

MEDIATING CRIMINAL MATTERS IN ETHIOPIAN CRIMINAL JUSTICE SYSTEM: THE PROSPECT OF RESTORATIVE JUSTICE SYSTEM

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1. INTRODUCTION

The use of traditional dispute resolution methods practiced outside the rubric of formal criminal justice system is important in maintaining close and continuing relationships in every community.¹ Typically, the use of mediation process, falling within the realm of Alternative Dispute Resolution, (ADR), plays pivotal role as it emphasizes on the role of parties themselves to reach at mutually satisfactory resolutions. Its advantage in restoring the relationships of the victim and the offender, its essence in maintaining social fabric and its potential as an alternative option to dispose disputes promptly is becoming increasingly recognized. However, while claiming mediation was not a panacea for every kinds of dispute, its proponents increasingly push it as a serious contender for resolving disputes in criminal matters in the context of criminal justice. For this reason, recently much focus was given to it primarily in criminal matters as a reinforcement of restorative justice principle which empowers crime victims, offenders and communities to take an active part in the formulation of the public response to crime and to increase public trust in the justice system.

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¹ Melissa Lewis and Les Mc Crimmon, The Role of ADR Processes in the Criminal Justice System: A view from Australia. Available at; http://www.justice.gov.za/alraesa/conferences/.../ent_s3_mccrimmon.pdf (accessed April 6, 2011)

In Ethiopia, the use of mediation process as a traditional method of dispute resolution has been practiced for centuries. Even today in rural areas, particularly criminal dispute resolution processes dealing with victims and criminal offenders are widely practiced and deep rooted with varying degrees among the different ethnic groups in the country. For instance, the use of mediation process through *Jaarsa Biyyaa* or *Jaarsa Araaraa* among the Oromo and the other ethnic groups has been used.² However, despite the potential applicability of these institutions as an Alternative Criminal Dispute Resolution process in the local community, it has not yet attained any significant position of usage and acceptance in the formal criminal justice system. In other words, despite its wide practice and importance in resolving criminal disputes, Ethiopian formal criminal justice system failed to integrate mediation process as an alternative criminal dispute resolution process.

Therefore, the aim of this article is to deal with interrelated issues of integrating mediation process as a criminal dispute resolution program in to the formal criminal justice system, and its importance in consolidation of the ideas of restorative justice in the administration of Ethiopian criminal justice system. The article also aims to provoke legislatures, policy makers and social workers to work towards promoting, adapting and applying compatible traditional criminal dispute resolution process in a criminal justice context as part of an overall package of Ethiopian Criminal Justice Reform.

This article first introduces the theoretical frameworks of mediation process and its potential applicability in criminal matters. Then it continuous to articulate the fundamental principles and reasons behind the espousal of

² S M Gowak, *Alternative Dispute Resolution in Ethiopia- A Legal Framework*, African Research Review (2008), Vol. 2 (2) p. 265.

mediation process and uniquely treats its importance to the criminal justice system. In the first part, it tries to elucidate the theoretical frameworks of ADR and its role in resolving criminal disputes as a paradigm shift in the administration of criminal justice. In the second part, an attempt will be made in scrutinizing mediation as a unique ADR process that fits criminal dispute resolution process. Particularly, its potential application in consolidating restorative justice, including its limitations will be elaborated. Part three is devoted to discuss how Restorative Justice Principles could be legally entrenched in a way that is compatible with community traditions and customs of dealing with conflict, yet maintaining the oversight of the State to ensure that human rights and due process are respected. The *Jaarsummaa* institution of mediating criminal disputes as practiced among the Oromo will be discussed as a legitimate extension of traditional dispute resolution process to explore restorative justice in Ethiopian criminal justice system and as an archetype of Ethiopian traditional dispute resolution process among the array of diverse culture. Also, comparisons will be made with the experience of Western countries criminal restorative justice programs specifically by reference to criminal mediation programs. In part four, analyses will be made on whether the existing legal framework within Ethiopian criminal justice system sheds light on the ideas of restorative justice and accommodates mediation process in criminal disputes. The article finally concludes by suggesting some points on what can be done in order to effectively integrate mediation process in Ethiopian criminal justice administration as a prospect of restorative justice.

2. ADR IN GENERAL

In any state-based formal justice system involving civil and criminal justice, institutions like police, public prosecution, and courts form the basic foundation of justice administration.³ However, despite its well organization and establishment as formal machineries of justice, it is increasingly clear that the formal justice system is becoming inadequate, wasteful, inflexible and inefficient in contrast to the more accessible and speedy alternative dispute resolution system.⁴ In other words, dispute settlement within the formal court procedures will take time to build the necessary effect of justice and may not be opted by individuals and community at large. However, this does not mean that the idea of ADR will substitute the formal Court procedures as the venue for justice.⁵ Rather, particularly, ADR process will provide a set of different options for the offenders or victims of crime in criminal justice. The formal justice system will always be present, in adjudicating cases in which either the defendant /offender or the plaintiff/victim does not wish to participate in the alternative dispute resolution process, or also serving as a default for the cases in which the parties fail to reach a resolution in the ADR process.⁶ Therefore, dispute resolution processes through ADR can be seen as a critical element of efforts to maintain community harmony by maintaining the relationship of disputing parties in a more flexible option.⁷

³Ewa Wojkowska, *Doing Justice: How informal justice systems can contribute* (Oslo, 2006), p.9.

⁴ *Ibid.*

⁵ Ric Simmons, *Private Criminal Justice*, Wake Forest Law Review (2007) Vol. 42, p. 912.

⁶ *Ibid.*

⁷ Thomas Barfield, Neamat Nojumi, and J Alexander Their, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan* available at: http://www.usip.org/files/file/clash_two_goods.pdf, (accessed at April 6, 2011)

Traditional dispute resolution mechanisms today designated as a variety of ADR were practiced since time immemorial in Africa, Asia and Western societies.⁸ Hence, the idea of developing and introducing ADR process is not a new concept but rather has been re-discovered, as informal justice mechanisms which have long been the dominant method of dispute resolution in many societies, and in indigenous communities in particular.⁹ Therefore, the robustness of this traditional dispute settlement mechanism could be harnessed to improve dispute resolution and increase the capacity of the state to maintain order, peace and harmony.¹⁰

In a nutshell, the re-birth of ADR is often associated with the development of community justice centers to resolve neighborhood disputes. However, its use in a variety of dispute contexts has grown rapidly in recent years, and has been institutionalized to a large extent through the introduction of legislative schemes and through the development of professional bodies which have fostered the use of ADR processes.¹¹ Therefore, it could also be adapted to serve the effective administration of criminal justice system by involving victims, offenders and the community in the dispute resolution process.

2.1. UNDERSTANDING THE MEANING OF ADR

There is no consensus as to what the acronym 'ADR' signifies, or as to what it constitutes.¹² The term 'Alternative Dispute Resolution' has become deep-rooted despite the fact that the description of such processes as 'alternative'

⁸ *Ibid.*

⁹ *Supra note, 1*

¹⁰ *Ibid.*

¹¹ H. Astor and C. Chinkin, *Dispute Resolution in Australia* (2nd Ed, 2002), p.8.

¹² See *supra* note 1, p.2

attracted significant criticism.¹³ There are two conceptual criticisms of the use of the word ‘alternative’. First, it is incorrect to suggest that such processes can replace the formal court litigation. A legal scholar, Laurence Street, said in this regard that;

“It is not in truth ‘Alternative’. Nothing can be alternative to the sovereign authority of the court system. We cannot tolerate any thought of an alternative to the judicial arm of the sovereign in the discharge of responsibility of resolving disputes between state and citizen or between citizen and citizen. We can, however, accommodate mechanisms which operate as Additional or subsidiary processes in the discharge of the sovereign’s responsibility.”¹⁴

Accordingly, different definitions have been proffered including additional dispute resolution; appropriate dispute resolution; assisted dispute resolution and amicable dispute resolution.¹⁵ For instance, International Chamber of Commerce (ICC) has chosen to refer to ADR as ‘Amicable Dispute Resolution’ rather than the more traditional ‘Alternative Dispute Resolution.’¹⁶ Therefore, it is important to take notice of the difficulty that what the acronym ‘ADR’ signifies, what processes it includes and the precise nature of those processes as it has been conceptually and terminologically problematic. It is beyond the reach of this article to explore these issues in more profundity.

¹³ L Street, *The Language of Alternative Dispute Resolution*, *Alternative Law Journal* (1992) p. 194.

¹⁴ *Ibid.*

¹⁵ *Supra note 11*, p.78.

¹⁶ Fekadu Petros, *Underlying Distinctions Between ADR, Shimgilina and Arbitration: A Critical Analysis*, *Mizan Law Review* (2009), vol.3. No. 1, p.115

A second criticism is that the term ‘alternative’ is socially and historically inaccurate, bestowing an undeserved primacy on court litigation where in reality the majority of ‘disputes’ have traditionally been resolved without the use of formal legal processes.¹⁷ In other words, prior to the use of formal legal process, dispute resolution mechanisms were rooted in the customs and traditions of the society. It can be even argued to the contrary in the sense that it is court litigation that was alternative to the formal legal process and not vice versa.¹⁸ Notwithstanding the existing debate on the terminological meaning and primacy issues posed by the acronyms of ADR, understanding its meaning would be important for all intent and purpose of this article.

Black’s Law Dictionary defines ADR as: “*a procedure for settling a dispute by means other than litigation such as arbitration, mediation or mini-trial*”¹⁹ In this sense ADR is understood to mean the resolution of disputes outside the auspices of formal judicial system with the help of mediators, arbitrators and legal practitioners. Therefore, the definition constitutes recognition of the fact that ‘ADR’ is an umbrella term for a variety of processes which differ in form and application. Differentials include: levels of formality, the role of the third party (for example, the mediator) and the legal status of any agreement reached.²⁰ Generally, ADR can be broadly defined as processes or techniques, other than judicial determination, in which an impartial person/s (an ADR practitioner or traditionally, local elders) assists those in a dispute to resolve the issues between them.²¹ In conclusion, ADR can be understood as a process that saves time and money of disputing parties, eases the burden on an

¹⁷ *Supra note 11.*

¹⁸ *Ibid*

¹⁹ Black’s Law Dictionary, West Group, 7th ed. (1999)

²⁰ *Supra note, 11*

²¹ *Ibid.*

overloaded formal court procedures and above all in its focus on negotiation and compromise rather than confrontation and fault.

2.2. ADR IN CRIMINAL JUSTICE CONTEXT: SHIFTING THE PARADIGM

As already noted, the role of ADR process in dispute resolution was understood in the spirit of settling disputes to sustain community harmony functioning parallel to the duties of regular courts. In the formal justice system, ADR procedures are accustomed to be applied in disputes of civil nature.²² However, despite its wide application in informal criminal justice, the role of ADR in formal criminal justice system is marginal as criminal acts are perceived as an offense against the state. This assumption confers power on the state to determine guilt and punish wrongdoers. It is assumed that parties to the criminal dispute are the state and the offender. Alternatively, it is increasingly viewed that crime is understood as it is committed against people and a disturbance of the peace of the community. So, can we think of any jurisprudential insight by which the values and principles of ADR so discussed could be applied in disputes of criminal nature to mend this disruption?

Most of the literatures dealing with ADR contain little or no reference to its use in the criminal justice context. This situation has occurred for two reasons. First, ADR is usually ascribed as a method of resolving civil disputes between parties without resorting to formal court-based adjudication. Second, the public perception of criminal justice within the formal criminal justice administration viewed that criminal offending is largely a matter between the

²² For instance see the Civil Procedure Code of the Empire of Ethiopia, *Negarit Gazeta*, No. 3/ 1965, Article 315-319.

offender and the state.²³ For these reasons the role of ADR process was largely marginal in criminal disputes within the formal criminal justice system. As noted before, the multiple delays inherent in the formal criminal justice system caused huge pendency of criminal cases. Most importantly, lack of victims ultimate control over the adjudicative process and the outcomes of the dispute, hampered the need to address the psychological needs of the victim in restoring the status quos.²⁴

In general, the shift in paradigm of ADR in criminal context should be understood in the sense that there are values and ideals of ADR process that should be appraised and applied in criminal disputes which potentially impact the formal criminal adjudicative process and the resolution stage. It does not mean that the whole system of formal criminal justice should be totally replaced by the ADR procedures. It is rather to mean that if it combines the ideals and institutions of ADR process to that of formal criminal justice operation, criminal justice system can achieve more effective result,

As noted above, whether the term ADR process can be appropriately applied in a criminal context is elucidated. However, such deliberation is relevant in that it examines the theoretical bases for the development of ADR processes and prompts discussion as to which ADR types can and should be applied in a criminal context. Therefore, the following discussion will try to shed light on applying the appropriate ADR prototype in criminal matters, primarily, its unique feature as podium to the nature of criminal disputes.

²³ R Sarre and K Earle, 'Restorative Justice' in R Sarre and J Tomaino (eds), *Key Issues in Criminal Justice* (2004) pp. 144-145.

²⁴ S Kift, *Victims and Offenders: Beyond the Mediation Paradigm* Australian Dispute Resolution Journal (1996) p.71.

3. MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION PROCESS IN CRIMINAL MATTERS

As already noted, the potential appliance of ADR processes in criminal disputes is discussed. But, not all types of ADR process fits to the rubric of criminal dispute resolution. Thus, it is vital to identify and justify which appropriate dispute resolution process best suits the nature of criminal disputes resolution in the particular case.

In any discourse of ADR discussion there are three commonly used categories of ADR processes. It includes Mediation, Negotiation and Arbitration. To begin with, Mediation refers to a method of nonbinding dispute resolution involving a neutral third party who helps the disputing parties reach a mutually agreeable solution.²⁵ According to this definitional element, mediation is a voluntary process in dispute resolution whereby a person who is independent of the disputing parties, called the mediator, assists them to reach an agreement. It seeks to achieve the best outcome for all parties through collaboration, procedural flexibility, interest accommodation, contextualization, active participation, and relationship preservation.²⁶ The mediator develops options or offers some guidance or 'light path' towards a mutually satisfying objective. For instance, the mediator may suggest ways of resolving the dispute but does not impose a settlement. Hence, the mediator may make suggestions and point out issues that the parties may have disregarded but the final outcome depends on the parties. Therefore, mediation offers the advantages of informality, with reduced time and expenses.²⁷

The other category of ADR is Negotiation. It refers to a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potential disputed matter. Negotiation usually involves complete autonomy for the

²⁵ *Supra note, 19*

²⁶ *Ibid.*

²⁷ L Boule, *Mediation: Principles, Process, Practice* (1996) p.35

parties involved without the intervention of third parties.²⁸ Lon L. Fuller describes it as: “*a road the parties must travel to arrive at their goal of mutually satisfactory settlement.*”²⁹

Finally, Arbitration refers to a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.³⁰ Here, from this definition, unlike the case of mediation, a neutral third party is entrusted with the power of passing binding decisions. In other words, in arbitration, like court adjudication, the arbitrator declares the winner of the game. For this reason, some legal writers try to exclude arbitration from the ambit of ADR and treats arbitration as a variant of dispute resolution within the formal legal process, mainly adjudication. What makes arbitration pragmatically different from adjudication is its non judicial facet in the sense that arbitrators are private appointees and judges are government pen pusher.³¹ In fact, arbitration shares basic features of ADR with mediation since it offers more flexible process, more party autonomy and cheaper and swifter dispute settlement options.³²

Consequently, one can pinpoint the following key and unique features of mediation as a dispute resolution process in criminal matters when compared with the other two ADR variants. First, unlike, negotiation, mediation creates a congenial forum by a neutral third party whereby a victim and offender gets the opportunity to reconciliation on the conflicts. Negotiation will not offer such forum as it requires an equal consensual motive on both parties to the

²⁸ *Ibid*

²⁹ Lon Fuller, *Mediation - Its Form and Its Functions*, s. California Law Review (1971), Vol. 44, pp. 305-327.

³⁰ *Ibid*

³¹ *Supra note* 16, p.109

³² *Ibid*

conflict or dispute to settle their disputes which is unlikely, in criminal disputes given the grievance and suffering of the victim at least for a while. Second, in arbitration the arbitrator ultimately determines the loser and winner in the dispute. Hence, applying the principles and rules of arbitration in criminal disputes has no relevance in pacification despite the transfer of criminal dispute resolution to private arbitrator, which amounts to shifting the prime responsibility of criminal prosecution from the state to a private individual. In other words, neither adjudication nor arbitrations do contribute to the amicable settlement of criminal dispute as dictated by the principles of mediation is supposed to do. Therefore, it is safe to argue that mediation, in contrast to negotiation and arbitration process, process plays pivotal role in criminal dispute resolution process as it creates a congenial forum between the victim and offender through the help of neutral third party.

So much so that, in the following discussion an attempt will be made to explore the ideas of mediation and its theoretical and practical relevance. Its relationship with the basic features of restorative justice in the context of criminal justice will also be looked at.

3.1. MEDIATION PROCESS: A PRECURSOR IN RESTORING JUSTICE

The idea of 'Restorative Justice' was first introduced in the contemporary criminal justice literature and practice in the 1970's. However, evidences suggest that the roots of its concept trace back into the traditions of justice as old as the ancient Greek and Roman civilizations.³³ The term restorative justice was coined by Albert Eglash who sought to differentiate between what

³³ Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy* (Criminal Justice Press, Helsinki, 2007), p, 21

he saw as three distinct forms of criminal justice.³⁴ The first is concerned with retributive justice, in which the primary emphasis is on punishing offenders for their wrong deeds. The second relates to what he called 'distributive justice', in which the primary emphasis is on the rehabilitation of offenders. The third is concerned with idea of 'restorative justice', which he broadly equated with the principle of restitution. He claimed that the first two focuses on the criminal act, deny victim participation in the justice process and require merely passive participation by offenders.³⁵ The third one, however, focuses on restoring the harmful effects of the the act of crime, and actively involves all parties in the criminal process.

Restorative Justice according to Eglash is a deliberate opportunity for offender and victim to restore their relationship, along with a chance for the offender to come up with a means to repair the harm done to the victim.³⁶ Accordingly, Eglash tried to link restorative justice with an approach that attempts to address the harmful consequences of an offender's actions by seeking to actively involve both parties in a process aimed at securing reparation for victims and the rehabilitation of offenders.³⁷

Furthermore, Hans von Hentig and Benjamin Mendelsohn considered as the fathers of Victimology, without reference to Restorative Justice directly, identified the deficiencies of the modern criminal justice system particularly with regard to victims' rights.³⁸ Particularly, Margery Fry, a British reformer,

³⁴ *Ibid*

³⁵ Jim Dignan, *Understanding Victims and restorative Justice*, (Open University Press,2005), p. 94

³⁶ See *Supra note 33*

³⁷ *Ibid*

³⁸ See *Supra note 33* at p, 22

claimed that victims were being ignored by the criminal justice system, and proposed a formal use of restitution.³⁹

It is clear from the above discussions that there is a general consensus between scholars on the conceptual underpinnings of restorative justice in its potential application to the context of criminal justice as a new alternative panacea to the defects of both retributive and rehabilitative criminal justice. However, the task of defining restorative justice presents a seemingly persistent challenge as none of many attempts made in the past have proved to be universally acceptable.⁴⁰ The most widely accepted definition was formulated by an early advocate of restorative justice, Tony Marshall, in the following terms: “*Restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future.*”⁴¹ Similarly, Howard Zehr, a leading proponent of the restorative justice movement, has defined restorative justice as “*a process to involve . . . those who have a stake in a specific offence and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.*”⁴²

At the institutional level, the Handbook on Restorative Justice Programmes prepared under the auspices of United Nations Office on Drugs and Crime defines the term Restorative justice as “a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders

³⁹ *Ibid*

⁴⁰ See *Supra* note 33 at p, 2

⁴¹ *Ibid* at p, 2-3

⁴² See *Supra* note 5 at p. 945

accountable for their actions and, often also, engaging the community in the resolution of that conflict.⁴³

A closer look at the three definitions portrayed above generally defines restorative justice similar to Eglash definition which attempted to define it by indicating in opposition to Retributive Justice.⁴⁴ That is, while retributive justice as a model of criminal justice system tries to take in to account that crime is viewed chiefly as a violation of the state, and punishment is premised on deterrence and retribution,⁴⁵ the theory of restorative justice is not to punish the offender, but rather to guide him/her to repent for his/her crime, strive to mend the injury he/she has done, and reintegrate him/her into the community.⁴⁶ Thus, while restorative justice focuses on both the offender and the injured party, seeking to restore the affected individuals to their previous status quo; retributive justice system focuses on the offender in imposing a sentence upon him in order to punish him for past wrongdoing and to deter him from future criminal actions.⁴⁷ This idea was also propounded by John Braithwaite, the leading restorative justice theorist, that restorative justice is about restoring victims, restoring offenders, and restoring communities. Hence, the philosophy is quite distinct from the existing formal criminal justice mentality; as proponents of restorative justice put it, the goal is to find hope, meaning, and healing in the process of creating justice and promoting accountability.⁴⁸

⁴³ United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes; (Criminal Justice Handbook Series, New York, 2006), p. 6

⁴⁴ *Supra note 23*

⁴⁵ *Ibid.*

⁴⁶ *Supra note 5*, p.945.

⁴⁷ *Ibid*

⁴⁸ *Ibid.*

Furthermore, the notable tenets of restorative justice like Howard Zehr has set out in which restorative justice differs from retributive criminal justice among other things includes the fact that restorative justice creates opportunities for crime victims, offenders and community members who want to do so to meet to discuss the crime and its ramification; expects offenders to take steps to repair the harm they have caused; seeks to restore victims and offenders to whole, contributing members of society (reintegration); and provides opportunities for parties with a stake in a specific crime to participate in its resolution (inclusion).⁴⁹

From the forgoing discussions the common definitional elements worth emphasis are the characterizations of restorative justice as a particular type of process involving victim, offender and the community which can accommodate variants of restorative justice programs such as victim-offender mediation, different forms of conferencing and circle sentencing. What is intended here is not to discuss the variants of restorative justice programs. But, as it is clear from the title, it is to show that the process involved in the concepts and theories of restorative justice are flexible to accommodate mediation process i.e. the use of mediation as a dispute resolution process is a perfect platform to attain the ideals of restorative justice and could be harnessed as a new approach in the criminal justice system. Here, I'm not claiming that application of mediation process as a traditional dispute resolution process is a new discourse. I simply mean that the values of restorative justice that were deep rooted in the local community could be re-introduced to same in formal, systematic and coordinated way to bear the fruits of what the restorative justice theory is craving for. In this regard, discussion will be made particularly on the importance of the *Guma* (blood

⁴⁹ *Ibid.*

price) program in *Jaarsumma* process among the Oromo's and find out whether this traditional dispute resolution process profess the ideals of restorative justice.

In conclusion, mediation process can be linked with the essence of restorative justice as an instrument which seeks to shift the emphasis from the ideas of violation of the state and chastisement towards amends and inculcating in the offender a sense of responsibility to the victim and the community.⁵⁰ In this approach crime is understood as a violation of people and relationships and a disruption of the peace of the community. It is not simply an offence against the state. Restorative justice is collaborative and inclusive. It involves the participation of victims, offenders and the community affected by the crime in finding solutions that seek to repair harm and promote harmony. In this sense, mediation process as a precursor of restorative justice becomes a perfect platform in bringing the victim and the offender to restore their relationship through apology and forgiveness. Therefore, in order to facilitate the process of restorative justice, mediation process plays pivotal role in creating a congenial forum based on consent of the victim and the offender to amicably solve their conflict through the help of mediator.

3.2. THE LIMITS OF MEDIATION PROCESS IN CRIMINAL MATTERS

As noted before and repeated below, the concept of mediation as a driving engine of restorative justice in criminal matters had gained momentum as victims, community and offenders have been dissatisfied with the malfunction

⁵⁰ D Schmid, *Restorative Justice: A New Paradigm for Criminal Justice Policy*, (Victoria University of Wellington Law Review, 2003) p. 4.

of the formal criminal justice litigation system to meet their needs.⁵¹ But, the applicability of mediation process to the rubric of criminal justice system is not without limitations.⁵²

The first limitation is derived from an extension of the principle of formal criminal justice system that declares criminal dispute, as a public wrong contrary to criminal law affecting the peace and order of the society thereby mandating the state to prosecute criminal matters on behalf of individuals and the general public. Second, mediation as an alternative dispute resolution process will not replace the formal criminal justice system in all criminal matters as we shall see below. Rather, the process of mediating criminal disputes within the ambits allowed by the formal criminal justice system will provide a diverse alternative or, more precisely, there is a set of different options for the individuals who commit or are victims of crime. In other words, the public criminal justice system will always be present, adjudicating cases in which either the offender or the victim does not wish to participate in the mediation process, or also serving as a default for the cases in which the parties fail to reach a resolution in the mediation system⁵³ Third, it is argued that there are factors specific to the criminal context which renders mediation process unlikely to succeed because, a kind of mediation supposed to be applicable in criminal context is somewhat different from our understandings of mediation process in civil matters. That means, there is an assumption that in mediating civil disputants, both sides contributed to the conflict at hand, while in victim-offender mediation process there is an innocent victim, likely to be highly emotionally charged due to criminal injury, and an offender who

⁵¹ *Supra note* 43, p. 5

⁵² *Ibid.*

⁵³ *Ibid.*

has usually already admitted to the crime. This puts the parties at different positions when dialogue begins.

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

4. WHAT CRIMINAL DISPUTE RESOLUTION PROCESSES ARE IN PLACE? THE PRACTICE FROM WITHIN AND THE LESSON FROM ABROAD

Once again, in Ethiopia, traditional criminal dispute resolution techniques were practiced in different ethnic groups with varying degrees in reflecting the ideas of restorative justice. So, it is possible to explore the tenets of restorative justice as many of these alternatives provide the parties involved, and often also the surrounding community, an opportunity to participate in resolving conflict and addressing its consequences. However, due to space limitations, it is difficult to deal with all the diverse traditions of criminal dispute resolution process which are practiced across a wide range of the Ethiopian territory. Indeed an attempt will be made to highlight the traditional criminal dispute resolution process of *Jaarsummaa* through the mediators of *Jaarsaa Araara* as practiced among the Oromo as an example of enduring Ethiopian traditional criminal dispute resolution process. Here, the criminal *Jaarsummaa* process varies from place to place in Oromiya. But, a focus will be made to explore

the criminal *Jaarsumma* process as it existed today as a common and shared value among the Oromo Nation. Furthermore, lessons from the practice of western countries which succeed in applying mediation process as a restorative justice scheme in the criminal justice system will be consulted for the benefit of Ethiopian criminal justice system. Hence, concentration will be made only on mediation process as a criminal restorative justice scheme.

4.1. THE PRACTICE OF JAARSUMMA AS A TRADITIONAL CRIMINAL DISPUTE RESOLUTION PROCESS AMONG THE OROMO NATION

In every society, regardless of the yearning for harmony and people will often fall short of the ideal, will default on their obligations, will disappoint, and will come into conflict with their neighbors, kin, and compatriots.⁵⁴ It is then necessary to heal the breach, find reconciliation, and restore the peace between and among its members. In the following discussion I will describes the manner in which the Oromo attempt to maintain peace and restore harmony through the use of *Jaarsumma* institution when disputes arise between individuals in the local community.

The *Jaarsummaa*, literally mean Mediation Council is a group of 3 to 8 reputable local elders which gathers to resolve disputes peacefully. The *Jaarsummaa* process presiding over a single case is formed in different ways and varies from place to place.⁵⁵ Generally, the formation of *Jaarsummaa* institution commonly practiced among the Oromo in Ethiopia could be categorized in to three alternative processes.

⁵⁴Herbert S Lewis, *Some Aspects of Oromo Political Culture*, The Journal of Oromo Studies, vol.1, No.2 (1994), p.56.

⁵⁵ Dejene Gemechu, *Some Aspects of Conflict and Conflict Resolution Among Waliso Oromo of Eastern Macha, With Particular Emphasis on the Guma*,(2002), (Unpublished Master's Thesis), Addis Ababa University p, 72.

First, it happens when the offender who admits his offense takes the initiative to start reconciliation. In this process, the offender chooses his own elders and requests the victim or his family for settlement of the matter through local custom. If the victim or his family wants to resolve their disputes through *Jaarsummaa*, they may independently nominate their own *Jaarsa araara* (literally meaning, reconciliation elder) whom they think would favor them. In this process, both parties comment on the nominee of the opposite side. The group to be set is however, the one in which both parties put their trust.⁵⁶

The Second alternative is taken by the initiatives of the local elders for the reconciliation process in order to maintain harmony in the community. These local mediators may or may not be concerned with a particular dispute. It simply emanates from their desire to help the victim, the offender and their families to live in harmony by restoring their previous relationships in the community. This process mostly occurs where there is no chance of communication between the quarreling parties or if any contact between the two exacerbates the conflict. The elders, called *jaarsa bitaaf-mirgaa* (literally mean 'the elders of the left and the right'), tries to reconcile both disputing parties and their families independently. If the mediator on the either side of respective party to the conflict succeeded in persuading them for reconciliation, the *Jaarsummaa* process will commence immediately. These elders may or may not constitute the new *Jaarsummaa* process unless both parties agreed. In this process too, both parties may commonly choose elders whom they think are neutral and would handle their case efficiently and impartially.⁵⁷

⁵⁶ *Ibid*

⁵⁷ *Ibid*

The third alternative process involves a condition in which the victim or his family may forward their claims to the local elders before resorting to formal criminal dispute resolution through state-based court. However, this process is likely to happen mostly in crimes affecting the personal interests of the victim such as minor crimes and crimes relating to property. Sometimes resort to formal court litigations is disadvantageous in terms of resource, time and preservation of sense of friendship. Therefore, the victim may opt for *Jaarsummaa* institutions to accommodate these interests. Research findings show that the role played by the *Jaarsummaa* institution influences the outcome of the dispute resolution process by facilitating dispute resolution promptly and efficiently as compared to the formal criminal dispute litigation system, where cases remain unsettled for years.⁵⁸

Generally, the *Jaarsummaa* institution is mainly characterized by the presence of local elders who are selected by virtue of their good reputation, their extensive and good knowledge of custom, precedent and *seera* (law) of the Oromo, their individual talent and experience in dealing with conflict, altruism, their good sense and willingness to give his time to reconcile the disputants and help solve their neighbors problems and restore the peace.⁵⁹

The *Jaarsummaa* deliberation, on the other hand, starts to operate when elders at a gathering demand the disputants to be honest in providing information and to be reasonable in claiming and counter claiming. The victim and the offender are supposed to provide information by narrating history of the dispute and probe into their former relationships. The elders listen to the opinion, information and claims of each party in the presence of the opponent.

⁵⁸ *Id* at p.75

⁵⁹ *Ibid*

Then, the elders gather full information from the disputants themselves. The elders as a group of mediators often consult the victim and the offender by referring to norms, values, and rules to move them to an acceptable proposed solution.⁶⁰ Finally, based on the information from the disputants, the elders propose decision after assessing the amount of injury sustained by the victim or his families and encourage the disputants in dispute to make joint decision. Therefore, the only decision to which both agree would be final. The mediators would not dictate the disputants to accept their recommended decision. But they try their best to avert the feeling of the contenders as a looser and urge them to accept the decision. Wherever the *Jaarsummaa* proceedings are successful in settling a dispute, reconciliation is symbolically marked by shaking and kissing hands with each other as a sign of maintaining the pervious relationships.⁶¹

Despite all the efforts, the role of *Jaarsa araara* in *Jaarsummaa* institution in determining the outcomes of the dispute varies in degree depending on the nature of the case and the nature of the relationships of persons in the dispute.⁶² For instance, where the disputing parties have no serious problem in negotiating through face-to-face discussion, but are unable to settle their own case on their own, the role of *Jaarsa araara* is limited to facilitating the process so that the disputant parties arrive at a decision on which both parties agree.

On the other hand, in some criminal cases, the local elders play the role of rendering binding decisions as an arbitrator. For instance, in homicide cases, the offender must compensate the family of the victim often called *guma*

⁶⁰ *Ibid*

⁶¹ *Ibid*

⁶² *Id.* at p.70

(blood price) as restitution. The *guma* intends to pacify the feelings of the injured through payment of compensation, which is set by the local custom and practice. It helps to achieve a rapprochement between the parties at feud and avoid the sense of retaliation that would in turn lead to another vengeance.⁶³ As one of the principal motives for payment of *guma* is fear of retaliation, the decisions of local elders on the amount of blood price assessed by reference to the local custom, must be respected by the offender and his family. In such case, the offender is forced to accept the decisions of the local elders as binding decision. The decision is a form of punishment for his wrong deeds not only to the victim and his family, but also to the general public. However, once *guma* is paid, the relationship between the families of the victim, the offender and his family lineage will be restored. They are said to be of one flesh, the hurt of any member amounts to the hurt of the family.⁶⁴ Generally, decisions rendered by *Jaarsummaa* process are enforced through the criticism of public opinion and ostracism. Lack of respect for the *araara* (or peace) decision is believed to be lack of respect for the community's value and culture.

In conclusion, the *Jaarsummaa* institution as practiced today among the Oromo of Ethiopia, entrenches the values of restorative justice in a deeper and compatible sense. As pointed out, the *Jaarsummaa* institution involves the promotion of accountability of the offender and the participation of the victim and the local community in addressing the current and future effects of the crime. The use of *Jaarsummaa* institution and its mediating role played by *Jaarsa araara* to attempt to restore the relationships of the victim and offender *could be harnessed as a victim-offender mediation scheme in reinforcing the*

⁶³ *Id.*, at p.88

⁶⁴ *Id.*, at p.87

principles of restorative justice in Ethiopian criminal justice system. Once again, similar practices of informal criminal dispute resolution processes, embedding the values of restorative justice could be explored through a systematic way from the array of diverse cultures rooted in Ethiopian diverse ethnic groups. Therefore, it is safe to argue that, if the schemes are introduced in to the formal criminal justice administration in a more systematic and coordinated way, it will indisputably contribute to the effort of the state to maintain peace and tranquility of the public.

4.2. LESSONS FROM ABROAD

To mention but few, countries like South Africa, Germany, France, and Canada applied mediation process as restorative justice scheme in the context of criminal disputes.⁶⁵ Victim-Offender Mediation Programs, Private Complaint Mediation Service and Victim Offender Reconciliation Programs are among the various mediation programmes that were used in criminal matters in a varying degrees.

The idea of victim-offender mediation, as the oldest and most widely developed expression of restorative justice⁶⁶, programme was started in Canada and was first introduced in 1988.⁶⁷ The programme was aimed to be applied at all stages of criminal justice process which provide substantial

⁶⁵ John R. Gehm, *Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, Western Criminology Review1(1).Available at: <http://wcr.sonoma.edu/v1n1/gehm.html>, (visited 22, April, 2011)

⁶⁶ Mark S. Umbreit and Robert B.Coates, *Victim-Offender Mediation: Three Decades of Practice and Research*, Conflict Resolution Quarterly, (2004) vol. 22, No. 1–2, p. 281

⁶⁷Theo Gavrielides (2007), *Restorative Justice Theory and Practice: Addressing the Discrepancy*, available at <http://www.heuni.fi/uploads8oiteshk6w.pdf> (Assessed at April 2, 2011) p. 59.

support to victims through effective victim services and encourage a high degree of community participation. In the 1996, criminal code of Canada, declared that the purposes of sentencing should include reparation of harm to the victim and the community and promoting a sense of responsibility in offenders.⁶⁸ The importance of the aforementioned legislative amendments is reflected in the jurisprudence of the Supreme Court of Canada, and particularly in the landmark decisions: *R v. Gladue* and *R. v. Proulx* case said: “Restoring harmony involves determining sentences that respond to the needs of the victim, the community, and the offender.”⁶⁹ The Canadian ‘Youth Criminal Justice Act of 2003 also provides principles, rules and procedures for young persons who come into conflict with the law. It applies to laws about criminal conduct issued by the Government of Canada and is based on a number of restorative ideas like accountability, responsibility, meaningful consequences for youth crimes, support for long-term/sustainable solutions, consistency with national and international human rights, and promotion of a more flexible and streamlined youth justice system.⁷⁰

In South Africa also, Victim-offender mediation scheme, started to develop in the early 1990s.⁷¹ The Child Justice Bill issued by the South African parliament in the end of June 2008, is the first regulation to mention Victim-Offender Mediation. Victim-Offender Mediation in South Africa is therefore used as an alternative, a complement and a sentence.⁷² The decision whether or not Victim-Offender Mediation is appropriate is made by the prosecutor or the court. The seriousness of the crime does not automatically exclude a case

⁶⁸ *Ibid.*

⁶⁹ *Ibid*

⁷⁰ *Ibid*

⁷¹ Frida Eriksson, *Victim-offender mediation in Sweden and South Africa*, (Unpublished Master’s Thesis, University of Gottenberg), (2008), p. 3

⁷² *Ibid.*

from the use of Victim-Offender Mediation scheme altogether. Instead the nature of the offence only influences the decision as to how it would be best applied, at pre-trial, pre-sentence or sentence stage.⁷³

The Victim-Offender Mediation programs also referred to as Victim-Offender Reconciliation (“VOM”) programs in Germany is also recognized by the German Penal Law, as a constructive social alternative to the field of penal sanctions.⁷⁴ The majority of cases handled through Victim-Offender Reconciliation (VOR) programs are bodily injury offenses, theft, and crimes against person and, to some extent, robbery.⁷⁵ The German Penal and Criminal Procedure Code introduced compensation scheme which enables the offender to avoid punishment for offenses carrying prison terms not exceeding one year. In such cases the judge may, in his discretion, refrain from punishment if VOR has taken place. The prosecutor may withdraw the charge under same conditions. Generally, VOR program in Germany has become an integral part of the system of *penal* sanctions, making it necessary to explore how conflict resolution may be incorporated into state control of crime. Nearly four hundred VOR service institutions in Germany mostly carried out by social workers settle conflicts through personal contact between victim and offender in cases of minor crimes and offenses against person.⁷⁶

Furthermore, criminal alternative dispute resolution processes in France, being called as *médiation pénale* model is widespread which is however, far from being equivalent to truly restorative Victim-Offender Mediation due to lack of

⁷³ *Ibid*

⁷⁴ Dieter Rössner, *Mediation as a Basic Element of Crime Control: Theoretical and Empirical Comments*, Buffalo Criminal Law Review, (1999), Vol.3. p, 212

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

community participation.⁷⁷ Indeed, the médiation pénale, when accepted, allows victims and offenders to come together and find an arrangement, but under no circumstances external parties such as community or family members, neighbors or friends may ever be included in such process. Mediation may be proposed to victim and offender by court entities, namely prosecuting authorities and the whole proceeding always remains under judicial supervision and monitoring.⁷⁸

In general, from the preceding discussion, one can learn from these countries that integration of mediation scheme into the formal criminal justice system is important for Ethiopian criminal justice administration for several reasons. First, it is naïve to think that Ethiopian criminal justice system should standstill as the western criminal justice systems from which our criminal justice system was borrowed is evolving and accommodating the needs of the society. Therefore, we must adapt ‘our criminal justice system’ to the emerging needs of our society, basically by integrating traditional criminal dispute resolution processes in a systematic and coordinated way as an auxiliary process. Second, we can adjust the best practices of their restorative justice schemes that are compatible with the reality of our country by taking Ethiopian traditional dispute resolution processes capable of expressing restorative justice in to account. Finally, the application of mediation process as a restorative justice scheme in Ethiopian formal criminal justice context is a new phenomenon. Therefore, we can harness and re-shape Ethiopian traditional mediation processes in line with the basic principles of restorative justice in a systematic and coordinated way. Particularly, the role of

⁷⁷ L. Carpentieri, *Restorative Justice in France: Obstacles for the Application of a Truly Restorative Approach to French Dispute Resolution*, available at http://www.restorativejustice.org/10fulltext/carpentier/at_download/file, (Assessed on April 5, 2011)

⁷⁸ *Ibid*

government and community in Restorative Justice Schemes, the effects of victim's participation and appropriate offences for restorative justice process, accountability issues, training and standards of practice are some major lessons we should learn from abroad and inculcate to Ethiopian criminal justice system.

Therefore, we must carefully select and weigh the merits and de-merits of traditional and modern criminal mediation processes practiced in Ethiopian diverse ethnic groups and foreign countries which are capable of expressing the ideals of restorative justice respectively before introducing the system as a fast and hard rule.

5. LEGAL FRAMEWORK OF MEDIATION PROCESS IN ETHIOPIAN CRIMINAL JUSTICE SYSTEM

Needless to mention it, Ethiopia is a nation of diverse languages, religions, and cultures. Each group has its own traditional methods of resolving civil and criminal conflicts. As already noted, these dispute resolution mechanisms involve an elder of the community investigating and facilitating the resolution of disputes. The majority of these conflicts are settled, as the fear of social isolation that may otherwise ensue is a strong motivating factor. In a country where 85% of the population lives in rural areas, survival often depends on belonging to a community. However, modern Ethiopian criminal justice failed to accommodate customs of dispute resolution process. It entirely disregarded indigenous customs and transplanted western criminal justice system. This could be understood from the words of Rene David who is member of Ethiopian laws codification commission in 1960's. His statement is quoted as follows.

“Ethiopia wishes to modify her structure completely even to the way of life of her people. Consequently Ethiopians do not expect the new code to be a work of consolidation, the methodical and clear statement of actual customary rules, they wish it to be a program envisaging a total transformation of society and they demand that for the most part it set out new rules appropriate for the society they wish to create.”⁷⁹

Therefore, it is easy to understand why Ethiopian criminal justice system failed to reflect customary practices of criminal dispute resolution, despite the enduring legacies and contemporaneity among different ethnic group in Ethiopia. As noted before, Ethiopian criminal justice system was largely modeled in the western criminal justice system reflecting retributive justice.⁸⁰ It was structured with the assumption that criminal matters are by and large the concerns of the state rather than the concerns of private individuals and the community. This assumption undeniably affects the core values of traditional dispute resolution mechanisms practiced informally with in the local community since time immemorial.⁸¹ It rather reflects legal paternalism in disregard to the values, norms of a given society which at some time become more efficient and reliable than what the state deems good for its citizens through its legislative intent. In fact often there exist a higher ideals which in no case be compromised and which the state must protect. On the other hand, it is also absurd to prohibit a society to resolve its disputes as its inherent

⁷⁹ Rene, David, *A civil Code for Ethiopia: Consideration on the Codification of the Civil Law in African Countries*, Tulane Law Review (1963), p.193

⁸⁰Julie Macfarlane, (2007), *Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems with the Formal Legal System*, available at; [http:// www.cojcr.orgvol8no2487-510.pdf](http://www.cojcr.orgvol8no2487-510.pdf) (Assessed on April 10, 2011)

⁸¹ *Ibid.*

problems by its own well established and even more accepted values of protecting the status quo that exists.

Generally, an appeal to time, resource, efficiency and values dictates society to furnish the delicate balance through its long practiced norms of dispute resolution in restoring its relationships which should be relied and nurtured persistently as a matter of social policy. Against this background, I will scrutinize whether the existing legal regime accommodates the likelihood applicability of mediation process as a restorative justice scheme in Ethiopian criminal justice system and if any, the limits and opportunities of applying it.

5.1. FINDING THE RELEVANT LAWS: OPPORTUNITIES TO EXPLORE MEDIATION PROCESS

Until the present day, Ethiopia enacted three penal legislations: The Penal Code of the Empire of Ethiopia 1957, the Revised Special Penal Code of the Provisional Military Administration Council 1982, Proclamation No. 214/1982, and currently The Criminal Code of the Federal Democratic Republic of Ethiopia 2004, Proclamation No.414/2004. The aims of all penal legislations are to prevent crimes and to punish the wrong doers for their misdeeds. All penal legislations failed to recognize the role of victim, offender and the community in the criminal justice system. The development in the FDRE criminal legislation is its allocation of rehabilitative justice which helps wrongdoers to take vocational training and participate in academic education *while in prison* to lead peaceful life and benefit them upon release from prison.⁸² (*Emphasis added*)

⁸² The FDRE Criminal Code, Proclamation No. 414/2004, preface and Article 1

Generally speaking, the concept of restorative justice was disregarded to the point of dismay even under the current criminal code which purported itself as if it properly consulted foreign countries experience⁸³ in the wake of 21st century. If ideals of restorative justice are not introduced in to the criminal justice system, it is impractical to explore the opportunities of mediation process as a criminal dispute resolution process. As noted before, much attention was not paid to the agenda of restorative justice as a community response to the consequences of crime as a new paradigm shift in the administration of criminal justice in the eyes of academicians in the fields of criminal justice, including parliamentarians and policy reformers. Beyond that, some countries had unequivocally introduced the purposes of restorative justice in to their formal criminal justice administration.⁸⁴ Thus, which countries foreign experience are we talking about? For sure, the answer could not be the experience of western criminal justice system as their experience before 2004 reveals and consults more than that! So, which legal regimes am I going to assess if Ethiopian penal legislations from the outset failed to incorporate mediation process as the expressions of the ideals of restorative justice? Let me try to assess and find out what Ethiopian substantive and procedural law can afford. Particularly, a focus will be made on the current criminal code of Ethiopia since the previous penal legislations are repealed by same.

The FDRE Criminal Code clearly permits consent of the victim as a defence to the commission of crimes punishable upon complaint⁸⁵ which is prohibited

⁸³ *Ibid.* See the Preface

⁸⁴ See my discussion on “lessons from abroad”.

⁸⁵ *Supra* note 82, Article 70

under the repealed penal code.⁸⁶ Crimes punishable upon complaint are crimes that are predominantly private in nature and solely affect individual interest.⁸⁷ Therefore, consent of the victim is a condition precedent to try and punish offenders committing crimes punishable upon complaint which give an opportunity to victims and offenders to reconcile freely with the help of mediation services by local elders. Under FDRE Criminal Code, around 47 articles are labeled as crimes punishable upon complaint. This fortune could create an opportunity to apply mediation process to restore the relationships of the victim and the offender.

In a similar way, under the Criminal Procedure Code setting justice in motion on complaint crimes is only possible on consent of the injured party or his legal representatives.⁸⁸ So, as crimes punishable only upon complaint requires a formal complaint by the injured party a police officer must take care of arresting offenders of complaint crimes without securing the prior consent of the victims concerned.⁸⁹ This caution is important as it creates a chance to the victim, offender and the community to initiate mediation process to maintain their relationships before throwing the offender in to pretrial detention. The criminal procedure also stipulates that crimes punishable upon complaint can be prosecuted by private prosecution on the authorization of the public prosecutor.⁹⁰ Therefore, there is a tendency to own criminal prosecution by private individuals in Ethiopian criminal justice system in cases of crimes punishable upon complaint. So, the victim may opt for court litigation with a

⁸⁶ See The Penal Code of the Empire of Ethiopia, Proc. No. 158 of 1957, *Negarit Gazette*, Extraordinary issue, 23 July of 1957, Article 66

⁸⁷ *Ibid*, Article 216(2)

⁸⁸ Criminal Procedure Code of Ethiopia, Proclamation No. 185/ 1961, Article 13

⁸⁹ *Id*, at Article 21(1)

⁹⁰ *Id*, at Article 44(1)

view of criminal prosecution privately or with the help of public prosecutor or settle his disputes amicably through mediation with the help of local elders.

Does this entire mean that Ethiopian criminal and procedural laws are professing the ideals of restorative justice by permitting the victim to opt for reconciliation process rather than prosecution at its own peril? Alternatively, can we think of any other ideal of what the law wants to protect other than this? In my opinion, of course there are ideals that Ethiopian Criminal and Procedural law wants to protect. But, this time not to promote restorative justice rather primarily to promote privacy of individuals. Here, the *raison d'être* behind this assertion and the requirement of consent in complaint crimes is twofold. First, it is aimed to protect the will and interest of the injured party as the crime affects his interest at large. In other words, if a criminal proceeding is instituted against the will of the injured party, it may be more harmful to him/her than the commission of the crime. Criminal prosecution before a court of law may draw the attention of the society to certain facts, and this might be harmful to the injured party if he wants confidentiality. For instance, a victim of crime whom his wife committed a crime of adultery may opt for secrecy as it ruins the reputation of his marriage in the eyes of the public if the public is aware of the unfaithfulness of his spouse. In such situations, the institution of criminal proceedings is conditional upon a complaint first being made by the individual concerned. Second it emanates from the inherent nature of complaint offence itself. As noted before, complaint offences expressly provided by criminal law are predominantly private in nature and their effect does not transcend victims at least directly. In this sense, one also might explain complaint offences, at least in part, in terms of a legislative intent to conserve scarce prosecutorial resources by not compelling state prosecution in relatively minor cases unless

the injured party is sufficiently disturbed to file a complaint.⁹¹ Viewed in this way, prosecuting compliant crimes which do not merit expenditure of public resource is injudicious unless the victim is seriously upset, and might disturb public order by revenge behavior if the state does not act.⁹²

In general, paradoxically, Ethiopian substantive and procedural laws currently in force provides the opportunity to the victim, the offender and the local community to resort to mediation process in order to maintain their relationships. At least, it does not hinder local elders an opportunity to gear their efforts to restore peace and harmony, for example, in crimes punishable upon complaint if they are able to win the consent of the victim to their side. Therefore, its total reliance on the discretion of the victim and its limit only to crimes punishable upon complaint and above all, lack of intent to profess restorative justice are the limitations of Ethiopian criminal laws as it stands now.

5.2. DETERMINING THE APPROPRIATE CRIMES FOR RESTORATIVE JUSTICE

As explained earlier, the concept of mediation process as a restorative justice practice is not limited to crimes affecting individual interest or minor crimes. For instance, while traditional restorative justice practices like *Jaarsummaa* push further to the extent of homicide cases, victim-offender mediation programs in western criminal justice system is limited to misdemeanour and juvenile offences. However, we have to take notice of the fact that the appropriateness of applying mediation programs or similar programs either to minor or serious crimes is dependent on the effectiveness of that program or system to reinforce the ideals of restorative justice as it is meant to be.

⁹¹Graven Phillips, *Prosecuting Criminal Offences Punishable Only Upon Private Complaint* Ethiopian Law Journal, (1965), Vol. II, No. I, p.121.

⁹² *Ibid.*

In Ethiopian criminal justice system, crimes are categorized depending on the gravity and heinous of the injury it left behind and the dangerous dispositions of the offenders.⁹³ This is a corollary understanding of the fact that public prosecutions of crimes as a primary duty of the state is required to keep the peace and order of the general public.⁹⁴ In recognition of this fact, the "*New Draft Criminal Procedure Code*" currently under deliberation, tried to specifically categorized crimes by scheduling as "*minor*", "*medium*" and "*serious*" crimes.⁹⁵ However, what and what not crimes are to be included in the schedules is not yet determined and nor the draft law attached as such to that effect. The question to answer at this time is which categories of crimes fall under the ambit of criminal ADR which the Draft Criminal Procedure purport to introduce? In order to answer this question I will try to analyze the base for such classifications by reference to Ethiopian substantive and procedural criminal law including the current draft criminal procedure.

Obviously as mentioned before, crimes punishable upon complaint, predominantly affect private interest for which their prosecution and punishment require the consent of the injured party.⁹⁶ This crimes are less serious and do not endanger public peace. Therefore, it is more effective and appropriate to refer such crimes to criminal dispute resolution process as a restorative justice scheme not only by the consent of the victim but also by the discretion of the court or public prosecutor.

The other classification of crimes under Ethiopian criminal code is branded as crimes punishable upon accusation. Under the current criminal justice system,

⁹³ See the expressions of Article 89, 106, 109 of the FDRE Criminal Code of minor crimes, petty offences, serious crimes and crimes of grave nature.

⁹⁴ See the *Expose de motifs* of the 2004 FDRE Criminal Code, 1993 (pp 116-119)

⁹⁵ See Draft FDRE Criminal Procedure Code, Article 2(1)

⁹⁶ See *supra note* 80 at Article 212.

this brand of crimes simply includes the rest of crimes which are not expressly stipulated as compliant crimes under the criminal code including the petty code. As already mentioned, this category of crimes includes minor, medium and serious crimes under the New Draft Criminal Procedure Code.⁹⁷ According to this understanding, these crimes affect individual and public interest and are punishable under the patronage of public prosecutor. Once again, the new draft criminal procedure code in section four, integrated criminal ADR as “Alternative resolution procedures outside the formal litigation process”. It clearly set out the very purpose of alternative resolution process which among other things considers time and resource of the formal litigation process, the need to re-integrate the offender with the community, the need to maintain the relationship of the offender and the victim and re-establish the status quos, the willingness of the offender to take full responsibility and repentance to the crime and to reduce recidivism.⁹⁸

However, if the new criminal procedure code is to be enacted in the future, only minor and medium crimes can be resolved through criminal ADR processes on two conditions, first, the court or public prosecutor must deem necessary that out of court alternative resolution method is better and effective provided that such process does not adversely affect public interest. Second, diverting such criminal matters must inculcate consent, rights and special circumstances of the victim and offender in to account.⁹⁹ Specifically, Alternative criminal dispute resolution process may be opted in minor and medium crimes in cases where the offender is young, women and physically disable, where prosecution of the crime by court has a tendency to create physical and psychological effect on the victim, where the offender is under

⁹⁷ See *supra* note 90, at Article 222.

⁹⁸ *Ibid* at article 223(1, 2, 3)

⁹⁹ *Ibid*

mental illness while commission and prosecution of the crime, where the offender is willing to make damage good proportional to the injury sustained by the victim or take corrective measures to that effect or where the public prosecutor simply opted to direct such criminal dispute to be entertained by alternative resolution processes.¹⁰⁰

Furthermore, the draft criminal procedure empowered the public prosecutor to determine types of crimes which must and must not fall under alternative resolution process, the requirements under which the offenders are selected for reference of their criminal case to such alternative process and the institutional set up entrusted with resolving such criminal matters so directed by the public prosecutor for amicable resolution.¹⁰¹ In other words, the reference of minor and medium crimes to out of court system for amicable settlement presupposes the establishment of criminal ADR centers designed to fulfill its purposes either with in the office of the public prosecutor or by outside ADR service providers after their establishment is duly recognized by an appropriate office of the public prosecutor.¹⁰²

However, the types of ADR services which is/are appropriate as an alternative amicable settlement and the procedures and rules under which such ADR service centers function to capably run amicable settlement of criminal dispute in minor and medium crimes is not provided. Hence, we need to clearly articulate the rules and suitable ADR prototype to amicably settle criminal matters in Ethiopian traditional ADR context. In fact an attempt under the draft criminal procedure code was made to articulate the obligations of ADR organizations established under the recognition of the public prosecutor

¹⁰⁰ *Id*, Article 224

¹⁰¹ *Id*, Article 229 and 230

¹⁰² *Ibid*

including their roles, obligations and their relationships towards the court or public prosecutor.¹⁰³ Indeed the discussion on the *Jaarsummaa* institution is a good example of traditional mediation practice and the consulted foreign literatures on mediation is a suitable ADR process in criminal context capable of reinforcing restorative justice. Therefore, *it is necessary to primarily adapt indigenous mediation process* capable of consolidating the ideals of restorative justice. As noted before, this is useful to safeguard traditional values of restorative justice and thereby attach the profound sentiments of the people with the scheme to be adopted.

Eventually, it is important to also discuss the legal effect of such out of court amicable settlement process and its relationship with the formal criminal prosecution system. The Draft Criminal Procedure Code authorizes the public prosecutor to follow up on the overall process including checking whether the resolutions are enforced or not.¹⁰⁴

Lastly, inspired by the new draft criminal procedure code, as a reform to criminal justice system, both at Federal and State levels, Business Process Re-engineering (BPR) was already launched as a core process of criminal investigation and decision making.¹⁰⁵ In this process use of amicable dispute settlement mechanism as an alternative to criminal prosecution in compliant crimes and minor crimes is incorporated in the BPR document. But, what is meant by minor crime is not clearly identified by BPR document like the New Draft Criminal Procedure Code. Likewise, Institutions dealing with amicable dispute settlement in public prosecutor's office and their functions are also not

¹⁰³ *Id.*, article 232

¹⁰⁴ *Id.*, Article 235

¹⁰⁵ BPR Manuals and Documents and TO-BE's for Core Process in Criminal Investigation and Decision making prepared both at Regional and Federal levels reveal this fact.

well articulated in the document and neither established under the auspices of public prosecutor's office.¹⁰⁶

In general, the aforementioned discussions tried to shed light on the legal framework and limit of integrating ADR process in Ethiopian criminal justice system. As the law stands now, Ethiopian criminal justice system is devoid of restorative justice ideals, despite the strict interpretation of possibilities of applying mediation process in complaint crimes. This is also not without limitations as it utterly depends on the consent of the victim. Ample literatures and state practices show that mediating minor and complaint crimes are considered as a priority of criminal justice reform due to its importance compared to formal criminal prosecution system. In fact, the tradition of our local community and our experience shows that this country used to practicing mediation process in criminal disputes since time immemorial, despite its seriousness let alone of being dubious on mediating minor and complaint crimes as an old fashioned informal criminal justice system. Ultimately, as far as Ethiopian criminal justice system is concerned, one can firmly argue black and white that mediation as an alternative criminal dispute resolution mechanism could be applicable without any legal and procedural difficulty as long as complaint crimes are concerned. But, in order to achieve the very purposes of criminal ADR, complaint crime mediation service centers or organizations must be established in a systematic and well organized way under the recognition of courts or office of the public prosecutor in addition to voluntary mediation services by local elders. Yet, most importantly, the process of integrating criminal ADR process in minor and medium crimes under the upcoming criminal procedure code is another milestone in the milieu

¹⁰⁶ For instance, I have tried to interview public prosecutor in Gondar Zonal Justice Office and personally observed that there is no such service centers nor organizations accredited to run such ADR Services

of criminal justice system reform and should be maintained as a prospect of implanting restorative justice in the future Ethiopian criminal justice system.

CONCLUSION

Generally, I have tried to sketch the picture within which the rubric of mediation process could be embraced as a panorama of restorative justice in criminal justice context. The article also attempted in exploring the theoretical and practical frameworks within which mediation process as a traditional and western restorative justice scheme is appraised. In this article the possible options from within and abroad are clearly articulated. While the article admits the limitations of mediation process to the context of criminal justice as an expression of restorative justice ideals, it also contends that the deep rooted ideals of traditional criminal mediation processes practiced among the diverse Ethiopian ethnic groups could be harnessed in a systematic and coordinated way to bear the fruits of restorative justice. In so doing I have tried to unfold the fruits of *Jaarsummaa* institutions practiced among the Oromo's as a single example of Ethiopian traditional criminal mediation process worth attention. The *Jaarsummaa* institution almost embedded the ideals of restorative justice in the context of criminal justice administration in its contemporary sense. Therefore, the *Jaarsummaa* process should be consolidated as an epitome in order to develop its shared values of restorative justice.

The article further, explored the practices of western criminal mediation process, and its place in their criminal justice administration. Accordingly, an effort was made to draw the important lesson basically on how their criminal mediation process functions to effectively integrate restorative justice in to the formal criminal justice administration. The appropriateness of victim-offender mediation program as restorative justice scheme, in particular, the role of

government and community in Restorative Justice Schemes, restitution of victim and accountability of offender and appropriate offences for restorative justice are elucidated based on the experience of western criminal justice system.

On the other hand, the discussion on Ethiopian legal frameworks and limits on the applicability of mediation process in criminal matters unfolds the search for legislative intent as to whether the solid basis of criminal law and procedure is promoting restorative justice. In addressing this issue, the purposes of Ethiopian criminal code and procedure is assessed. The finding reveals that criminal law and procedure as it stands now does not promote criminal mediation process as an expression of restorative justice in Ethiopian context. It was unfortunately that the permission of consensual prosecution upon the request of the victim leaves the room for both victim and offender to opt for criminal mediation process in crimes punishable up on complaint. Around 47 articles in Ethiopian criminal code are crimes punishable up on complaint. But, in spite of using traditional criminal dispute resolution process as an alternative, the victims of crime punishable upon complaint tends to prosecute their case through the formal criminal court litigation process for several reasons. First, as Rene David pointed it out, Ethiopian formal justice system ignored traditional customs including mediation process in criminal matters under the guise of modernity. This perception created lost sense of belongingness and confidence on traditional mediation process as outdated and futile as viewed today. Second, the formal criminal justice administration itself is futile as it failed to incorporate provisions that mandate reference of crimes punishable upon complaint to alternative dispute resolution process. That is, Ethiopian criminal law and procedure failed to discourage trial of at least crimes which are predominantly private in nature. Finally, there is no

systematic and coordinated criminal dispute resolution programs such as victim-offender mediation programs that able promote and facilitate victim and offender reconciliation process.

Currently, the meager of legal framework that purports to shed lights on the concept of restorative justice at *the end of the dark tunnel* is the potential applicability of mediation process in crimes punishable upon complaints through the only consent of the victim. Of course I have tried to elucidate the recognition given to criminal dispute resolution process under the Draft Criminal Procedure Code basically for minor and medium crimes labeled under Ethiopian criminal law. However, there are no clear provisions in the 'Draft' which defined minor or medium crimes. Despite its innovation to incorporate out of court dispute resolution process as alternative criminal dispute resolution method, it does not clearly provide the appropriate dispute resolution process that fits the context of criminal justice administration. More precisely, as the Draft Criminal Procedure Code is not yet crystallized as a governing procedural law, it is difficult to rely on such soft law to apply alternative criminal dispute resolution process in minor and medium crimes in its present context.

It has to be re-called that it is useful to safeguard traditional values and thereby attach the profound sentiments of the people with the administration of criminal justice. To the contrary, the codification process of modern Ethiopian criminal law disregarded a full prior study of the local customary practices related to the administration of criminal justice. In lieu of that Ethiopian criminal justice system adopted western system of criminal justice and borrowed so many elements from it. Of course there was a paradigm shift in the administration of western criminal justice system. Hence, as a replica of

western criminal justice system, Ethiopian criminal justice should accommodate itself through adjustments that are equally important in the eyes of western criminal justice system as failure of the criminal justice system in western criminal justice system is equally important to Ethiopia. It is also a critical juncture to recognize compatible customary practices of criminal dispute resolution process with national and international human rights, and promote it in a more flexible and streamlined justice system which was previously disregarded by the past regimes. Accordingly, the writer suggests the following recommendations;

1. The current Ethiopian criminal justice system is devoid of appraising principles of restorative justice. It is not conveyed from the criminal legislation that the law aims to secure restorative justice through application of alternative dispute resolution process nor encourages parties to criminal dispute to opt for such process. Therefore, it is recommended that the current criminal code should be amended so as to incorporate the purpose of restorative justice and should clearly provide catalogs of crimes that fall under dispute resolution scheme.
2. The “New Draft Criminal Procedure Code” should be enacted in such a way to provide an appropriate criminal dispute resolution process that is capable of reinforcing restorative justice program within the context of Ethiopian criminal justice. Therefore, legal recognition should be given to traditional criminal dispute resolution processes that are compatible with the FDRE Constitution and International Human Rights Law as an auxiliary to the formal criminal justice system.
3. The government should introduce victim-offender mediation program directly accountable to justice offices and other compensation schemes which guarantee restitution of victim, and accountability of the offender.

4. A further wide-ranging research must be conducted by federal and state legal research institutes on traditional criminal dispute resolution process practiced in different Ethiopian ethnic groups that are capable of consolidating the values of restorative justice.