body of law.

Ethiopian customary dispute resolution mechanisms were in use to regulate every aspect of life before the introduction of modern laws in the 1960s. However, Ethiopia involved itself in legal transplantation activities through

a grand codification process in which six codes, namely the Penal Code, the Civil Code, the Maritime Code, the Criminal and Civil Procedure Codes, and the Commercial Code, were produced from 1957 to 1965. The Ethiopian legal importation, induced by ambitions to introduce modernity and change into the country, created discontinuity from the traditional beliefs and values (Fiseha et al. 2011:23). This is mainly because the codes were drafted according to European experience and the transplantation process was conducted by expatriate scholars who were ignorant of local customary and cultural practices of Ethiopia (Mulugeta 1999:22). It may be argued that legal transplantation is a common and normal practice in a law-making process. However, the transplanted laws need to be contextualised within the realities of the country after being discussed and deliberated by the national parliament. In the Ethiopia of the time, the real power of law making was in the hands of the emperor; and as long as he approved the law drafted by foreign experts, it became effective law regardless of whether it was discussed by the house of senate or deputies (the then parliament). Hence, the transplantation process was not healthy in a sense that it did not take into account the customs and traditions of peoples, and the realities on the ground.

The consequence of such an ill legal transplantation process was the exclusion of customary laws from application since they were considered as the anti-thesis of modernity and change. That was manifested by the repeal provision of the Ethiopian Civil Code that abrogates the application of customary laws. This repeal provision (Civil Code of the Empire of Ethiopia 1960: Art. 3347 (1)) reads:

Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this code shall be replaced by this code and are hereby repealed.

This legal provision made all customary practices out of use, irrespective of whether they were consistent or inconsistent with the provisions of the Civil Code, by the mere fact that the Code covered and regulated the matter. The transplantation process was, thus, a drastic measure taken against customary dispute resolution mechanisms which made them lose formal legal

recognition and standing. *De facto*, however, customary dispute resolution mechanisms remained functional on the ground, as the transplanted laws were unable to penetrate into the local communities and get legitimacy.

The enactment of the Constitution revived a formal legal recognition of customary laws, however. One of the relevant constitutional recognitions is provided under Art. 34 (5) of the Constitution, which reads:

This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws with the consent of the parties to the dispute.

According to the above legal provision, customary dispute resolution mechanisms are legally authorised to regulate personal and family matters as long as the conflicting parties give their consent to that effect. In line with this legal recognition given to customary laws, the Constitution (Art. 78 (5)) also authorises the House of People Representatives and State Councils to establish and to give official recognition to religious and customary courts. These articles obviously show that the Constitution took some important steps towards recognising legal diversity or pluralism by recognising customary laws and their institutions.

However, such recognition is still limited to civil matters. The Constitution does not rectify the past mistakes and fails to extend the legal recognition to applying customary dispute resolution mechanisms in criminal matters, despite the fact that they are still being used on the ground to resolve criminal matters and serve as the main way of obtaining justice, especially in rural Ethiopia. All types of criminal cases which range from petty offences to serious crimes, such as homicide as well as inter-ethnic and inter-religion conflicts, can be and are being resolved via customary dispute resolution mechanisms in many regions of the country (Gemechu 2011:270). Peoples also resort to customary dispute resolution mechanisms for reconciliation even after a verdict, be it conviction or acquittal, is given by the formal criminal justice system in order to avoid the cultural practice of revenge by the victim or his/her relatives (Zelege 2010:74). Hence, the status of applying customary dispute resolution mechanisms to criminal matters still remains *de facto*.

Nonetheless, certain interpretative arguments may arise in this regard. Some legal scholars argue that the absence of express recognition of the application of customary laws to criminal matters in the Constitution does not necessarily mean that they are totally excluded from application (Mengiste 2012). They further claim that the Constitution would have provided express provision to exclude the application of customary laws to criminal matters had the legislature intended it as such (Mengiste 2012); and they call for a broader and holistic interpretation of the Constitution, as total exclusion of applying customary laws to criminal matters would defeat the overall objectives of the Constitution to ensure lasting peace and to maintain community safety. On the other hand, the *a contrario* interpretation of Art. 34 (5) of the Constitution may be understood as implying an explicit prohibition of the application of customary dispute resolution mechanisms in criminal matters. However, the first line of argument, which favours the broader and holistic interpretation, is important as it helps to give formal legal status to applying customary laws in criminal matters.

In short, Ethiopia exhibits plural legal systems, both multi-layered state laws and customary laws, though no formal recognition is given to the use of customary dispute resolution mechanisms in criminal matters under Ethiopian laws. Hence, necessary legal reform needs to be undertaken so as to give sufficient legal recognition and formal status to the application of customary dispute resolution mechanisms in criminal matters. This may include the amendment of the Constitution to incorporate a clear constitutional clause which recognises the application of customary dispute resolution mechanisms in criminal matters. The inclusion of a clear constitutional clause is a necessary and important measure to avoid interpretative arguments concerning the status and mandate of the customary mechanisms. Moreover, the theory of legal pluralism can be used as a basis to elevate the status of the application of customary dispute resolution mechanisms in criminal matters, for it recognises their existence and application. The validation and recognition legal pluralism gives to customary dispute resolution mechanisms are, in turn, important to develop restorative justice programmes based on such customary dispute resolution mechanisms

because they are compatible with the reintegrative, healing and other values and principles of restorative justice, as discussed below in more depth.

2.3 Mode of operation of the customary dispute resolution mechanisms⁶

The customary dispute resolution mechanisms of Ethiopia are handled by elders, *non-specialised specialists* to use the words of Nils Christie, who are well known and respected members of the community and may comprise religious leaders, wise men and other community leaders (Fiseha et al. 2011:27). However, their composition, number, and the procedure they follow may vary from ethnic group to ethnic group depending on specific local customs and practices. Unlike the judges of the formal legal system who are appointed by a state on the basis of their knowledge of state laws, elders are chosen by the conflicting parties themselves or their families on an *ad hoc* basis of their 'reputation for high sense of justice, impartiality, deep knowledge of community norms, wisdom and rich experience' (Fiseha et al. 2011:27). They work persistently to identify the root causes of the conflict so as to restore the balance and to establish sustainable peace in the community instead of punishing the offender. To that end, the customary dispute resolution mechanisms involve different stages which are discussed below.

2.3.1 Setting customary dispute resolution mechanisms in motion

The customary dispute resolution processes of Ethiopia are set in motion by the offender him/herself, by his/her family or close relatives; and in some minor crimes by the victim or his/her family (Regassa et al. 2008:66).⁷ When a crime is committed, the perpetrator, the victim, their respective families, or any third party observers run to and ask elders to help the settlement of the conflict

6 Since it is claimed that almost all ethnic groups in Ethiopia have their own distinct customary law systems with specific variations, the author tries to present the mode of operation of customary dispute resolution mechanisms in a general manner.

7 The victim or his/her family makes a request for the beginning of the customary dispute resolution process only for minor crimes and not for serious crimes such as homicide, as it is regarded as a shame for the victim's side to take the initiative to use customary dispute resolution mechanisms instead of taking vengeance (see Gemechu 2011:261).

(Regassa et al. 2008:66). The community elders will then call the parties to some public place, or in the case of a serious crime, go to the victim's and/or his/her family's home to persuade them into resolving the matter peacefully.

In serious crimes, such as homicide, the victim's family may not initially be willing to engage in the customary dispute resolution processes and may demand vengeance against the victim or his/her relatives. In almost all of the Ethiopian societies, vengeance is a culturally accepted instrument for redressing injury, and the men of the victim's side are *duty bound* to take vengeance against the killer or one of the killer's close relatives (Zelege 2010:73). Since killing one's family member is regarded as challenging the dignity of the whole family or relatives, the victim's relatives should prove their *wondinet* (manhood), and restore their dignity by taking vengeance (Zelege 2010:73). This cultural duty to take revenge is aggravated by praising a person who kills the killer or one of the killer's family members as hero, for he/she restores the dignity of his/her family; and by belittling and insulting those who did not take avenging action as cowards (Zelege 2010:73). Consequently, the victim's family may not easily submit to the customary dispute resolution mechanisms in the first instance. However, the elders insist and pressurise them to come to the process, and mostly do not leave without getting their consent to come to the peaceful settlement (Kebede 2012). Once the victim or his/her family agrees to engage in the process of the customary dispute resolution, the actual deliberation and reconciliation stage will start.

2.3.2 Deliberation and reconciliation

After obtaining the willingness of the victim or his/her family to engage in the customary dispute resolution process, the community elders sit, under the shadow of a big tree or in the church compound, in a circle with the victim, the offender,⁸ and their respective family members to discuss the matter (Regassa et al. 2008:66). This stage constitutes the heart of the customary dispute resolution process in which the details of the conflict, such as the root causes, the manner

8 In some serious crimes such as homicide, offenders and the victim's families do not initially meet face-to-face fearing that the latter will take vengeance. Instead the elders act as a go-between mediator, moving back and forth between the two parties until agreement is reached.

of its commission, its consequences, and how it can be settled, are discussed. The victim personally or his/her family, as the case may be, is given the first chance to explain the crime and its impact. The offender is then allowed to state whether he/she has committed the crime, the manner of its commission, and the factors which prompted the commission of a crime (Pankhurst and Assefa 2008b:11). In the presentation of their version of the case the parties are not restricted to the main issue of the case; rather they are free to narrate the long story of the dispute and provide any information which could have been excluded as irrelevant in the regular criminal court proceedings (Gemechu 2011:261). This unrestricted freedom of expression in the customary processes is essential to identify the root causes of the conflict while tracing back to the beginning of the long story. Once the offender admits⁹ the commission of the crime, a discussion will be opened so as to censure the offender and to determine the appropriate decision to be imposed on him/her.

The decisions may vary depending on the type and gravity of the crime, and the particular customary practice. Some minor crimes and crimes committed among close relatives may merely require an apology or forgiveness without compensation which is known as '*yiqir le egziabher*', forgiveness in the name of God (Pankhurst and Assefa 2008b:15). The very purpose in such a case is to restore the parties to the position they were in before the commission of the crime and to ensure sustainable community peace.

The most common decision is, however, the payment of compensation. The amount of compensation is often negotiated and is fixed taking into account the loss suffered by the victim, the circumstances of its commission, whether intentionally or by negligence, the economic capacity of the offender, and the

9 Admission is a requirement to proceed with the customary dispute resolution mechanisms. If the offender denies the commission of a crime in his presentation of the case, elders employ different strategies to convince and persuade him/her to tell the truth. They may try to impress him/her about the seriousness of social sanctions – such as refusal to help with burial, exclusion from local associations and from the traditional collective system of work, losing any assistance at a time of hardship; and being cursed by the elderly people – he/she is going to endure if the truth is discovered later in time (see Pankhurst and Assefa 2008b:63). Therefore, fearing such social sanctions, the offender usually does not deny the crime.

number of families he/she supports (Pankhurst and Assefa 2008b:66). The compensation may be paid in cash money or in kind, such as camels, cattle, or sheep and goats (Pankhurst and Assefa 2008b: 68). Unlike the formal criminal legal system which is guided by the principle of the *personal nature of crime*, in which only the criminal is liable for his/her crime, customary dispute resolution mechanisms may entail collective responsibility for the payment of compensation. The offender's family or his/her clan members may be required to contribute to the compensation determined by the elders (Fiseha et al. 2011:30). This collective responsibility to pay compensation manifests the communitarian character of the Ethiopian societies, and plays an important role when family or clan members have to be monitored for their compliance with the community values.

In some societies like the Beni-Shangul Gumuz, compensation may take the form of a person known as *bride compensation*. A girl is given as a wife to a relative of a deceased in the form of compensation in order to end hostilities by creating a marital relationship (Besie and Demie 2008:124; Gluckman 1973:13). Though this practice is believed important to maintain sustainable peace between the two groups, it infringes upon the human rights of a woman because the marriage is conducted without her consent, and she is given as a chattel.

Generally, this stage of the customary dispute resolution process ensures the participation of the victim, the offender, their respective families and the community members in the administration of justice. It also helps the parties to come together, and ensures that the victim or his/her family is compensated for the loss they have suffered due to the crime. Once the conflict is settled and a compromise is reached, elders fix a day to conduct the final customary ceremonies or rituals.

2.3.3 Customary rituals

After the compensation is decided upon and the conflict is settled, the restoration of prior relationships is symbolised through instruments of 'reintegrative' ceremonies or rituals.¹⁰ These rituals vary from region to region, depending on

¹⁰ The settlement or reconciliation process and the customary rituals may take place on the same day or later. Usually, the customary rituals are conducted some days after the settlement is reached to allow time for preparation.

each particular customary practice. Dejene Gemechu (2011:265) has described one of the dramatic customary rituals of the Weliso Oromos as follows:

The killer wipes the eyes of one of the close relatives of the victim using cotton. The practice presupposes that the killer caused the latter to cry with grief and he/she is still in tears. The act, thus, connotes the wiping off tears of the aggrieved using a very smooth and delicate material.

According to Gemechu (2011:265), the act also implies that the killer regrets his/her wrong and shows sincere remorse by 'appeasing the offended'. It is also a custom in many Oromo societies that the conflicting parties 'suck one another's finger immersed in honey to symbolize the fact that their future relationships will be as sweet as honey' (Regassa et al. 2008:60). In the Amhara region, in the customary practice of *shimgilina* (elders' mediation), and also in many other ethnic groups of Ethiopia, a reconciliatory celebration or feast is arranged by the offender after the end of the dispute resolution. In this feast, the offender's side slaughters a head of cattle and the conflicting parties and their families come together and eat together, while the village community is also invited to the feast (Regassa et al. 2008:62). Their eating together from the same plate, which otherwise is considered a taboo, signals the end of enmity, and their togetherness and pledge to live peacefully in the future. In some parts of Ethiopia, such as Afar and Wello, both parties may be required to take an oath in accordance with their custom, confirming that they will not resume the conflict and refrain from acts of revenge (Zelege 2010:73). The ritual process is then mostly concluded with a blessing pronounced by the elders.

In sum, these customary rituals aim at restoring the relationship between the parties, ceremoniously reintegrating the offender into the community, and avoiding the cultural practices of revenge by the victim and his/her family. Hence, the ritual practices are mainly forward-looking and aiming at the reintegration of the offender into his/her community, and the preservation of future communal peace and harmony.

3. Ethiopian customary dispute resolution mechanisms: Compatible with restorative justice values and principles?

As shown above in the discussion of models of restorative justice, most of the modern restorative justice programmes are developed based on, and shaped by customary or indigenous processes, since the 'underlying philosophy of indigenous practices that justice seeks to repair the torn community fabric following crime has resonated well with and informed the modern restorative justice ideal' (Van Ness 2005:2). Similarly, tracing its historical roots, Gavrielides (2011:3) writes that the 'roots of restorative justice practices are ancient, reaching back into the customary practices and religions of most traditional societies though the term restorative justice was coined in the 1970s'. Hence, the customary processes are used as a basis for modern restorative justice programmes because their philosophy and values are similar to the values of the modern theory of restorative justice.

The Ethiopian customary dispute resolution mechanisms have values that resonate well with the values and principles of restorative justice, namely encounter, inclusion, participation, restitution or compensation, and reintegration.

In the Ethiopian customary dispute resolution mechanisms, *encounter* between the parties which leads to a peaceful settlement of the conflict is one of the values given top priority. Except for some serious crimes where the parties do not meet face to face for fear of provocative vengeance, the conflicting parties personally meet with each other and discuss the crime, the harms caused and the appropriate responses to it. In addition, in line with the values or principles of *inclusion* and *participation* of restorative justice, the customary dispute resolution mechanisms of Ethiopia allow the presence of the victim, the offender, their respective families and other community members, and promote their active participation in the conflict resolution process. With the aim of discovering the whole truth about the wrongdoing, the customary dispute resolution mechanisms give the parties maximum freedom to explain and narrate every detail of the conflict and to vent their feelings without limiting them only to relevant issues. In addition to the families of the parties and the elders who are chosen to manage and lead the customary dispute resolution mechanisms, other community members are

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allowed to attend and take part in the process. In some customary groups, such as the Oromo, youths are required and encouraged to attend the customary dispute resolution processes so as to make them know and learn the wisdom of customary practices in order to ensure the existence and continuity of the customs from generation to generation (Mergia and Kebede 2012). This indicates how the Ethiopian customary dispute resolution mechanisms are focused on community participation. In this regard, Jembere (1998:39) has rightly stated that the legitimacy of Ethiopian customary dispute resolution mechanisms is rooted in and remains relevant due to ‘the participation and consensus of the community’.

Similarly, the customary dispute resolution mechanisms, like the modern restorative justice processes, emphasise the *restitution* or *compensation* of victims. It involves concrete material compensation such as cash or in kind payments, or symbolic compensation which involves showing sincere remorse and making apology by the offender, especially for minor crimes and crimes occurring among close relatives (Pankhurst and Assefa 2008b:15). Since the amount of compensation is subject to negotiation, the offender is also actively involved in the determination of the amount of compensation to be imposed on him/her in the form of punishment.

Moreover, the *reintegration* of the offender into his/her community through the process of reconciliation is the other main feature that Ethiopian customary dispute resolution mechanisms have in common with modern restorative justice ideals. The various types of customary rituals that follow reconciliation in customary dispute resolution mechanisms, as discussed above, aim at restoring the relationship between the parties, and reintegrating the offender back into the society. Instead of excluding and branding the offender as permanently criminal, the customary dispute resolution mechanisms use words of forgiveness or rituals to ‘decertify the offender as deviant’ and facilitate his/her reintegration into the communities (Braithwaite 1989:55). In other words, the customary dispute resolution mechanisms of Ethiopia resonate well with the ‘reintegrative shaming’ aspect of restorative justice. The involvement and participation of the respected members of the community – such as the elders and those who care most about the offender and the victim, their respective close families – play an important

role to effectively communicate 'shame' to the offender and help reintegrating him/her into the law abiding community.

Besides, unlike the one-sided theory of reintegrative shaming which focuses on the shaming of the offender, the Ethiopian customary dispute resolution mechanisms are double edged, which involves the shaming of both the offender and the victim as well as their families. As stated above, vengeance is a culturally accepted instrument for redressing injury in which the men of the victim's side are *duty bound* to take vengeance against the killer or one of the killer's close relatives in order to restore the dignity of the victim's family. However, once the conflict is resolved via the customary ways, the families of the victim will not, most of the time, resort to vengeance because the love and support of the community to the victim's families as expressed in the customary rituals make them get rid of the grudge; as well as of the fear of curse by community elders and of condemnation and isolation by the community members as if they were violators of the community values. This is mainly because failure to comply with the decision is considered as disregarding the customary values on which it was based or as a shameful act disrespecting the elders. Hence, the customary dispute resolution mechanisms of Ethiopia are capable of communicating 'shame' not only to the offender but also to the victim and his/her close relatives – thereby preventing them from taking revenge, and are consistent with the reintegrative shaming ideals of restorative justice.

Generally, the customary dispute resolution mechanisms of Ethiopia involve mediation between the conflicting parties and their respective families. It also involves restitution, reconciliation, and aims at not only settling the conflict between the parties but also at restoring the previous peaceful relationship within the community as well as maintaining their future peaceful relationships by circumventing the culture of revenge. Further, the customary dispute resolution mechanisms use elders as mediators who are appointed by and known to the parties and/or communities, which shows the high degree of community participation in the process. Hence, the customary dispute resolution mechanisms of Ethiopia are compatible with the values and principles of restorative justice and may fall either at the fully or mostly, or at the partly restorative part of the continuum of restorative justice – in spite of the fact that their functioning is not

fully recognised by law, that they are not well organised programmes, and that they are subjected to some shortcomings, as highlighted below.

4. Shortcomings of the customary dispute resolution mechanisms

Though the customary dispute resolution mechanisms are useful tools for administering justice in Ethiopia as discussed above, they are not without shortcomings. The limitations are mainly related to the non-compliance with human rights standards, and particularly to the unequal treatment of women and men. Most of the time, in most customary dispute resolution mechanisms of Ethiopia, women are not treated equally. Assefa and Pankhurst (2008:264) stated that women may not, in some customary dispute resolution mechanisms like in Beni Shangul Gumuz and Afar regions, have 'a standing to appear before elders in the customary dispute resolution processes on their own, and may require a male relative to represent them'. Similarly, customary dispute resolution institutions may also pass decisions which are against the interests of women. In some customary dispute resolution mechanisms, such as in the Afar and some parts of the Oromia regions, the amount of compensation for female victims is half of that which may be due for a male victim (Pankhurst and Assefa 2008b:10). Besides, as stated above, a girl may be provided as a wife to a relative of a deceased in the form of compensation, *bride compensation*, against her consent (Besie and Demie 2008:124). Therefore, the limitations associated with the customary dispute resolution mechanisms should be properly addressed so as to utilise those mechanisms as an asset and as a tool to implement restorative justice in the Ethiopian criminal justice system.

5. Conclusions and the way forward

The currently functioning criminal laws of Ethiopia, including the Constitution, neither recognise the application of customary dispute resolution mechanisms to criminal matters nor do they give discretionary power for legal practitioners to identify certain matters that may be more appropriate for pre-charge or post-charge diversion into the customary dispute resolution mechanisms.

Despite the Ethiopian policy of ‘turning a blind eye’ to the customary dispute resolution mechanisms, they are playing an important role in resolving conflicts of any kind and maintaining peace and stability in the community. The customary dispute resolution mechanisms use elders as mediators who are appointed by and known to the parties and/or communities. They involve reconciliation of the conflicting parties and their respective families, using different customary rituals; emphasise healing and restitution and aim at not only settling the conflict between the parties but also at restoring the previous peaceful relationship within the community as well as maintaining their future peaceful relationships by avoiding the culturally accepted practices of revenge. Hence, the customary dispute resolution mechanisms of Ethiopia, no doubt, are compatible with the values and principles of restorative justice. They may be regarded as ranging from the fully to the partly restorative parts in the continuum of restorative justice.

The presence of diverse customary dispute resolution mechanisms, which resonate well with the values and principles of restorative justice, are valuable assets and offer the greatest opportunities for the introduction and implementation of restorative justice in the Ethiopian criminal justice system. Since most of the Ethiopian communities are traditional and religious people who live up to, and have great respect for, the customary and religious rules, the implementation of restorative justice using customary dispute resolution mechanisms would be much easier. Using customary dispute resolution mechanisms to develop restorative justice programmes is also consistent with the constitutional provision of ensuring access to justice; and the recognition of the nation’s and the peoples’ right of self determination, autonomy, and control over the administration of the justice system provided under the Constitution.

Therefore, the Ethiopian customary dispute resolution mechanisms are in line with the values and principles of modern restorative justice and can be used as a basis to implement restorative justice in the Ethiopian criminal justice system if and only if certain things are done.

First, the Constitution should be amended to include express provision which recognises the customary dispute resolution mechanisms’ application to criminal matters. The inclusion of such a constitutional clause will give a strong foundation

for applying customary dispute resolution mechanisms to criminal matters and avoid interpretative arguments concerning their status, as discussed above in section 2.2. On the other hand, the absence of such a clause places a shadow on the validity of some diversions of criminal cases, based on the discretion of some legal practitioners, to customary dispute resolution mechanisms. This is because any act of officials or customary practice which contradicts the Constitution is null and void (Constitution, Art. 9). Hence, the amendment of the Constitution to include a clear constitutional clause recognising the application of customary dispute resolution mechanisms to criminal matters is necessary to avoid such doubts.

Second, the customary dispute resolution mechanisms should be properly organised or institutionalised. Organised and well established customary institutions which are capable of receiving cases diverted to it by the court or public prosecutor are essential requirements to properly implement restorative justice by facilitating diversionary processes. However, a detailed and comprehensive study should be conducted to find out how to better organise or institutionalise the customary dispute resolution mechanisms, especially in a way to adequately demarcate the state's involvement and role in such institutions so as to prevent it from politicising customary dispute resolution institutions.

Third, necessary measures should be taken to properly address the limitations associated with the customary dispute resolution mechanisms, and to re-orient and make them consistent with contemporary human rights principles. This in particular requires the provision of necessary training to elders (traditional adjudicators) to make them aware of and up to date with the constitutional principles and international human rights treaties that Ethiopia has ratified. But, yet, the training should not be delivered in a way that abuses the age-long traditional customs.

In sum, if all of the above and other necessary measures are properly taken, Ethiopia has a great potential to develop restorative justice systems which meet the needs of its peoples and reflect its cultural heritage by legally recognising and organising the customary dispute resolution mechanisms, and linking them with the formal criminal justice system.

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